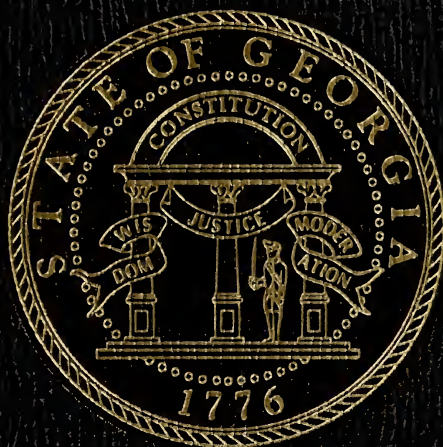


**OFFICIAL CODE
OF
GEORGIA**

ANNOTATED



VOLUME 26

Title 34. Labor and Industrial Relations

2008 Edition



OFFICIAL CODE OF GEORGIA ANNOTATED

With Provision for Subsequent Pocket Parts

Prepared by

The Code Revision Commission
The Office of Legislative Counsel
and
The Editorial Staff of LexisNexis®



Published Under Authority of the State of Georgia

Volume 26 2008 Edition

Title 34. Labor and Industrial Relations

Including Acts of the 2008 Session of the General Assembly of Georgia
and Annotations taken from the Georgia Reports
and the Georgia Appeals Reports

LexisNexis®

Charlottesville, Virginia

2008

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ISBN 978-1-4224-4790-1

41916-13



OFFICE OF SECRETARY OF STATE

*I, Karen C. Handel, Secretary of State of the State of Georgia, do
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the statutory portion of the Official Code of Georgia Annotated contained
in this volume is a true and correct copy of such material as enacted by
the General Assembly of Georgia: all as same appear of file and record in
this office.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed
the seal of my office, at the Capitol, in the City of Atlanta,
this 15th day of July, in the year of our Lord Two Thousand
and Eight and of the Independence of the United
States of America the Two Hundred and Thirty-Third.

Karen C. Handel

Karen C. Handel, Secretary of State



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Preface

This volume cumulates and replaces the 2004 edition of Volume 26 of the Official Code of Georgia Annotated, as supplemented by the 2007 Cumulative Supplement. The 2004 Volume 26 and its 2007 Supplement may be recycled or, if so desired retained for historical purposes.

This volume contains all laws specifically codified in Title 34 by the General Assembly through the 2008 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through April 4, 2008. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2006, 2007, and 2008 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2006 Session of the General Assembly, the user should consult the Georgia Laws.

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PREFACE

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

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Law reviews. — For article, "Migratory Labor: Some Legal, Economic and Social Aspects," see 3 Mercer L. Rev. 278 (1952). For annual eleventh circuit survey of labor law, see 42 Mercer L. Rev. 1497 (1991). For survey of 1995 Eleventh Circuit cases on labor law, see 47 Mercer L. Rev. 891 (1996).

For note, "Position of Labor in Georgia," see 1 Mercer L. Rev. 289 (1950).

RESEARCH REFERENCES

ALR. — Effect of National Labor Relations Act to exclude state action, 174 ALR 1051.

Validity of state statutory provisions for arbitration of labor disputes, as against the objection of delegation of legislative power without setting up adequate standards to guide the administrative agency, 9 ALR2d 871.

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Liability for discharge of at-will employee for in-plant complaints or efforts relating to working conditions affecting health or safety, 35 ALR4th 1031.

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Excessiveness or inadequacy of punitive damages in cases not involving personal injury or death, 14 ALR5th 242.

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CHAPTER 1

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34-1-1. Requirements for scaffolding and staging design; inspection by Commissioner of Labor.

(a)(1) All scaffolding or staging swung or suspended from an overhead support or erected with stationary supports, which scaffolding or staging is suspended or rises 30 feet or more above the ground, shall have a safety rail properly attached, bolted, braced, and otherwise secured, which safety rail shall rise at least 34 inches above the floor or main portions of such scaffolding or staging and extend for the full length of such staging and along the ends thereof with only such openings as may be necessary for the delivery of materials being used on such scaffold or staging. Such scaffolding or staging shall also be so fastened as to prevent it from swaying from the building or structure. However, this paragraph shall not apply to any scaffolding or staging which is wholly within the interior of a building or other structure and which covers the entire floor space therein.

(2) It shall be unlawful for any person to employ or direct others to perform labor of any kind in the erecting, demolishing, repairing, altering, cleaning, or painting of a building or other structure without first having furnished proper protection to such person so employed or directed, as provided in paragraph (1) of this subsection.

(b) All scaffolding or staging shall be so constructed that it will bear at least four times the weight required to be hanging therefrom or placed thereon when in use.

(c)(1) The Commissioner of Labor, upon receipt of any complaint, shall make or cause to be made an immediate inspection of the scaffold, or mechanical device connected therewith, concerning which complaint has been made.

(2) The Commissioner shall attach to every scaffold, staging, mechanism, or mechanical device inspected by him a certificate bearing his name and the date of inspection, on which certificate he shall plainly state whether he has found the scaffolding, staging, or mechanical device "safe" or "unsafe."

(3) If the Commissioner of Labor finds any scaffolding, staging, or mechanical device complained of to be unsafe, he shall at once notify in writing the person responsible for the erection and maintenance of the scaffolding, staging, or mechanical device that he has found it to be unsafe. Such notice may be served personally upon the person responsible under the law or may be perfected by affixing such notice in a conspicuous place on the scaffold, staging, or mechanical device found unsafe. The manner of service shall be within the discretion of the Commissioner of Labor. The Commissioner shall then prohibit the use of such scaffolding, staging, or mechanical device by any person until all danger has been removed or until it has been made to comply with the terms of this Code section by alteration, reconstruction, demolition, or replacement, as the Commissioner may direct.

(d) Any person who willfully, knowingly, and persistently continues the use of a scaffold, staging, or other mechanical device in violation of any provision of this Code section shall be guilty of a misdemeanor. (Ga. L. 1933, p. 111, §§ 1-7; Ga. L. 1967, p. 792, § 1.)

Cross references. — General duty of employers with respect to employment safety, § 34-2-10.

Administrative rules and regulations. — Rules regulating scaffolding, Official Compilation of the Rules and Regulations of the

State of Georgia, Rules of Georgia Department of Labor, Chapter 300-5-9.

Law reviews. — For survey article on labor and employment law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 303 (2003).

JUDICIAL DECISIONS

Cited in *Mimms v. Travelers Ins. Co.*, 156 Ga. App. 889, 275 S.E.2d 825 (1981); *Rice v.*

Delta Air Lines, 217 Ga. App. 452, 458 S.E.2d 359 (1995).

RESEARCH REFERENCES

ALR. — Liability for personal injury by fire escape, 42 ALR 1111.

Constitutionality of statute requiring protection against occupational or industrial diseases and accidents with respect to definiteness and completeness, 99 ALR 613.

Duty of owner of premises to furnish independent contractor or his employee a safe place of work, where contract is for repairs, 31 ALR2d 1375.

Liability of owner or occupant of premises to building or construction inspector coming upon premises in discharge of duty, 28 ALR3d 891.

Boiler and machinery insurance: risks and losses covered by policy or provision expressly covering boilers and machinery, 49 ALR4th 336.

Tort liability for window washer's injury or death, 69 ALR4th 207.

34-1-2. Prohibition of age discrimination in employment.

(a) No person, firm, association, or corporation carrying on or conducting within this state any business requiring the employment of labor shall refuse to hire, employ, or license nor shall such person, firm, association, or corporation bar or discharge from employment any individual between the ages of 40 and 70 years, solely upon the ground of age, when the reasonable demands of the position do not require such an age distinction, provided that such individual is qualified physically, mentally, and by training and experience to perform satisfactorily the labor assigned to him or for which he applies. Nothing in this Code section shall affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to evade the purposes of this Code section. When the retirement or insurance benefit program of any employer shall prohibit the employment of any person because of excessive age, such person shall have the authority, as a condition of employment, to waive the right to participate in any such program and receive any benefits therefrom. Nothing in this Code section shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age and who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policy-making position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least \$27,000.00.

(b) Any person or corporation who violates any provision of subsection (a) of this Code section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than \$100.00 nor more than \$250.00. (Ga. L. 1971, p. 384, §§ 1, 2; Ga. L. 1981, p. 636, § 1.)

Cross references. — Equal protection, U.S. Const., amend. 14 and Ga. Const. 1983, Art. I, Sec. I, Para. II. Discrimination in public employment on basis of age, race, sex, § 45-19-20 et seq. Compulsory retirement of pilots engaged in conducting vessels to and from ports, § 52-6-53.

Law reviews. — For annual eleventh cir-

cuit survey of employment discrimination, see 42 Mercer L. Rev. 1381 (1991). For survey of 1995 Eleventh Circuit cases on employment discrimination, see 47 Mercer L. Rev. 797 (1996). For annual eleventh circuit survey of employment discrimination, see 56 Mercer L. Rev. 1233 (2005).

JUDICIAL DECISIONS

No private cause of action. — Penal statutes in Georgia, such as O.C.G.A. § 34-1-2, do not give rise to a private cause of action for the conduct proscribed. *Calhoun v. Federal Nat'l Mtg. Ass'n*, 823 F.2d 451 (11th Cir. 1987), cert. denied, 484 U.S. 1078, 108 S. Ct.

1058, 98 L. Ed. 2d 1019 (1988); *Suber v. Bulloch County Bd. of Educ.*, 722 F. Supp. 736 (S.D. Ga. 1989).

An at-will employee may not sue in tort under O.C.G.A. § 51-1-6 or O.C.G.A. § 51-1-8 for wrongful discharge based upon

age discrimination. *Reilly v. Alcan Aluminum Corp.*, 272 Ga. 279, 528 S.E.2d 238 (2000).

The provisions of O.C.G.A. §§ 51-1-6 and 51-1-8 do not create a civil action for age discrimination for an employee-at-will based upon a violation of either O.C.G.A. § 34-1-2 or the Age Discrimination in Employment

Act, 29 U.S.C. § 621 et seq. *Reilly v. Alcan Aluminum Corp.*, 221 F.3d 1170 (11th Cir. 2000).

Cited in *Spencer v. Moore Bus. Forms, Inc.*, 87 F.R.D. 118 (N.D. Ga. 1980); *Bruce v. S & H Riggers & Erectors, Inc.*, 732 F. Supp. 1172 (N.D. Ga. 1990).

RESEARCH REFERENCES

Am. Jur. 2d. — 45A Am. Jur. 2d, Job Discrimination, §§ 16, 17. 45B Am. Jur. 2d, Job Discrimination, §§ 701, 1212 et seq.

Am. Jur. Proof of Facts. — Discrimination — Under Age Discrimination in Employment Act, 10 POF2d 1.

Age as Bona Fide Occupational Qualification Under ADEA, 15 POF2d 481.

Proof of Discrimination Under Age Discrimination in Employment Act, 44 POF3d 79.

Contingent Worker's Protection Under Federal Anti-Discrimination Statutes, 57 POF3d 75.

Am. Jur. Trials. — Age Discrimination in Employment under ADEA, 75 Am. Jur. Trials 363.

C.J.S. — 14A C.J.S., Civil Rights, § 287 et seq. 51 C.J.S., Labor Relations, § 10.

ALR. — Recovery of damages as remedy for wrongful discrimination under state or local civil rights provisions, 85 ALR3d 351.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress, 52 ALR4th 853.

Award of front pay under state job discrimination statutes, 74 ALR4th 746.

Application of state law to age discrimination in employment, 51 ALR5th 1.

Availability and scope of punitive damages under state employment discrimination law, 81 ALR5th 367.

Individual liability of supervisors, managers, officers or co-employees for discriminatory actions under state Civil Rights Act, 83 ALR5th 1.

Circumstances which warrant finding of constructive discharge in cases under Age Discrimination in Employment Act (29 USC § 621 et seq.), 93 ALR Fed. 10.

Who, other than specifically excluded persons, is "employee" under § 4(a)(1) of Age Discrimination in Employment Act of 1967 (29 U.S.C.S. § 623(a)(1)), 125 ALR Fed. 273.

Employee's retention of benefits received in consideration of promise not to enforce claims under Age Discrimination in Employment Act as ratification of otherwise invalid or voidable waiver under § 7(f)(1) of act (29 U.S.C.S. § 626(f)(1)), 128 ALR Fed. 577.

Application of Age Discrimination in Employment Act (29 U.S.C.S. § 621 et seq.) to religious institutions, 136 ALR Fed 487.

Who is "employer" within meaning of Age Discrimination in Employment Act of 1967 (29 U.S.C.S. § 621 et seq.), 137 ALR Fed 551.

Award of compensatory damages under 42 U.S.C.A. § 1981a for violation of Title VII of Civil Rights Act of 1964, 154 ALR Fed. 347.

What constitutes direct evidence of age discrimination in action under age discrimination in employment act (29 U.S.C.A. § 621 et seq.) — Post-Price Waterhouse cases, 155 ALR Fed. 283.

Propriety of treating separate entities as one for determining number of employees required by Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e(b)) for action against "employer", 160 ALR Fed. 441.

What constitutes willful violation under age discrimination in employment act (29 U.S.C.A. § 626 et seq.) entitling victim to liquidate damages, 165 ALR Fed. 1.

Disparate impact claims under Age Discrimination Act of 1967, 29 U.S.C.A. § 621 et seq., 186 ALR Fed. 1.

34-1-3. Discrimination against employee for attending a judicial proceeding in response to a court order or process; exception to applicability of Code section.

(a) It shall be unlawful for any employer or the agent of such employer to discharge, discipline, or otherwise penalize an employee because the employee is absent from his or her employment for the purpose of attending a judicial proceeding in response to a subpoena, summons for jury duty, or other court order or process which requires the attendance of the employee at the judicial proceeding. It shall be unlawful for any employer or the agent of such employer to threaten to take or communicate an intention of taking any action declared to be unlawful by this subsection.

(b) Any employer or agent of such employer who violates subsection (a) of this Code section shall be liable to the injured employee for all actual damages thereby suffered by the employee and for reasonable attorney's fees incurred by the employee in asserting a successful claim under this Code section.

(c) This Code section shall not apply to an employee who is charged with a crime, nor shall it prohibit an employer from requiring an employee to abide by regulations requiring reasonable notification to an employer of the employee's expected absence or delay in reporting to work in order to attend a judicial proceeding. (Code 1981, § 34-1-3, enacted by Ga. L. 1987, p. 1156, § 1; Ga. L. 1990, p. 590, § 2.)

Cross references. — Right to trial by jury, Ga. Const. 1983, Art. I, Sec. I, Para. XI. Exemptions from jury duty, § 15-12-1 et seq. and § 38-2-276. Selection of jurors, § 15-12-40 et seq. Jury leave for teachers, § 20-2-870 et seq.

Law reviews. — For survey article on labor and employment law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 303 (2003).

JUDICIAL DECISIONS

Juvenile court proceedings. — As it was undisputed that the particular reason the employee was terminated was that the employee was absent from work while attending

juvenile court proceedings, that termination was in violation of O.C.G.A. § 34-1-3. *Glover v. Scott*, 210 Ga. App. 25, 435 S.E.2d 250 (1993).

OPINIONS OF THE ATTORNEY GENERAL

Criminal offense not created. — O.C.G.A. § 34-1-3 does not create a separate criminal offense; however, a violation can be grounds for contempt of court. 1995 Op. Att'y Gen. No. 95-13.

Employee is entitled to pay while serving jury duty. — An employee is entitled to be paid the employee's salary while missing

work to serve on jury duty. 1989 Op. Att'y Gen. No. 89-55.

Judicial proceedings in other states. — "Judicial proceeding" as used in subsection (a) of O.C.G.A. § 34-1-3 includes judicial proceedings in other states; therefore, a person employed in Georgia who has been penalized for being absent from work for the

purpose of attending a judicial proceeding in another state in response to a jury summons from a court in that other state has a civil cause of action against the employer. 1995 Op. Att'y Gen. No. 95-13.

RESEARCH REFERENCES

ALR. — Protection of debtor from acts of discrimination by private entity under § 525(b) of Bankruptcy Code of 1978 (11 USCS § 525(b)), 105 ALR Fed. 555.

34-1-4. Employer immunity for disclosure of information regarding job performance.

(a) As used in this Code section, the term:

(1) “Employee” means any person who is employed by an employer described in paragraph (2) of this subsection.

(2) “Employer” means any individual engaged in a business, corporation, S-corporation, limited liability company, partnership, limited liability partnership, sole proprietorship, association, or government entity.

(b) An employer as defined in subsection (a) of this Code section or any person employed by an employer and designated as the employer’s representative who discloses factual information concerning an employee’s or former employee’s job performance, any act committed by such employee which would constitute a violation of the laws of this state if such act occurred in this state, or ability or lack of ability to carry out the duties of such job to a prospective employer of such employee or former employee upon request of the prospective employer or of the person seeking employment is presumed to be acting in good faith unless lack of good faith is shown by a preponderance of the evidence, unless the information was disclosed in violation of a nondisclosure agreement or the information disclosed was otherwise considered confidential according to applicable federal, state, or local statute, rule, or regulation. (Code 1981, § 34-1-4, enacted by Ga. L. 1993, p. 1056, § 1; Ga. L. 1995, p. 982, § 1; Ga. L. 1996, p. 748, § 1; Ga. L. 2001, p. 4, § 34.)

Law reviews. — For note on 1993 enactment of this Code section, see 10 Ga. St. U.L. Rev. 146 (1993). For review of 1996 labor and industrial relations legislation, see 13 Ga. St. U. L. Rev. 224 (1996).

34-1-5. “Multiracial” classification required on forms.

(a) As used in this Code section, the term “multiracial” means having parents of different races.

(b) All written forms, applications, questionnaires, and other written documents or materials produced by or for or used by any person, firm, association, or corporation conducting business within this state requiring

the employment of labor which request information on the racial or ethnic identification of an employee and which contain a list of racial and ethnic classifications from which such employee must select one shall include among their choices the classification “multiracial.”

(c) No such written document or computer software described in subsection (b) of this Code section shall bear the designation “other” as a racial or ethnic classification after July 1, 1994, unless such document was printed and in stock before July 1, 1994.

(d) The failure of any person, firm, or corporation to comply with the provisions of this Code section shall not be construed to create any civil cause of action. (Code 1981, § 34-1-5, enacted by Ga. L. 1994, p. 1360, § 3; Ga. L. 1998, p. 128, § 34.)

Editor’s notes. — Ga. L. 1994, p. 1360, § 4, not codified by the General Assembly, provides that the provisions of the Act apply to those forms, applications, questionnaires, and other written documents printed or typed or otherwise originating after July 1, 1994; provided, however, that all documents

printed and in stock on July 1, 1994, which bear the racial designation “other” shall be used and the stock depleted prior to reordering under the provisions of the Act even if the date occurs after July 1, 1994.

Cross references. — Multiracial classification on forms, §§ 20-2-2041, 50-18-135.

34-1-6. Employer obligation to provide time for women to express breast milk for infant child.

(a) As used in this Code section, the term “employer” means any person or entity that employs one or more employees and shall include the state and its political subdivisions.

(b) An employer may provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child. The employer may make reasonable efforts to provide a room or other location (in close proximity to the work area), other than a toilet stall, where the employee can express her milk in privacy. The break time shall, if possible, run concurrently with any break time already provided to the employee. An employer is not required to provide break time under this Code section if to do so would unduly disrupt the operations of the employer. (Code 1981, § 34-1-6, enacted by Ga. L. 1999, p. 464, § 2.)

Cross references. — Breast-feeding of baby, § 31-1-9. Newborn baby and mother protection act, § 33-24-58.

34-1-7. Definitions; application for temporary restraining order and injunction; requirements; hearing; notice and service; notification of law enforcement agencies.

(a) As used in this Code section, the term:

(1) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose including following or stalking an employee to or from the place of work; entering the workplace of an employee; following an employee during hours of employment; telephone calls to an employee; and correspondence with an employee including, but not limited to, the use of the public or private mails, interoffice mail, facsimile, or computer e-mail.

(2) "Credible threat of violence" means a knowing and willful statement or course of conduct which would cause a reasonable person to believe that he or she is under threat of death or serious bodily injury, and which is intended to, and which actually causes, a person to believe that he or she is under threat of death or serious bodily injury, and which serves no legitimate purpose.

(3) "Employer" means any person or entity that employs one or more employees and shall include the State of Georgia and its political subdivisions and instrumentalities.

(4) "Unlawful violence" means assault, battery, or stalking, as prohibited by Code Section 16-5-20, 16-5-21, 16-5-23, 16-5-23.1, 16-5-24, 16-5-90, or 16-5-91, but shall not include lawful acts of self-defense or defense of others.

(b) Any employer whose employee has suffered unlawful violence or a credible threat of violence from any individual, which can reasonably be construed to have been carried out at the employee's workplace, may seek a temporary restraining order and an injunction on behalf of the employer prohibiting further unlawful violence or threats of violence by that individual at the employee's workplace or while the employee is acting within the course and scope of employment with the employer. Nothing in this Code section shall be construed as authorizing a court to issue a temporary restraining order or injunction prohibiting speech or other activities that are protected by the Constitution of this state or the United States.

(c)(1) Except for proceedings involving a nonresident respondent, the superior court of the county where the respondent resides shall have jurisdiction over all proceedings under this Code section.

(2) For proceedings under this Code section involving a nonresident respondent, the superior court where the petitioner's workplace is located shall have jurisdiction, where the act involving unlawful violence or a credible threat of unlawful violence meets the elements for personal jurisdiction provided for under paragraph (2) or (3) of Code Section 9-10-91.

(d) Upon filing a petition with the court for an injunction pursuant to this Code section, the petitioner may obtain a temporary restraining order

if the petitioner also files an affidavit which, to the satisfaction of the court, shows reasonable proof that an employee has suffered unlawful violence or a credible threat of violence by the respondent and that great or irreparable harm shall result to an employee if such an injunction is not granted. The affidavit shall further show that the petitioner has conducted a reasonable investigation into the underlying facts which are the subject of the petition. A temporary restraining order granted under this Code section shall remain in effect, at the court's discretion, for a period not to exceed 15 days, unless otherwise modified or terminated by the court.

(e) Within ten days of filing of the petition under this Code section or as soon as practical thereafter, but in no case later than 30 days after the filing of the petition, a hearing shall be held on the petition for the injunction. In the event a hearing cannot be scheduled within the county where the case is pending within the 30 day period, the same shall be scheduled and heard within any other county of the circuit. The respondent may file a response which explains, excuses, justifies, or denies the alleged unlawful violence or credible threat of violence or may file a cross-complaint under this Code section. At the hearing, the judge shall receive any testimony that is relevant and may make an independent inquiry. If the judge finds by clear and convincing evidence that the respondent engaged in unlawful violence or made a credible threat of violence, an injunction shall issue prohibiting further unlawful violence or threats of violence at the employee's workplace or while the employee is acting within the course and scope of employment with the employer. An injunction issued pursuant to this Code section shall have a duration of not more than three years. At any time within the three months before the expiration of the injunction, the petitioner may apply for a renewal of the injunction by filing a new petition for an injunction pursuant to this Code section.

(f) Upon the filing of a petition for an injunction pursuant to this Code section, the respondent shall be personally served with a copy of the petition, temporary restraining order, if any, and notice of hearing on the petition.

(g) The court shall order the petitioner or the attorney for the petitioner to deliver a copy of each temporary restraining order or injunction, or modification or termination thereof, granted under this Code section, by the close of the business day on which the order was granted, to the law enforcement agencies within the court's discretion as are requested by the petitioner. Each appropriate law enforcement agency shall make available information as to the existence and current status of these orders to law enforcement officers responding to the scene of reported unlawful violence or a credible threat of violence.

(h) Nothing in this Code section shall be construed as expanding, diminishing, altering, or modifying the duty, if any, of an employer to provide a safe workplace for employees and other persons. (Code 1981, § 34-1-7, enacted by Ga. L. 2000, p. 1081, § 1.)

Cross references. — Temporary restraining and protective orders, § 17-17-16. Employment Law,” see 53 Mercer L. Rev. 349 (2001).

Law reviews. — For article, “Labor and

JUDICIAL DECISIONS

Cited in *Mattox v. Yellow Freight Sys.*, 243 Ga. App. 894, 534 S.E.2d 561 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Relationship, §§ 278 et seq., 340 et seq.

C.J.S. — 30 C.J.S. Employers’ Liability for Injuries to Employees, §§ 55 et seq., 214 et seq.

CHAPTER 2

DEPARTMENT OF LABOR

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| Sec. | | Sec. | |
| 34-2-1. | Creation of Department of Labor. | 34-2-8. | Variations from rules of Commissioner; keeping of index of variations. |
| 34-2-2. | Definitions. | | |
| 34-2-3. | Election, term of office, compensation, removal, and duties of Commissioner of Labor. | 34-2-9. | Preparation by Commissioner of annual report and recommendations. |
| 34-2-4. | Establishment by Commissioner of divisions within Department of Labor; appointment, fixing of salaries and duties, and removal of employees. | 34-2-10. | Employer's duty with respect to provision of safe employment generally. |
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| 34-2-6. | Specific powers and duties of Commissioner. | 34-2-12. | Duty of Attorney General and district attorneys to prosecute violations of those laws enforced by Commissioner. |
| 34-2-7. | Promulgation, review, amendment, and repeal of rules and regulations by Commissioner generally. | 34-2-13. | Penalties for violations of chapter and for false statements under oath. |
| | | 34-2-14. | Authorization to establish and administer pretrial intervention programs. |

Editor's notes. — By resolution (Ga. L. 1988, p. 337), the General Assembly designated the offices of the Department of La-

bor located in Albany, Georgia as the "A.W. 'Al' Holloway Labor Building."

RESEARCH REFERENCES

ALR. — Enforcement of labor board's order against employer's successors, assigns, or the like, 46 ALR2d 592.

34-2-1. Creation of Department of Labor.

There is created and established a separate and independent administrative agency to be known as the Department of Labor. (Ga. L. 1931, p. 7, § 101; Code 1933, § 54-101; Ga. L. 1937, p. 230, § 3.)

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, §§ 1, 3, 7.

§ 608. 67 C.J.S., Officers and Public Employees, § 18. 81A C.J.S., States, § 249.

C.J.S. — 51A C.J.S., Labor Relations,

34-2-2. Definitions.

As used in this chapter, the term:

(1) "Employer" includes every person, firm, corporation, partnership, stock association, agent, manager, representative, or foreman, or other persons having control or custody of any place of employment or of any employees, except agricultural and domestic labor and those employers having less than eight employees. Naval stores producers shall be classified as agricultural, except where otherwise classified by federal laws.

(2) "Safe" or "safety" as applied to any employment or place of employment shall include conditions and methods of sanitation and hygiene reasonably necessary for the protection of the life, health, safety, and welfare of employees. (Ga. L. 1937, p. 230, §§ 1, 10.)

JUDICIAL DECISIONS

Cited in Stanley v. Sims, 185 Ga. 518, 195 S.E. 439 (1937); Martin v. United States Fid. & Guar. Co., 58 Ga. App. 59, 197 S.E. 660 (1938).

RESEARCH REFERENCES

Am. Jur. 2d. — 48 Am. Jur. 2d, Labor and Labor Relations, § 15 et seq. 27 Am. Jur. 2d, Employment Relationship, § 1 et seq.

C.J.S. — 51 C.J.S., Labor Relations, § 57.

ALR. — When has employer "repeatedly" violated Occupational Safety and Health Act within meaning of § 17(a) of Act (29 U.S.C.A. § 666(a)), 151 ALR Fed. 1.

34-2-3. Election, term of office, compensation, removal, and duties of Commissioner of Labor.

(a) The Department of Labor shall be under the direction and supervision of a commissioner to be known as the Commissioner of Labor. The Commissioner shall devote his full time to the duties of his office and shall not hold any other office during his term of office.

(b) The Commissioner shall be elected by those persons entitled to vote for the members of the General Assembly, and his term shall be for four years.

(c) The Commissioner of Labor shall be compensated in the amount provided for in Code Section 45-7-4, payable in semimonthly installments, and shall receive such travel expenses and allowances as are provided for in Code Section 45-7-20; provided, however, that pursuant to Code Section 45-7-4, the Commissioner shall in addition thereto be entitled to receive necessary and actual expenses incurred by him in the performance of his duties as administrator of Chapter 8 of this title.

(d) The Commissioner may be removed by the Governor for neglect of duty or malfeasance in office, provided that written charges are served upon

the Commissioner at least ten days prior to a hearing thereon before the Governor and the constitutional officers of this state, and provided, further, that a majority shall find that the Commissioner is guilty of the charges preferred under this chapter, but for no other cause.

(e) The Commissioner shall have charge of the administration and enforcement of all laws, rules, and regulations which it is the duty of the department to administer and enforce except as provided in Chapter 9 of this title and shall direct all inspections and investigations except as otherwise provided. (Ga. L. 1911, p. 133, §§ 1-7; Ga. L. 1913, p. 82, §§ 1-3; Ga. L. 1919, p. 278, § 1; Ga. L. 1922, p. 77, § 1; Ga. L. 1925, p. 141, § 1; Ga. L. 1931, p. 7, §§ 101-106, 109; Code 1933, §§ 54-105, 54-106, 54-107, 54-108; Ga. L. 1937, p. 230, § 4; Ga. L. 1941, p. 240, § 2; Ga. L. 1943, p. 170, § 1; Ga. L. 1947, p. 673, § 1; Ga. L. 1953, Jan.-Feb. Sess., p. 613, §§ 1-6; Ga. L. 1961, p. 185, §§ 1, 2; Ga. L. 1984, p. 1152, § 3.)

Cross references. — Further provisions as to qualifications of Commissioner of Labor, Ga. Const. 1983, Art. V, Sec. III, Para. II.

Vacating of office upon permanent physical or mental disability of holder of office, Ga. Const. 1983, Art. V, Sec. IV.

JUDICIAL DECISIONS

Cited in Stanley v. Sims, 185 Ga. 518, 195 S.E. 439 (1937); State Bd. of Educ. v. Board

of Pub. Educ., 186 Ga. 783, 199 S.E. 641 (1938).

OPINIONS OF THE ATTORNEY GENERAL

Provision for removal of Commissioner unconstitutional. — Subsection (d) of O.C.G.A. § 34-2-3 authorizing proceedings to remove the Commissioner of Labor for

neglect of duty or malfeasance in office is unconstitutional. 1983 Op. Att'y Gen. No. 83-68.

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, §§ 1 et seq., 14 et seq., 137 et seq., 169 et seq.

C.J.S. — 67 C.J.S., Officers and Public Employees, §§ 2 et seq., 47, 148 et seq., 275 et seq. 81A C.J.S., States, § 249.

ALR. — Conclusiveness of governor's decision in removing or suspending officers, 92 ALR 998.

34-2-4. Establishment by Commissioner of divisions within Department of Labor; appointment, fixing of salaries and duties, and removal of employees.

(a) The Commissioner of Labor may establish within the Department of Labor such divisions as he may deem necessary for the exercise of the powers and the performance of the duties of the department, except as otherwise provided.

(b) The Commissioner is authorized and empowered to appoint a secretary, the heads of all divisions, and such other employees as may be needed and to assign them their duties and fix their annual salaries; provided, however, that no appointment shall be made whereby the aggregate salaries of the appointees are in excess of the amount appropriated by the General Assembly for salaries within the Department of Labor. The Commissioner may remove from office any officer or employee in the department, upon notice and hearing, for neglect of duty or malfeasance in office. (Ga. L. 1937, p. 230, § 8; Ga. L. 1950, p. 9, § 2; Ga. L. 1975, p. 198, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Commissioner's power to remove personnel. — The provision in Ga. L. 1937, p. 230, § 8 (see O.C.G.A. § 34-2-4(b)) providing for the commissioner's removing from office

any officer or employee in the department has been repealed by the former Merit System Act. 1945-47 Op. Att'y Gen. p. 355.

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, §§ 19, 169 et seq., 173 et seq., 241 et seq.

C.J.S. — 67 C.J.S., Officers and Public Employees, §§ 17, 149 et seq.

34-2-5. Office of Department of Labor to be maintained by Commissioner; payment of office expenses; lease or rental of unused office space.

(a) The Commissioner of Labor shall keep and maintain the office of the Department of Labor in the City of Atlanta, Georgia, and shall be provided with suitable rooms, necessary furniture, stationery, books, periodicals, maps, instruments, and other necessary supplies, the expense thereof to be paid by the state in the same manner as other similar expenses are paid. In connection with the maintenance of the office of the Department of Labor, the Commissioner with the approval of the State Properties Commission is authorized and empowered to lease or rent and to negotiate, execute, and administer any necessary lease or rental agreement for office or other space in the custody of, but not occupied by, the Department of Labor and is further authorized to utilize the Department of Administrative Services as his agent in carrying out the provisions of this subsection.

(b) Notwithstanding any other provisions of law, the Commissioner is authorized to retain all funds derived from lease, rental, or similar payments received from tenants, occupants, or other users of office or other space for the sole purpose of maintenance of such office or other space. Such funds shall not be considered taxes, fees, or assessments within the meaning of Article VII, Section III, Paragraph II(a) of the Constitution of the State of Georgia, provided that nothing in this subsection shall be construed so as to allow the Commissioner to retain any funds required by the Constitution

of Georgia to be paid into the state treasury. (Ga. L. 1911, p. 133, § 1; Ga. L. 1931, p. 7, § 109; Code 1933, § 54-109; Ga. L. 1937, p. 230, § 7; Ga. L. 1987, p. 1007, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, § 231.

34-2-6. Specific powers and duties of Commissioner.

(a) In addition to such other duties and powers as may be conferred upon him by law, the Commissioner of Labor shall have the power, jurisdiction, and authority:

(1) To superintend the enforcement of all labor laws in the State of Georgia, the enforcement of which is not otherwise specifically provided for, and all rules and regulations made pursuant to this title;

(2) To make or cause to be made all necessary inspections in order to see that all laws and the rules made pursuant thereto which the department has the duty, power, and authority to enforce are promptly and effectively carried out;

(3) To make investigations, collect and compile statistical information, and report upon the conditions of labor generally and upon all matters relating to the enforcement and effect of this chapter and of the rules issued thereunder;

(4) To make and promulgate such rules or changes in rules as he may deem advisable for the prevention of accidents or the prevention of industrial or occupational diseases in every employment or place of employment, and such rules or changes in rules for the construction, repair, and maintenance of places of employment, places of public assembly, and public buildings as he may deem advisable, to render them safe. The Commissioner may appoint committees composed of employers, employees, and experts to suggest rules or changes therein;

(5) To do all in his power to promote the voluntary arbitration, mediation, and conciliation of disputes between employers and employees and to avoid strikes, picketing, lockouts, boycotts, blacklisting, discriminations, and legal proceedings in matters of employment. In pursuance of this duty, the Commissioner may appoint temporary boards of arbitration, provide necessary expenses of such boards, order reasonable compensation not exceeding \$15.00 per day for each member engaged in such arbitration, prescribe rules for such arbitration boards, conduct investigations and hearings, publish reports and advertisements, and do all things convenient and necessary to accomplish the purpose of this chapter. The Commissioner may designate a mediator and may, from

time to time, detail employees or persons not in the department to act as his assistants for the purpose of executing such provisions. Employees of the Department of Labor shall act on temporary boards without extra compensation. Nothing in this Code section or in this chapter shall be construed to prohibit or limit in any way employees' rights to bargain collectively;

(6) To supervise the business of private employment agencies and employment intelligence bureaus and as frequently as may be necessary to examine into the condition of each such agency or bureau;

(7) To exercise jurisdiction over such person, firm, or corporation acting as an emigrant agent or agency, hereinafter referred to as emigrant agent. As used in this paragraph, the term "emigrant agent" means any person who shall solicit or attempt to procure labor in this state to be employed beyond the limits of this state. The Commissioner shall require each emigrant agent to make application for license to do business, such application to be endorsed by two taxpayers and accompanied by a bond of \$1,000.00 for the faithful performance of duty and the payment of such tax as may be required by law; each emigrant agent must secure annually a license to do business. Each emigrant agent shall make a daily report to the Commissioner showing the names, addresses, and number of persons carried out of the state, the points to which they have been carried, the nature and character of work secured for them, the pay to be received by them, and the fee charged them or to be collected and from whom. The emigrant agent shall show clearly by whom employed, if paid a salary, or from whom he receives a commission, and how much. The Commissioner shall inspect the office and work of each emigrant agent as often as may be necessary; and if any emigrant agent shall be found to be violating the law it shall be the duty of the Commissioner immediately to proceed to have such person presented to the proper authorities for prosecution and to cancel the license to do business;

(8) To post or have posted at his discretion in a conspicuous place in all state employment agencies throughout the state, the "Help Wanted" advertisements from the Sunday editions of the two newspapers with the largest circulation in each of the cities of Detroit, Michigan; Chicago, Illinois; St. Louis, Missouri; New York, New York; Pittsburgh, Pennsylvania; Baltimore, Maryland; Washington, D.C.; Los Angeles, California; and San Francisco, California, so that persons making application for employment through such agencies, but unable to find employment in this state, may see what employment is available elsewhere. It shall be the further duty of the Commissioner of Labor to assist, in any way possible, any person making application for employment in the securing of a position in some other state if employment is not available in Georgia for such a person; and

(9) To initiate and continue to operate an ongoing educational assistance program to include high school through graduate levels for qualified Department of Labor personnel.

(b) Upon a formal determination that a debt or obligation of a former employer who is no longer in business in the State of Georgia to the Department of Labor of \$300.00 or less is uncollectable, or that the costs of collection would equal or exceed the amount due, such department, the Commissioner of Labor shall execute and transmit to the state accounting officer a certification which includes the following: a recapitulation of the efforts made to collect the debt or obligation; an estimate of the costs to pursue collection of the debt or obligation administratively or judicially; such other information as may be required by the procedure developed by the Commissioner of Labor and that complies with policies prescribed by the state accounting officer; and a statement that further collection effort would be detrimental to the financial interests of the state. The certification shall be made under oath or affirmation and shall be sent to the state accounting officer at such times as shall be prescribed in the procedure developed by the Commissioner of Labor and the state accounting officer. Upon receipt of the certification, the state accounting officer shall be authorized to approve the removal of such uncollectable amounts from the financial records of the Department of Labor. (Ga. L. 1911, p. 133, §§ 2, 5; Ga. L. 1917, p. 88, § 1; Ga. L. 1920, p. 118, §§ 1, 2; Ga. L. 1931, p. 7, § 108; Code 1933, § 54-110; Ga. L. 1937, p. 230, § 9; Ga. L. 1945, p. 487, § 1; Ga. L. 1950, p. 9, § 3; Ga. L. 1958, p. 380, § 1; Ga. L. 1959, p. 283, § 7; Ga. L. 1974, p. 567, § 20; Ga. L. 1992, p. 1029, § 1; Ga. L. 2005, p. 694, § 32/HB 293.)

Cross references. — Duty of Commissioner to enforce laws pertaining to installations of glass in public buildings and other

public places, § 8-2-90 et seq. Arbitration generally, Ch. 9, T. 9.

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Agencies, §§ 3, 8. 63C Am. Jur. 2d, Public Officers and Employees, § 241 et seq.

C.J.S. — 51 C.J.S., Labor Relations, § 41. 51B C.J.S., Labor Relations, § 965. 67 C.J.S., Officers and Public Employees, §§ 8, 9.

ALR. — Collective labor agreements, 95 ALR 10.

Specific performance or injunction as proper remedy for breach of collective bargaining agreement, 156 ALR 652.

Closed shops and closed unions, 160 ALR 918.

Construction and effect of termination and automatic renewal provisions in collective bargaining agreements, 17 ALR2d 754.

Right of individual employee to enforce collective labor agreement against employer, 18 ALR2d 352.

Construction and effect of vacation pay clause in collective labor agreement, 30 ALR2d 351.

Enforcement of labor board's order against employer's successors, assigns, or the like, 46 ALR2d 592.

Construction and application of provisions of general arbitration statutes excluding from their operation contracts for labor or personal services, 64 ALR2d 1336.

Vacation pay rights of employee not hired under collective labor agreement, 33 ALR4th 264.

34-2-7. Promulgation, review, amendment, and repeal of rules and regulations by Commissioner generally.

The Commissioner shall comply with the requirements of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," in the promulgation, adoption, review, amendment, and repeal of all rules and regulations of the department.

34-2-8. Variations from rules of Commissioner; keeping of index of variations.

If there are practical difficulties or unnecessary hardships in carrying out a rule of the Commissioner of Labor, the Commissioner, after public hearing, may make a variation from such requirements if the spirit of the rule and law is observed. Any person affected by such rule, or his agent, may petition the Commissioner for such variation, stating the grounds therefor. The Commissioner shall fix a day for the hearing on such petition and shall give reasonable notice thereof to the petitioner. A properly kept index of all variations shall be kept in the office of the Department of Labor and shall be open to public inspection. (Ga. L. 1937, p. 230, § 13; Ga. L. 1945, p. 487, § 4.)

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Administrative Law, § 58 et seq.

C.J.S. — 73 C.J.S., Public Administrative Law and Procedure, §§ 171, 172.

34-2-9. Preparation by Commissioner of annual report and recommendations.

The Commissioner of Labor shall annually, on or before January 1, compile a report covering the activities of the Department of Labor, accompanied by recommendations with reference to such changes in the law, applying to and affecting industrial labor conditions, as the Commissioner may deem advisable. Such report shall be kept in the Commissioner's office and shall be available for public inspection during regular business hours. Copies of the report or portions thereof shall be made available on request. (Ga. L. 1911, p. 133, § 6; Code 1933, § 54-113; Ga. L. 1937, p. 230, § 19; Ga. L. 1978, p. 9, § 1.)

34-2-10. Employer's duty with respect to provision of safe employment generally.

(a) Every employer shall furnish employment which shall be reasonably safe for the employees therein, shall furnish and use safety devices and safeguards, shall adopt and use methods and processes reasonably adequate to render such an employment and place of employment safe, and shall do

every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees.

(b) Every employer and every owner of a place of employment, place of public assembly, or public building, now or hereafter constructed, shall so construct, repair, and maintain such facility as to render it reasonably safe. (Ga. L. 1937, p. 230, § 10.)

Cross references. — Safety and weight support requirements for scaffolding and staging design, § 34-1-1. Liability of employ-

ers for injuries to employees generally, § 34-7-20 et seq.

JUDICIAL DECISIONS

Employer, not union, obligated to provide safe workplace. — The common law places the duty to provide a safe workplace on an employer not on a union. By O.C.G.A. § 34-2-10, it is also true in Georgia. *Skipper v. Hoff & Assocs.*, 684 F. Supp. 707 (S.D. Ga. 1987).

Master is to make effort to furnish safe place. — The fixed standard of the law that the master shall furnish a safe place for the servant to work does not impose an absolute duty to furnish a safe place, but the duty is placed upon the master to make an effort to do so. *Smith v. Ammons*, 228 Ga. 855, 188 S.E.2d 866 (1972).

Master is held to only ordinary care in furnishing servant reasonably safe place to work. *Smith v. Ammons*, 228 Ga. 855, 188 S.E.2d 866 (1972).

Jury charge on ordinary care — It is a misdirection to charge the jury in language the effect of which is to subject the master to more extensive obligations than those indicated by the phrase "ordinary care" or its equivalents. *Smith v. Ammons*, 228 Ga. 855, 188 S.E.2d 866 (1972).

Claim brought in employment discrimination case. — The district court adopted the magistrate judge's recommendation in a case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., in which (1) an employee alleged tangible employment action sexual harassment, a sexually hostile work environment, retaliation, and state law claims; (2) a magistrate judge found that an employee's claim for negligent failure to provide a safe working environment arose out of O.C.G.A. § 34-2-10(a); (3) the magistrate judge noted that the employee had provided no citation to any case law that permitted such a claim to be raised on the facts in the present case; and (4) the employee had not filed any objection to the magistrate judge's recommendation that the claim be dismissed. *Orquiola v. Nat'l City Mortg. Co.*, 510 F. Supp. 2d 1134 (N.D. Ga. Jan. 16, 2007).

Cited in *Horton v. Ammons*, 125 Ga. App. 69, 186 S.E.2d 469 (1971); *Sams v. United Food & Com. Workers Int'l Union*, 866 F.2d 1380 (11th Cir. 1989); *Englehart v. Oki Am., Inc.*, 209 Ga. App. 151, 433 S.E.2d 331 (1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Relationship, §§ 193 et seq., 254. 61 Am. Jur. 2d, Plant and Job Safety—OSHA and State Laws, § 1 et seq.

ALR. — Duty of master providing machine of standard make and in common use to equip same with safety device or guard, 36 ALR 1477.

Liability of contractee and contractor inter se with respect to injuries sustained while

the stipulated work is in course of performance, 44 ALR 891.

Duty of employer to furnish tools or appliances to be used in effecting rescues, 50 ALR 372.

Duty of owner of premises to furnish independent contractor or his employee a safe place of work, where contract is for repairs, 31 ALR2d 1375.

Liability of master for injury or death of

servant on master's premises where injury occurred outside working hours, 76 ALR2d 1215.

Shipowner's liability for injury caused to seaman or longshoreman by cargo or its stowage, 90 ALR2d 710.

Employer's liability to employee for failure to provide work environment free from tobacco smoke, 63 ALR4th 1021.

Tort liability for window washer's injury or death, 69 ALR4th 207.

Liability for retaliation against at-will employee for public complaints or efforts relating to health or safety, 75 ALR4th 13.

When has employer "repeatedly" violated Occupational Safety and Health Act within meaning of § 17(a) of Act (29 U.S.C.A. § 666(a)), 151 ALR Fed. 1.

What constitutes "willful" violation for purposes of § 17(a) or (e) of Occupational Safety and Health Act of 1970 (29 U.S.C.A. § 666(a) or § 666(e)), 161 ALR Fed. 561.

34-2-11. Employer's duty to keep records.

Every employer shall keep a true and accurate record of the name, address, and occupation of each person employed by him, and of the daily and weekly hours worked by each such person and of the wages paid during each pay period to each such person. Such records shall be kept on file for at least one year after the date of the record. No employer shall make or cause to be made any false entries in any such record. (Ga. L. 1937, p. 230, § 16.)

Cross references. — Employer's records of hours worked by and wages paid to employees, § 34-4-4. Duty of employers to maintain records to indicate compliance with

minimum wage law, § 34-4-5. Record-keeping duties of employers under workers' compensation law, § 34-9-12.

RESEARCH REFERENCES

Am. Jur. 2d. — 48B Am. Jur. 2d, Labor and Labor Relations, § 3257 et seq.

C.J.S. — 51B C.J.S., Labor Relations, §§ 1102 et seq., 1266, 1267.

ALR. — Defamation: loss of employer's qualified privilege to publish employee's

work record or qualifications, 24 ALR4th 144.

Validity and construction of statute giving employee the right to review and comment upon personnel record maintained by the employer, 64 ALR4th 619.

34-2-12. Duty of Attorney General and district attorneys to prosecute violations of those laws enforced by Commissioner.

It shall be the duty of the Attorney General of the state and the district attorneys of their respective judicial circuits, upon request of the Commissioner of Labor or any of his authorized representatives, to prosecute any violation of the law which is made the duty of the Commissioner to enforce. (Ga. L. 1937, p. 230, § 17.)

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Administrative Law, § 6 et seq.

C.J.S. — 73A C.J.S., Public Administrative Law and Procedure, § 481 et seq.

ALR. — Enforcement of labor board's order against employer's successors, assigns, or the like, 46 ALR2d 592.

34-2-13. Penalties for violations of chapter and for false statements under oath.

(a) Any employer or owner who violates or fails or refuses to comply with any provision of this chapter within the time prescribed or any judgment or decree made by any court in connection with the provisions of this chapter for which no penalty has been otherwise provided shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished for each such offense by a fine of not less than \$20.00 nor more than \$200.00, by imprisonment not to exceed six months, or by both such fine and imprisonment.

(b) Any person who shall knowingly testify falsely, under oath, or shall knowingly make, give, or produce any false statements or false evidence, under oath, to the Commissioner of Labor or his authorized representatives commits the offense of perjury. (Ga. L. 1937, p. 230, § 18; Ga. L. 1975, p. 198, § 3.)

Cross references. — Offense of perjury generally, § 16-10-70.

JUDICIAL DECISIONS

Ga. L. 1937, p. 230, § 18 (see O.C.G.A. § 34-2-13) is a penal section and must be strictly construed. *Plummer v. State*, 90 Ga. App. 773, 84 S.E.2d 202 (1954).

Employer's false statements do not support at-will employee's wrongful discharge claim. — Although a discharged at-will city employee's claims that the employer falsified the separation notice and conspired to de-

ceive the Department of Labor for purposes of denying the employee unemployment compensation benefits could possibly have implicated the criminal provisions of O.C.G.A. §§ 34-2-13(b) and 34-8-256(b), there was nothing in those statutes that authorized a wrongful discharge claim on that basis. *Reid v. City of Albany*, 276 Ga. App. 171, 622 S.E.2d 875 (2005).

34-2-14. Authorization to establish and administer pretrial intervention programs.

The Georgia Department of Labor shall have the authorization to enter into agreements with district attorneys and solicitors-general of the several judicial circuits of this state for the purpose of establishing pretrial intervention programs in such judicial circuits. The Georgia Department of Labor shall be authorized to administer all such programs pursuant to said agreement. (Ga. L. 1982, p. 1093, § 2; Code 1981, § 34-2-15, enacted by Ga. L. 1982, p. 1093, § 4; Code 1981, § 34-2-14, as redesignated by Ga. L. 1985, p. 708, § 3; Ga. L. 1996, p. 748, § 18.)

Editor's notes. — Ga. L. 1985, p. 708, § 3, repealed former Code Section 34-2-14 (Ga. L. 1982, p. 1093, §§ 1, 3), relating to creation of the Correctional Services Division

within the Georgia Department of Labor, and redesignated former Code Section 34-2-15 as this Code section.

OPINIONS OF THE ATTORNEY GENERAL

Dismissal of charges against person completing program. — If an indictment or accusation has been filed against a person who successfully completes a pretrial diversion program, consent of the court is required before the criminal charge can be

dismissed. If the person completes the pretrial diversion program prior to the filing of an indictment or accusation, consent of the court is not required. 1988 Op. Att'y Gen. No. U88-25.

CHAPTER 3

HOURS OF LABOR IN FACTORIES

| | | | |
|---------|--|---------|---|
| Sec. | | Sec. | |
| 34-3-1. | Hours of labor in cotton or woolen manufacturing establishments. | 34-3-3. | Actions for violations of chapter; disposition of amount recovered. |
| 34-3-2. | Effect of contracts requiring more than 40 hours of work per week. | 34-3-4. | Penalties for violations of chapter. |

RESEARCH REFERENCES

ALR. — What is a “manufacturing establishment” within meaning of regulatory statutes, 96 ALR 1351.

Judicial questions regarding Federal Fair Labor Standards Act (Wage and Hours Act) and state acts in conformity therewith, 130 ALR 272; 132 ALR 1443.

Provision of Fair Labor Standards Act for increased compensation for overtime, 140 ALR 1263; 152 ALR 1030; 169 ALR 1307.

Power under Fair Labor Standards Act to prohibit homework, 155 ALR 782.

What is a “factory” within statutes relating to safety and health of employees, 163 ALR 447.

Construction of provision of Fair Labor Standards Act (29 U.S.C. § 215(a)(3)) forbidding reprisals against any employee who has filed complaint, or the like, under the Act, 93 ALR2d 610.

What constitutes “amusement or recreational establishment” within meaning of seasonal amusement exemption from Fair Labor Standards Act (29 USC § 213(a)(3)), 88 ALR Fed. 880.

Employee’s protection under § 15(a)(3) of Fair Labor Standards Act (29 USC § 215(a)(3)), 101 ALR Fed. 220.

34-3-1. Hours of labor in cotton or woolen manufacturing establishments.

The hours of labor required of all persons employed in all cotton or woolen manufacturing establishments in this state, except engineers, firefighters, watchmen, mechanics, teamsters, yard employees, clerical force, and all help that may be needed to clean up and make necessary repairs or changes in or of machinery, shall not exceed ten hours per day; or the same may be regulated by employers, so that the number of hours shall not in the aggregate exceed 60 hours per week, provided that nothing contained in this Code section shall be construed to prevent any of the aforesaid employees from working such time as may be necessary to make up lost time, not to exceed ten days, caused by accidents or other unavoidable circumstances. (Ga. L. 1889, p. 163, § 1; Civil Code 1895, § 2615; Civil Code 1910, § 3137; Ga. L. 1911, p. 65, § 1; Code 1933, § 54-201; Ga. L. 1983, p. 3, § 25; Ga. L. 2002, p. 660, § 4; Ga. L. 2002, p. 1259, § 11.)

OPINIONS OF THE ATTORNEY GENERAL

Legislature intended to remedy unreasonable hours. — The evil sought to be remedied by the legislature was the unreasonable hours of service of employees working in cotton and woolen manufacturing establishments. 1945-47 Op. Att'y Gen. p. 354.

This section could not be of force in industry engaged in interstate commerce, since subsequent federal statutes have been enacted which in law supersede state stat-

utes. 1945-47 Op. Att'y Gen. p. 354 (see O.C.G.A. § 34-3-1).

Application of section. — Whether men and fixers in textile factories are within the maximum hours provisions of the state law depends upon whether their work is a necessary part of the day's operation, and not merely incidental thereto. 1945-47 Op. Att'y Gen. p. 354.

RESEARCH REFERENCES

Am. Jur. 2d. — 48B Am. Jur. 2d, Labor and Labor Relations, §§ 2997, 2998.

ALR. — What employers are within "hours of labor" statutes, 16 ALR 537.

Constitutionality of statutes limiting hours of labor in private industry, 90 ALR 814.

Waiver of statutory right to minimum wage or benefit of regulation as to hours of labor, 102 ALR 842; 129 ALR 1145.

34-3-2. Effect of contracts requiring more than 40 hours of work per week.

All contracts which require employees of cotton or woolen manufacturing establishments to work more than 40 hours per week shall be null and void. (Ga. L. 1889, p. 163, § 2; Civil Code 1895, § 2616; Civil Code 1910, § 3138; Code 1933, § 54-202.)

RESEARCH REFERENCES

Am. Jur. 2d. — 17A Am. Jur. 2d, Contracts, §§ 162, 229 et seq. 48B Am. Jur. 2d, Labor and Labor Relations, § 3112 et seq.

C.J.S. — 17 C.J.S., Contracts, § 201 et seq.

34-3-3. Actions for violations of chapter; disposition of amount recovered.

Any person with whom a contract violative of this chapter is made or any person having knowledge thereof may institute an action against such cotton or woolen manufacturing establishment; and the amount recovered as a fine shall inure to the benefit of the board of education of the county in which the violation shall have occurred. (Ga. L. 1889, p. 163, § 4; Civil Code 1895, § 2618; Civil Code 1910, § 3140; Code 1933, § 54-204.)

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Actions, § 114 et seq. 36 Am. Jur. 2d, Forfeitures and Penalties, § 63.

C.J.S. — 1A C.J.S., Actions, § 31 et seq.

36A C.J.S., Fines, §§ 2, 19. 51B C.J.S., Labor Relations, § 1102 et seq. 70 C.J.S., Penalties, § 23.

34-3-4. Penalties for violations of chapter.

Any cotton or woolen manufacturing establishment that makes any contract in violation of Code Section 34-3-1 shall be subject to a fine of not less than \$20.00 and not more than \$500.00 for each and every such violation. (Ga. L. 1889, p. 163, § 3; Civil Code 1895, § 2617; Civil Code 1910, § 3139; Code 1933, § 54-203.)

CHAPTER 4

MINIMUM WAGE LAW

| Sec. | | Sec. | |
|-----------|---|---------|--|
| 34-4-1. | Short title. | 34-4-4. | Authority of Commissioner to grant exemptions from operation of chapter. |
| 34-4-2. | Administration and enforcement of chapter by Commissioner of Labor. | 34-4-5. | Employer's records of hours worked by and wages paid to employees. |
| 34-4-3. | Amount of minimum wage to be paid by employers; employers and employees covered by chapter. | 34-4-6. | Action to recover difference where employee paid less than minimum wage. |
| 34-4-3.1. | Wages and employment benefits by local government entities. | | |

OPINIONS OF THE ATTORNEY GENERAL

Exemptions. — The Georgia minimum wage law does not exempt charitable foundations which are exempt from federal tax, nor does it exempt amusement and recre-

ational establishments which are exempted under the federal Fair Labor Standards Act, 29 U.S.C. § 201 et seq. 1970 Op. Att'y Gen. No. U70-126.

RESEARCH REFERENCES

ALR. — Servant's right to compensation for extra work or overtime, 25 ALR 218; 107 ALR 705.

Construction and application of statute or ordinance relating to wages of persons employed on public work, 93 ALR 1249.

Judicial questions regarding Federal Fair Labor Standards Act (Wage and Hours Act) and state acts in conformity therewith, 130 ALR 272; 132 ALR 1443.

Provision of Fair Labor Standards Act for increased compensation for overtime, 140 ALR 1263; 152 ALR 1030; 169 ALR 1307.

Validity, construction, and effect of statutory or contractual provision in, government construction contract referring to Secretary of Labor questions respecting wage rates or classification of employees of contractor, 163 ALR 1300.

Nonprofit charitable institutions as within operation of labor statutes, 26 ALR2d 1020.

Validity of minimum wage statutes relating to private employment, 39 ALR2d 740.

Validity of statute, ordinance, or charter provision requiring that workmen on public work be paid the prevailing or current rate of wages, 18 ALR3d 944.

What entitles or projects are "public" for purposes of state statutes requiring payment of prevailing wages on public projects, 5 ALR5th 470.

Who is "employee," "workman," or the like, of contractor subject to state statute requiring payment of prevailing wages on public works projects, 5 ALR5th 513.

International Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co., 5 ALR5th 1106.

What are "prevailing wages," or the like, for purposes of state statute requiring payment of prevailing wages on public works projects, 7 ALR5th 400.

Employers subject to state statutes requiring payment of prevailing wages on public works projects, 7 ALR5th 444.

What projects involve work subject to state statutes requiring payment of prevailing wages on public works projects, 10 ALR5th 337.

Employees' private right of action to enforce state statute requiring payment of prevailing wages on public works projects, 10 ALR5th 360.

What constitutes "amusement or recre-

ational establishment” within meaning of seasonal amusement exemption from Fair Labor Standards Act (29 USC § 213(a)(3)), 88 ALR Fed. 880.

Employee’s protection under § 15(a)(3) of Fair Labor Standards Act (29 USC § 215(a)(3)), 101 ALR Fed. 220.

What constitutes “preschool” for purposes of § 3(s)(1)(b) of Fair Labor Standards Act (29 USCS § 203(s)(1)(b)), providing that preschools are subject to wage and hour provisions of act, 131 ALR Fed. 207.

34-4-1. Short title.

This chapter shall be known and may be cited as the “Georgia Minimum Wage Law.” (Ga. L. 1970, p. 153, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 48B Am. Jur. 2d, Labor and Labor Relations, §§ 3058 et seq., 3074.

ALR. — Increase, or promise of increase, or withholding of increase, of wages as unfair labor practice under National Labor Relations Act, 137 ALR Fed 333.

Who is “employee employed in agriculture” and therefore exempt from overtime provisions of Fair Labor Standards Act by § 13 (b)(12) of Act (29 U.S.C.A. § 213(b)(12)), 162 ALR Fed. 575.

34-4-2. Administration and enforcement of chapter by Commissioner of Labor.

The Commissioner of Labor shall administer and enforce this chapter and may make rules and regulations for such administration. (Ga. L. 1970, p. 153, § 3.)

OPINIONS OF THE ATTORNEY GENERAL

Commissioner of Labor has responsibility, authority, and is empowered to enforce provisions of Ga. L. 1970, p. 153 (see O.C.G.A.

Ch. 4, T. 34). 1970 Op. Att’y Gen. No. 70-184.

RESEARCH REFERENCES

C.J.S. — 51B C.J.S., Labor Relations, §§ 1109, 1270 et seq.

34-4-3. Amount of minimum wage to be paid by employers; employers and employees covered by chapter.

(a) Except as otherwise provided in this Code section, every employer, whether a person, firm, or corporation, shall pay to all covered employees a minimum wage which shall be not less than \$5.15 per hour for each hour worked in the employment of such employer.

(b) This chapter shall not apply with respect to:

(1) Any employer that has sales of \$40,000.00 per year or less;

- (2) Any employer having five employees or less;
- (3) Any employer of domestic employees;
- (4) Any employer who is a farm owner, sharecropper, or land renter;
- (5) Any employee whose compensation consists wholly or partially of gratuities;
- (6) Any employee who is a high school or college student;
- (7) Any individual who is employed as a newspaper carrier; or
- (8) Any individual who is employed by a nonprofit child-caring institution or long-term care facility serving children or mentally disabled adults who are enrolled in such institution and reside in residential facilities of the institution, if such employee resides in such facilities, receives without cost board and lodging from such institution, and is compensated on a cash basis at an annual rate of not less than \$10,000.00.

(c) This chapter shall not apply to any employer who is subject to the minimum wage provisions of any act of Congress as to employees covered thereby if such act of Congress provides for a minimum wage which is greater than the minimum wage which is provided for in this Code section. (Ga. L. 1970, p. 153, §§ 2, 6-8; Ga. L. 1984, p. 1324, § 1; Ga. L. 2001, p. 201, § 1.)

Law reviews. — For note on the 2001 amendment to O.C.G.A. § 34-4-3, see 18 Ga. St. U. L. Rev. 183 (2001).

JUDICIAL DECISIONS

Ordinance strengthening minimum wage law. — There is no unconstitutional conflict between the state minimum wage law as codified in this section and a city ordinance, which requires payment of the prescribed Davis-Bacon Act wage scale in construction projects in excess of \$10,000.00, where the ordinance does not detract from or hinder

the operation of that section, but rather it augments and strengthens it. *City of Atlanta v. Associated Bldrs. & Contractors*, 240 Ga. 655, 242 S.E.2d 139 (1978) (see O.C.G.A. § 34-4-3).

Cited in *City of Atlanta v. Associated Bldrs. & Contractors*, 143 Ga. App. 115, 237 S.E.2d 601 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 48B Am. Jur. 2d, Labor and Labor Relations, §§ 2814, 3035.

C.J.S. — 51B C.J.S., Labor Relations, §§ 1099 et seq., 1114 et seq., 1179 et seq.

ALR. — Waiver of statutory right to minimum wage or benefit of regulation as to hours of labor, 102 ALR 842; 129 ALR 1145.

Employee's or agent's acceptance of bonus, gratuity, or other personal benefit from

one with whom he deals on employer's or principal's account as affecting his right to recover wages, salary, or commissions, 102 ALR 1115.

Waiver or loss of statutory right to minimum wage or benefit of regulation as to hours of labor, 128 ALR 1145.

Validity of statute, or administrative regulation thereunder, which in effect guaran-

tees to part-time employees minimum wages regardless of the time of their actual employment, 143 ALR 1086.

Validity of statute or regulation in respect of tips, 147 ALR 1039.

Nonprofit charitable institutions as within operation of labor statutes, 26 ALR2d 1020.

Validity of minimum wage statutes relating to private employment, 39 ALR2d 740.

Who is employed in "professional capacity" within exemptions from minimum wage and maximum hours provisions of Fair Labor Standards Act, 72 ALR2d 1156; 77 ALR Fed. 681.

Who is executive, administrator, supervi-

sor, or the like, under exemption for such employees from state minimum wage and overtime pay statutes, 85 ALR4th 519.

Who is employed in "executive capacity" within exemption, under 29 USCS § 213(a)(1), from minimum wage and maximum hours provisions of Fair Labor Standards Act (29 USCS § 201 et seq.), 131 ALR Fed. 1.

Who is "employee employed in agriculture" and therefore exempt from overtime provisions of Fair Labor Standards Act by § 13 (b)(12) of Act (29 U.S.C.A. § 213(b)(12)), 162 ALR Fed. 575.

34-4-3.1. Wages and employment benefits by local government entities.

(a) As used in this Code section, the term:

(1) "Employee" means any individual employed by an employer.

(2) "Employer" means any person or entity that employs one or more employees.

(3) "Employment benefits" means anything of value that an employee may receive from an employer in addition to wages and salary. This term includes, but is not limited to, any health benefits; disability benefits; death benefits; group accidental death and dismemberment benefits; paid days off for holidays, sick leave, vacation, and personal necessity; retirement benefits; and profit-sharing benefits.

(4) "Local government entity" means a county, municipal corporation, consolidated government, authority, board of education, or other local public board, body, or commission.

(5) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any other organized group of persons.

(6) "Wage or employment benefit mandate" means any requirement adopted by a local government entity which requires an employer to pay any or all of its employees a wage rate or provide employment benefits not otherwise required under this Code or federal law.

(b)(1) Any and all wage or employment benefit mandates adopted by any local government entity are hereby preempted.

(2) No local government entity may adopt, maintain, or enforce by charter, ordinance, purchase agreement, contract, regulation, rule, or resolution, either directly or indirectly, a wage or employment benefit mandate.

(3) Any local government entity may offer its own employees employment benefits.

(c) No local government entity may through its purchasing or contracting procedures seek to control or affect the wages or employment benefits provided by its vendors, contractors, service providers, or other parties doing business with the local government entity. A local government entity shall not through the use of evaluation factors, qualification of bidders, or otherwise award preferences on the basis of wages or employment benefits provided by its vendors, contractors, service providers, or other parties doing business with the local government entity. (Code 1981, § 34-4-3.1, enacted by Ga. L. 2004, p. 377, § 2; Ga. L. 2005, p. 450, § 1/HB 59.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2004, “benefits;” was substituted for “benefits,” five times and “necessity;” was substituted for “necessity,” in paragraph (a)(3).

Editor’s notes. — Ga. L. 2004, p. 377, § 1, not codified by the General Assembly, provides that: “The General Assembly finds and declares that:

“(1) Economic stability and growth are among the most important factors affecting the general welfare of the people of this state, and that economic stability and growth are therefore among the most important matters for which the General Assembly is responsible;

“(2) Mandated wage rates and employment benefits comprise a major cost component for private enterprises and are among the chief factors affecting the economic stability and growth of this state;

“(3) Local variations in mandated wage rates and employment benefits threaten many businesses with a loss of employees to areas which require higher mandated wage rates and employment benefits, threaten

many other businesses with the loss of patrons to areas which allow lower mandated wage rates and employment benefits, and are therefore detrimental to the business environment of the state and to the citizens, businesses, and governments of the various political subdivisions as well as local labor markets;

“(4) In order for businesses to remain competitive and yet attract and retain the highest possible caliber of employees, private enterprises in this state must be allowed to function in a uniform environment with respect to mandated wage rates and employment benefits; and

“(5) Legislated wage and employment benefit disparity between local government entities of this state creates an anticompetitive marketplace that fosters job and business relocation.”

Law reviews. — For annual survey of labor and employment law, see 56 Mercer L. Rev. 291 (2004). For annual survey of labor and employment law, see 57 Mercer L. Rev. 251 (2005). For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 177 (2005).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Relationship, § 76 et seq.

C.J.S. — 63 C.J.S., Municipal Corporations, § 649 et seq.

34-4-4. Authority of Commissioner to grant exemptions from operation of chapter.

(a) The Commissioner of Labor is authorized to grant exemptions to certain categories of organizations and businesses for the purpose of exempting them from the operation of this chapter. The exemptions so granted shall be based upon considerations of the value of allowing certain

classes of persons to be employed at rates below the minimum rate because of overriding considerations of public policy to allow employment of certain persons with disabilities and others who cannot otherwise compete effectively in the labor market.

(b) The Commissioner of Labor is authorized to conduct investigations and compile information as to the reasons for granting exemptions to certain organizations and businesses pursuant to subsection (a) of this Code section. The Commissioner is required to maintain a list of such exemptions, along with the records of the investigations conducted and the basis for the granting of such exemptions, which list and records shall be a public record. (Ga. L. 1970, p. 153, § 7; Ga. L. 1992, p. 6, § 34; Ga. L. 1995, p. 1302, § 16.)

34-4-5. Employer's records of hours worked by and wages paid to employees.

Every employer subject to this chapter or any regulation pursuant thereto shall maintain records showing the hours worked by each employee and the wages paid to him and shall furnish to the Commissioner upon demand a sworn statement of the hours worked and wages paid to each person in his or its employment covered by this chapter. The records covering such hours and payments shall be open to inspection by the Commissioner, his deputy, or any authorized agent of the department at any reasonable time. Each employer subject to this chapter shall post copies of any regulation or order issued pursuant to its provisions in a conspicuous place in an area frequented by his employees. (Ga. L. 1970, p. 153, § 4.)

Cross references. — Duty of employers to keep records generally, § 34-2-11.

OPINIONS OF THE ATTORNEY GENERAL

Commissioner of Labor has responsibility, authority, and is empowered to enforce provisions of minimum wage law (see O.C.G.A. Ch. 4, T. 34). 1970 Op. Att'y Gen. No. 70-184.

RESEARCH REFERENCES

Am. Jur. 2d. — 48B Am. Jur. 2d, Labor and Labor Relations, § 3257 et seq. § 738, 51B C.J.S., Labor Relations, § 1266 et seq.

C.J.S. — 51A C.J.S., Labor Relations,

34-4-6. Action to recover difference where employee paid less than minimum wage.

If any employer pays any employee a lesser amount than the minimum wage provided in this chapter, the employee, at any time within three years, may bring a civil action in superior court for the recovery of the difference

between the amount paid and the minimum wage provided in this chapter, plus an additional amount equal to the original claim, which shall be allowed as liquidated damages, together with costs and such reasonable attorney's fees as may be allowed by the court. No contract or agreement between any employer and his employees nor any acceptance of a lesser wage by any employee shall bar the action. (Ga. L. 1970, p. 153, § 5.)

Cross references. — Time limitation on actions to recover wages, overtime and damages generally, § 9-3-22.

JUDICIAL DECISIONS

Arbitration. — Under the Supremacy Clause, § 2 of the Federal Arbitration Act, 9 U.S.C.A. § 2, pre-empts O.C.G.A. § 34-4-6 and the employee employed under contract requiring arbitration of any claims or disputes cannot bring action under the Georgia

statute for unpaid wages. *Haluska v. RAF Fin. Corp.*, 875 F. Supp. 825 (N.D. Ga. 1994).

Cited in *Equitable Life Assurance Soc'y of United States v. Studenic*, 77 F.3d 412 (11th Cir. 1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 48B Am. Jur. 2d, Labor and Labor Relations, § 3312.

C.J.S. — 51B C.J.S., Labor Relations, § 1305 et seq.

ALR. — Validity of statutory provision for attorney's fees, 11 ALR 884; 90 ALR 530.

Construction and application of statute providing for attorney's fees in action to recover for wages, 115 ALR 250.

Right of employee of public contractor to maintain action against latter based upon statutory obligation as to rate of wages or upon provisions in that regard in the contract between contractor and the public, 144 ALR 1035.

Right to recover under Fair Labor Standards Act minimum wages, compensation for overtime, or liquidated damages for non-payment thereof as affected by waiver, release, compromise, offer of compromise, tender, or full payment, 167 ALR 218.

Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 ALR2d 500; 48 ALR4th 1094.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period, 79 ALR2d 1080.

What constitutes "trial," "final trial," or "final hearing" under statute authorizing allowance of attorneys' fees as costs on such proceeding, 100 ALR2d 397.

Settlement negotiations as estopping reliance on statute of limitations, 39 ALR3d 127.

Validity of statute allowing attorney's fee to successful claimant but not to defendant, or vice-versa, 73 ALR3d 515.

Fraud as extending statutory limitations period for contesting will or its probate, 48 ALR4th 1094.

CHAPTER 5

SEX DISCRIMINATION IN EMPLOYMENT

| Sec. | | Sec. | |
|---------|---|---------|---|
| 34-5-1. | Declaration of public policy regarding discriminatory wage practices based on sex. | 34-5-5. | Collection of unpaid wages by aggrieved employee; attorney's fee; when action may be commenced. |
| 34-5-2. | Definitions. | 34-5-6. | Arbitration of disputes between employers and employees; appointment of arbitrators. |
| 34-5-3. | Prohibition of discriminatory wage differentials; penalty for discharge of or discrimination against complainant. | 34-5-7. | Posting of law by employers. |
| 34-5-4. | Powers and authority of Commissioner under chapter. | | |

Cross references. — Equal protection, U.S. Const., amend. 14 and Ga. Const. 1983, Art. I, Sec. I, Para. II. Discrimination in public employment on basis of sex, age, race, § 45-19-20 et seq.

Law reviews. — For annual eleventh circuit survey of employment discrimination, see 42 Mercer L. Rev. 1381 (1991). For survey of 1995 Eleventh Circuit cases on employment discrimination, see 47 Mercer L. Rev. 797 (1996).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Sex Discrimination in Employment — Promotion Practices, 12 POF2d 645.

Sex Discrimination — Sexual Harassment Creating a Hostile Work Environment, 50 POF2d 127.

Damages for Sexual Assault, 15 POF3d 259.

Employment Handicap Discrimination Based on Gender Dysphoria (Transsexualism), 25 POF3d 415.

Sex Discrimination in Employment Promotion Decisions, 46 POF3d 1.

Employer's Liability for Same-Sex Harassment, 61 POF3d 1.

Am. Jur. Trials. — Sexual Harassment in Employment, 33 Am. Jur. Trials 257.

Sex Discrimination Based Upon Sexual Stereotyping, 53 Am. Jur. Trials 299.

Workplace Sexual Harassment: Quid Pro Quo, 62 Am. Jur. Trials 235.

Taking the Deposition of the Sexual Harassment Plaintiff, 65 Am. Jur. Trials 65.

Sexual Harassment Damages and Remedies, 73 Am. Jur. Trials 1.

C.J.S. — 30 C.J.S. Employers' Liability for Injuries to Employees, § 237.

Validity, construction, and application of statute designed to prevent discrimination between male and female employees as regards wages or other conditions of work, 130 ALR 436; 7 ALR Fed. 707.

ALR. — Validity, construction, and application of statute designed to prevent discrimination between male and female employees as regards wages or other conditions of work, 130 ALR 436; 7 ALR Fed. 707.

Validity, construction, and effect of statutory or contractual provision in government construction contract referring to Secretary of Labor questions respecting wage rates or classification of employees of contractor, 163 ALR 1300.

On-the-job sexual harassment as violation of state civil rights law, 18 ALR4th 328.

Discipline or discharge for sexual conduct as violative of state fair employment laws, 47 ALR4th 863.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress, 52 ALR4th 853.

Construction and Application of Provisions of Equal Pay Act of 1963 (29 USCS § 206(d)) Prohibiting Wage Discrimination on Basis of Sex, 7 ALR Fed. 707.

Employee's protection under § 15(a)(3) of Fair Labor Standards Act (29 USC § 215(a)(3)), 101 ALR Fed. 220.

When is supervisor's hostile environment sexual harassment under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e et seq.) imputable to employer, 157 ALR Fed. 1.

34-5-1. Declaration of public policy regarding discriminatory wage practices based on sex.

The General Assembly declares that the practice of discriminating on the basis of sex by paying wages to employees of one sex at a lesser rate than the rate paid to employees of the opposite sex for comparable work in jobs which require the same, or essentially the same, knowledge, skill, effort, and responsibility unjustly discriminates against the person receiving the lesser rate; leads to low worker morale, high turnover, and frequent labor unrest; discourages workers paid at the lesser wage rates from training for higher level jobs; curtails employment opportunities; decreases mobility of workers and increases labor costs; impairs purchasing power and threatens the maintenance of an adequate standard of living by such workers and their families; prevents optimum utilization of the labor resources available to the state; threatens the well-being of citizens of this state; and adversely affects the general welfare. It is declared to be the policy of the State of Georgia to eliminate, as rapidly as possible, by exercise of the police power of this state, discriminatory wage practices based on sex. (Ga. L. 1966, p. 582, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 45A Am. Jur. 2d, Job Discrimination, §§ 135 et seq., 657, 658.

C.J.S. — 14 C.J.S., Civil Rights, §§ 19 et seq., 72, 79, 103, 104, 121.

ALR. — Constitutionality of "civil rights" legislation by state, 49 ALR 505.

Recovery of damages for emotional distress resulting from discrimination because of sex or marital status, 61 ALR3d 944.

Application of state law to sex discrimination in employment, 87 ALR3d 93.

What constitutes employment discrimination on the basis of "marital status" for purposes of state civil rights laws, 44 ALR4th 1044.

Validity, construction, and application of state enactment, order, or regulation expressly prohibiting sexual orientation discrimination, 82 ALR5th 1.

Individual liability of supervisors, managers, officers or co-employees for discriminatory actions under state Civil Rights Act, 83 ALR5th 1.

When is supervisor's or co-employee's hostile environment sexual harassment imput-

able to employer under state law, 94 ALR5th 1.

Discrimination against pregnant employee as violation of state fair employment laws, 99 ALR5th 1.

Conduct of plaintiff as defense in action for employment discrimination based on sexual harassment under federal civil rights statutes, 145 ALR Fed. 459.

What constitutes reverse or majority gender discrimination against males violative of federal constitution or statutes — public employment cases, 153 ALR Fed. 609.

Award of compensatory damages under 42 U.S.C.A. § 1981a for violation of Title VII of Civil Rights Act of 1964, 154 ALR Fed. 347.

Propriety of treating separate entities as one for determining number of employees required by Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e(b)) for action against "employer", 160 ALR Fed. 441.

Liability of employer, under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e et seq.) for sexual harassment of

employee by customer, client, or patron, 163 ALR Fed. 445.

JUDICIAL DECISIONS

Applicability. — Because a former employee alleged sexual harassment under O.C.G.A. § 34-5-1 by a manager, who made sexual overtures to the employee, the defendants were granted summary judgment be-

cause § 34-5-1 offered relief only for sex discrimination regarding wage practices. *Johnson v. Shoney's, Inc.*, ___ F. Supp. 2d ___, 2005 U.S. Dist. LEXIS 18101 (M.D. Ga. Aug. 18, 2005).

34-5-2. Definitions.

As used in this chapter, the term:

(1) “Commissioner” means the Commissioner of Labor of the State of Georgia.

(2) “Employ” means to permit to work.

(3) “Employee” means any individual employed by an employer, other than domestic or agricultural employees, and includes individuals employed by the state or any of its political subdivisions, including public bodies.

(4) “Employer” means any person employing ten or more employees and acting directly or indirectly in the interest of an employer in relation to an employee. The term “employer,” as used in this chapter, means an employer who is engaged in intrastate commerce.

(5) “Occupation” means any industry, trade, business or branch thereof, or any employment or class of employment.

(6) “Person” means one or more individuals, partnerships, corporations, legal representatives, trustees, trustees in bankruptcy, or voluntary associations.

(7) “Wage rate” means all compensation for employment, including payment in kind and amounts paid by employers for employee benefits. (Ga. L. 1966, p. 582, § 2; Ga. L. 1968, p. 1392, §§ 1, 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 48 Am. Jur. 2d, Labor and Labor Relations, § 889.

C.J.S. — 51 C.J.S., Labor Relations, §§ 6 et seq., 57. 51B C.J.S., Labor Relations, §§ 1251, 1252.

ALR. — What constitutes reverse or majority gender discrimination against males violative of federal constitution or statutes — public employment cases, 153 ALR Fed. 609.

34-5-3. Prohibition of discriminatory wage differentials; penalty for discharge of or discrimination against complainant.

(a) No employer having employees subject to any provisions of this chapter shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work in jobs which require equal skill, effort, and responsibility and which are performed under similar working conditions, except where such payment is made pursuant to (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) a differential based on any other factor other than sex. An employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with this subsection, reduce the wage rate of any employee.

(b) It shall also be unlawful for any person to cause or attempt to cause an employer to discriminate against any employee in violation of this chapter.

(c) It shall be unlawful for any person to discharge or in any other manner discriminate against any employee covered by this chapter because such employee has made a complaint to his employer or any other person or has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceedings. Any person who violates any provision of this Code section shall, upon conviction thereof, be punished by a fine not to exceed \$100.00. (Ga. L. 1966, p. 582, §§ 3, 8.)

RESEARCH REFERENCES

Am. Jur. 2d. — 45B Am. Jur. 2d, Job Discrimination, § 923 et seq. 48 Am. Jur. 2d, Labor and Labor Relations, § 889.

C.J.S. — 14 C.J.S., Civil Rights, §§ 19 et seq., 72, 79, 103 et seq., 281, 299. 51B C.J.S., Labor Relations, § 1425.

ALR. — Collective bargaining agreement discriminating against certain employees as infringement of their rights, 172 ALR 1351.

Recovery of damages for emotional distress resulting from discrimination because of sex or marital status, 61 ALR3d 944.

Recovery of damages as remedy for wrongful discrimination under state or local civil rights provisions, 85 ALR3d 351.

Application of state law to sex discrimination in employment, 87 ALR3d 93.

What constitutes employment discrimina-

tion on the basis of "marital status" for purposes of state civil rights laws, 44 ALR4th 1044.

Availability and scope of punitive damages under state employment discrimination law, 81 ALR5th 367.

Punitive damages in actions for violations of Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. § 1981a; 42 U.S.C.A. § 2000e et seq.), 150 ALR Fed. 601.

Award of compensatory damages under 42 U.S.C.A. § 1981a for violation of Title VII of Civil Rights Act of 1964, 154 ALR Fed. 347.

What constitutes reverse or majority gender discrimination against males violative of federal constitution or statutes — private employment cases, 162 ALR Fed. 273.

34-5-4. Powers and authority of Commissioner under chapter.

(a) The Commissioner shall have the power and it shall be his duty to carry out this chapter; and for this purpose the Commissioner or his authorized representative shall have the power to:

(1) Assist any employer to ensure that all employees are receiving comparable pay for comparable work in jobs which require comparable skill, effort, and responsibility;

(2) Assist any employer so that the character of the work and operations on which persons are employed can be compared, to question such persons, and to obtain such other information as is reasonably necessary for the administration and enforcement of this chapter; and

(3) Eliminate pay practices unlawful under this chapter by informal methods of conference, conciliation, and persuasion.

(b) The Commissioner is authorized to request witnesses to appear and to produce pertinent records for examination by the Commissioner or his authorized representative in the county of the place of business of the employer and such witnesses shall be paid the same fees as are allowed witnesses attending the superior courts of this state. In the event of failure of a person to attend, testify, or produce records voluntarily, the Commissioner may make application to the superior court of the county in which the business is located and, after notice and hearing, the court, in its discretion, and upon proper cause shown, may issue an order requiring the person to appear before the Commissioner or his authorized representative and testify or produce records as requested by the Commissioner.

(c) The Commissioner shall have the authority to issue such rules and regulations appropriate to the carrying out of this chapter. (Ga. L. 1968, p. 1392, § 3.)

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, § 241 et seq. seq. 51B C.J.S., Labor Relations, § 1424. 67 C.J.S., Officers and Public Employees, §§ 8, 9.
C.J.S. — 14A C.J.S., Civil Rights, § 724 et

34-5-5. Collection of unpaid wages by aggrieved employee; attorney's fee; when action may be commenced.

(a) Any employer who violates Code Section 34-5-3 shall be liable to the employee affected in the amount of his unpaid wages. An action to recover such liability may be maintained in any court of competent jurisdiction by the aggrieved employee. The court in such action shall, in cases of violation, in addition to any judgment awarded to plaintiff, allow costs of the action and a reasonable attorney's fee not to exceed 25 percent of the judgment to be paid by the defendant.

(b) Court action under this Code section may be commenced no later than one year after the cause of action accrues. (Ga. L. 1966, p. 582, §§ 4, 5.)

Cross references. — Time limitation on actions to recover wages, overtime, or other benefits generally, § 9-3-22.

RESEARCH REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d, Limitation of Actions, §§ 40 et seq., 52 et seq.

C.J.S. — 14A C.J.S., Civil Rights, §§ 335 et seq., 749 et seq., 756 et seq. 51B C.J.S., Labor Relations, § 1112. 54 C.J.S., Limitations of Actions, §§ 100, 101.

ALR. — Validity of statutory provision for attorney's fees, 90 ALR 530.

Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 ALR2d 500; 48 ALR4th 1094.

What constitutes "trial," "final trial," or "final hearing" under statute authorizing allowance of attorneys' fees as costs on such proceeding, 100 ALR2d 397.

Settlement negotiations as estopping reliance on statute of limitations, 39 ALR3d 127.

Validity of statute allowing attorney's fee to successful claimant but not to defendant, or vice-versa, 73 ALR3d 515.

Recovery of damages as remedy for wrongful discrimination under state or local civil rights provisions, 85 ALR3d 351.

Requiring apology as "affirmative action" or other form of redress under State Civil Rights Act, 85 ALR3d 402.

Fraud as extending statutory limitations period for contesting will or its probate, 48 ALR4th 1094.

Award of front pay under state job discrimination statutes, 74 ALR4th 746.

Availability and scope of punitive damages under state employment discrimination law, 81 ALR5th 367.

Right of prevailing defendant to recover attorney's fees under § 706(k) of Civil Rights Act of 1964 (42 U.S.C.S. § 2000e-5 (k)), 134 ALR Fed. 161.

Factors or conditions in employment discrimination cases said to justify increase in attorney's fees awarded under § 706(k) of Civil Rights Act of 1964 (42 U.S.C.S. § 2000e-5(k)), 140 ALR Fed. 301; 151 ALR Fed. 77.

Punitive damages in actions for violations of Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. § 1981a; 42 U.S.C.A. §§ 2000e et seq.), 150 ALR Fed. 601.

Award of compensatory damages under 42 U.S.C.A. § 1981a for violation of Title VII of Civil Rights Act of 1964, 154 ALR Fed. 347.

34-5-6. Arbitration of disputes between employers and employees; appointment of arbitrators.

In the event any dispute should arise between any employer and employee covered by this chapter in relation to any subject matter which is covered by this chapter, either of the parties shall have the right to request arbitration of the dispute. The party requesting arbitration shall file written notice of his request with the opposite party by either registered or certified mail or statutory overnight delivery. Within 30 days after receipt of such notice, the other party shall either accept or reject the arbitration offer. If the offer is accepted, the employer and the employee shall each select and appoint one arbitrator within ten days after acceptance. The arbitrators so selected shall then select a county adjoining the county in which the business of the employer is located and in which the dispute arose and the

judge of the superior court or the senior judge thereof in terms of length of service on the bench of the judicial circuit in which such selected county shall be located shall appoint a third arbitrator who shall act as the chairman of the arbitration committee. The arbitration committee shall meet at such time as shall be fixed by the chairman and, after giving notice of the hearing to the parties concerned and affording them an opportunity to appear and be heard on the matters in dispute, shall proceed to resolve all matters contained within the request for arbitration. The decision of the arbitration committee shall be binding upon the parties affected, except that either party may appeal such decision to any court of competent jurisdiction within 30 days from publication of the decision. (Ga. L. 1966, p. 582, § 6; Ga. L. 2000, p. 1589, § 3.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the 2000 amendment is applicable to notices delivered on or after July 1, 2000.

Cross references. — Arbitration generally, Ch. 9, T. 9.

RESEARCH REFERENCES

Am. Jur. 2d. — 48B Am. Jur. 2d, Labor and Labor Relations, § 2476 et seq.

C.J.S. — 6 C.J.S., Arbitration, § 4 et seq. 14A C.J.S., Civil Rights, § 722 et seq. 51A C.J.S., Labor Relations, § 532.

ALR. — Construction and application of provisions of general arbitration statutes excluding from their operation contracts for labor or personal services, 64 ALR2d 1336.

Construction and application of seniority provisions in labor relations agreements, 90 ALR2d 975.

Validity and construction of labor contract provision modifying or destroying seniority rights under prior contract, 90 ALR2d 1003.

Waiver of, or estoppel to assert, substantive right or right to arbitrate as question for court or arbitrator, 26 ALR3d 604.

Libel and slander: privileged nature of communications made in course of grievance or arbitration procedure provided for by collective bargaining agreement, 60 ALR3d 1041.

34-5-7. Posting of law by employers.

Every employer subject to this chapter shall keep an abstract or copy of this chapter posted in a conspicuous place in or about the premises wherein any employee is employed. Employers shall be furnished copies or abstracts of this chapter by the state upon request and without charge. (Ga. L. 1966, p. 582, § 7.)

RESEARCH REFERENCES

C.J.S. — 51A C.J.S., Labor Relations, § 738. 82 C.J.S., Statutes, § 59.

CHAPTER 6

LABOR ORGANIZATIONS AND LABOR RELATIONS

Article 1

General Provisions

- Sec.
34-6-1. Requirement of notice by labor organization before strike; penalty.
- 34-6-2. Use of force or threats to compel continuance in or departure from employment.
- 34-6-3. Unlawful assemblages near site of labor dispute.
- 34-6-4. Interference with lawful exercise of business activity.
- 34-6-5. Interference with public ways of travel, transportation, or conveyance by mass picketing near site of labor dispute.
- 34-6-6. Use of force or threats to compel or prevent labor organization membership or to compel or prevent strike participation.
- 34-6-7. Penalty for unlawful picketing and for unlawful interference with employment or business activity.
- 34-6-8. Payment of charges by carriers or shippers for movement of motor vehicles to or by rail facilities; receipt by labor organizations of such payments; penalties.

Article 2

Membership in Labor Organizations

- Sec.
34-6-20. Definitions.
- 34-6-21. Membership in or resignation from labor organization as condition of employment or continuation of employment.
- 34-6-22. Payment to labor organization of fee or assessment as condition of employment.
- 34-6-23. Contracts contrary to public policy.
- 34-6-24. Contracts requiring membership in or payments to labor organizations as condition of employment.
- 34-6-25. Deductions from employees' earnings of fees of labor organizations.
- 34-6-26. Contracts allowing deductions from employees' earnings of fees of labor organizations.
- 34-6-27. Injunctive relief where contracts made unlawful by article; application for injunction; assessment of court costs.
- 34-6-28. Penalty for violations of Code Sections 34-6-24 through 34-6-26.

Law reviews. — For article discussing right of Georgia public employees to organize into labor unions, bargain collectively, and

engage in concerted activity, see 4 Ga. L. Rev. 110 (1969).

JUDICIAL DECISIONS

Cited in *Rainwater v. Trimble*, 207 Ga. 306, 61 S.E.2d 420 (1950); *Looper v. Georgia, S. & Fla. Ry.*, 213 Ga. 279, 99 S.E.2d 101

(1957); *Gresham Park Community Org. v. Howell*, 652 F.2d 1227 (5th Cir. 1981).

OPINIONS OF THE ATTORNEY GENERAL

State employees' right to join organizations. — A state employee has the right, either individually or collectively, to express

or communicate complaints or opinions relating to state employment, including freedom to enter into organizations created for

like purposes; the only limitation upon such activities of state employees would be to prevent their striking, or otherwise interfering with proper performance of the duties of state employment, or obstructing access to or egress from state property. 1969 Op. Att'y Gen. No. 69-379.

Power of Department of Transportation. — The Department of Transportation has no power to take steps to prevent labor activity short of strikes and other obstructions to the performance of the duties of employment. 1969 Op. Att'y Gen. No. 69-379.

RESEARCH REFERENCES

Am. Jur. 2d. — 48 Am. Jur. 2d, Labor and Labor Relations, § 1 et seq.

C.J.S. — 51 C.J.S., Labor Relations, § 39 et seq.

ALR. — Liability of labor union or its members, for circulating false statements with respect to industrial disputes, 1 ALR 1149.

Collective labor agreements, 95 ALR 10.

Validity of trade union's classification of members, 97 ALR 609.

Constitutionality, construction, and application of statute denouncing offense of interfering with or molesting mechanic or laborer, 123 ALR 316.

Elimination or reduction of use of machinery or mechanical devices in order to maintain or increase employment as a proper labor objective, 136 ALR 282.

Mandamus to compel reinstatement of suspended or expelled members of labor union, 141 ALR 617.

Controversy within labor union regarding seniority rights as subject of litigation in civil courts, 142 ALR 1055.

What amounts to "collective bargaining" within National Labor Relations Act, 147 ALR 7.

Construction and application of provisions of collective bargaining agreement respecting loss of time or pay of employees in consequence of interruption or suspension of employers' business or operations, 167 ALR 992.

Constitutionality and construction of statutes respecting political contributions or other political activities by labor organizations, 167 ALR 1465.

Jurisdictional dispute between labor unions as "labor dispute" within anti-injunction statutes, 170 ALR 1096.

Units for collective bargaining, 174 ALR 1275.

Severability of provisions in collective bargaining labor contracts, 14 ALR2d 846.

Right of individual employee to enforce collective labor agreement against employer, 18 ALR2d 352.

Spontaneous or informal activity of employees as that of "labor organization" or as "concerted activities" within protection of Labor Relations Act, 19 ALR2d 566; 75 ALR Fed. 262.

Withdrawal of a local labor union or part of its membership from the parent organization or from a general association as affecting property rights, 23 ALR2d 1209.

Matters arbitrable under arbitration provisions of collective labor contract, 24 ALR2d 752.

Continuance or termination of labor union's status or authority as bargaining agent, 42 ALR2d 1415.

Substitution of independent contractor for employees as violation of collective labor contract, 57 ALR2d 1399.

Stock purchase or stock bonus plan as within provision of federal labor relations acts requiring employer to bargain collectively, 58 ALR2d 843.

Liability of labor union or its officers or members for wrongful suspension or expulsion of member, 74 ALR2d 783.

Exhaustion of remedies within labor union as condition of resort to civil courts by expelled or suspended member, 87 ALR2d 1099.

Civil actions involving union welfare funds subject to § 302 of the Taft-Hartley Act, 88 ALR2d 493.

Validity and construction of "right-to-work" laws, 92 ALR2d 598.

Who may intervene in action between union and union member, 93 ALR2d 1037.

Prevailing union member's right to recover attorneys' fees in action against union or union officers, 9 ALR3d 1045.

Manner of marking ballot as affecting validity of employee's vote in elections under labor relations act, 11 ALR3d 818.

Right of labor union to enforce in the courts fine validly imposed upon member, 13 ALR3d 1004.

Validity and construction of § 501 of Landrum-Griffin Act (29 U.S.C. § 501) dealing with fiduciary responsibilities of officers of labor organizations, 15 ALR3d 939; 85 ALR Fed. 803; 107 ALR Fed. 448; 114 ALR Fed. 417.

Right of labor union to exclude applicants for membership and remedies of applicant so excluded, 33 ALR3d 1305.

Bargainable or negotiable issues in state public employment labor relations, 84 ALR3d 242.

Union security arrangements in state public employment, 95 ALR3d 1102.

Labor union's liability to member for defamation, 100 ALR3d 546.

Failure to pursue or exhaust remedies under union contract as affecting employee's right of state civil action for retaliatory discharge, 32 ALR4th 350.

State criminal prosecutions of union officer or member for specific physical threats to employer's property or person, in connection with labor dispute — modern cases, 43 ALR4th 1141.

Right to jury trial in action for retaliatory discharge from employment, 52 ALR4th 1141.

Procedural rights of union members in union disciplinary proceedings — modern state cases, 79 ALR4th 941.

When is subsequent business operation bound by existing collective bargaining agreement between labor union and predecessor employer, 88 ALR Fed. 89.

Requirements for obtaining court approval or rejection of collective bargaining agreement by debtor in possession or trustee in bankruptcy under 11 USC § 1113(b) and (c), 89 ALR Fed. 299.

Pre-emption, by § 301(a) of Labor-Management Relations Act of 1947 (29 USC § 185(a)), of employee's state-law action for infliction of emotional distress, 101 ALR Fed. 395.

Suits by union members against union officers under 29 USC § 501(b), 114 ALR Fed. 417.

Suits by union members against union officers under 29 USC § 501(b), 114 ALR Fed. 417.

ARTICLE 1

GENERAL PROVISIONS

Law reviews. — For comment on Gossett v. Atlantic Steel Co., 102 Ga. App. 23, 115 S.E.2d 613 (1960), regarding liability of em-

ployer to third parties for injury inflicted by strikers, see 12 Mercer L. Rev. 419 (1961).

JUDICIAL DECISIONS

Cited in Pedigo v. Celanese Corp. of Am., 205 Ga. 392, 54 S.E.2d 252 (1949).

RESEARCH REFERENCES

ALR. — Liability of labor union or its members, for circulating false statements with respect to industrial disputes, 1 ALR 1149.

What amounts to a strike within "strike clause" of a bond or other contract, 11 ALR 1004.

Discharge of, or refusal to reinstate, an employee as justification for strike, 12 ALR 1059.

Lawfulness of strike to compel collective bargaining, 20 ALR 1513.

Liability of labor organization for inducing breach of contract to furnish or accept material, 29 ALR 562.

The boycott as a weapon in industrial disputes, 32 ALR 779; 116 ALR 484.

Strike benefits, 47 ALR 282.

Losses covered by insurance against strikes, lockouts, or other labor disputes, 52 ALR 162.

Right of union to refuse to work on materials produced or transported by nonunion labor, 54 ALR 806.

Right of labor union to refuse to work on materials produced or transported by non-union labor, 54 ALR 806.

Third party's right to force settlement in labor dispute, 63 ALR 179.

Sympathetic strikes, 83 ALR 458.

Validity and effect of statutes restricting remedy by injunction in industrial disputes, 97 ALR 1333.

Validity of statute or ordinance against picketing, 130 ALR 1303.

Injunction against picketing per se, where past picketing has been accompanied by violence or other improper conduct, 132 ALR 1218.

Picketing or other conduct to enforce demand for maintaining or servicing plant or apparatus by union labor, 136 ALR 1456.

National Labor Relations Act: sit-down strike, violence, or similar misconduct during strike as affecting employer's right to discharge employee or employee's right to be reinstated after strike, 155 ALR 885; 45 ALR2d 887.

Right of employer to injunction against picketing or boycott by labor union to enforce a demand compliance with which employer would constitute an unfair labor practice, 162 ALR 1438.

What amounts to seizure and holding of employer's plant, equipment, machinery, or other property within statutory exception to inhibition on injunctions in labor disputes, 163 ALR 668.

Liability of labor union or its members to contractee for their refusal to perform work for contractor with whom they have a closed shop agreement, 172 ALR 1274.

Relief against union activities as affected by the fact that owner of business operates without outside help or is doing part of the work, 2 ALR2d 1196; 13 ALR2d 642; 13 ALR2d 642.

Collective bargaining agreement as restricting right to strike or picket, 2 ALR2d 1278.

Inviting or soliciting return of striking employees to work as unfair labor practice, 4 ALR2d 1356.

Legality of, and injunction against, peaceful picketing as affected by employer's lack

of opportunity to negotiate with union or employees, 11 ALR2d 1069.

Picketing of place of business by persons not employed therein, 11 ALR2d 1274.

Legality of, and injunction against, peaceful picketing to force employees to join union or to compel employer to enter into a contract which would in effect compel them to do so, in the absence of a dispute between employer and employees as to terms or conditions of employment, 11 ALR2d 1338.

Interferences with production by concerted action of employees, short of formal strike, as affected by labor relations act, 25 ALR2d 315.

Construction and application of provisions of Unemployment Compensation or Social Security Acts regarding disqualification for benefits because of labor disputes or strikes, 28 ALR2d 287; 60 ALR3d 1; 60 ALR3d 11; 61 ALR3d 686; 61 ALR3d 693; 61 ALR3d 729; 61 ALR3d 746; 62 ALR3d 304; 62 ALR3d 314; 62 ALR3d 375; 62 ALR3d 380; 62 ALR3d 429; 62 ALR3d 437; 63 ALR3d 88.

Discharge of employee who refused to cross picket line as unfair labor practice, 31 ALR2d 519.

Validity and construction of statutes regulating or prohibiting coercive action by labor unions in jurisdictional disputes, 33 ALR2d 340.

Picketing, by employees of a plant where labor dispute exists, at another plant of employer where there is no labor dispute, 37 ALR2d 687.

Rights and remedies of workmen blacklisted by labor union, 46 ALR2d 1124.

Discontinuance or suspension by employer of all or part of his operations, or lockout of employees, as unfair labor practice, 20 ALR3d 403.

Consumer picketing to protest products, prices, or services, 62 ALR3d 227.

What constitutes participation or direct interest in, or financing of, labor dispute or strike within disqualification provisions of unemployment compensation acts, 62 ALR3d 314.

Refusal of nonstriking employee to cross picket line as justifying denial of unemployment compensation benefits, 62 ALR3d 380.

34-6-1. Requirement of notice by labor organization before strike; penalty.

(a) As used in this Code section, the term:

(1) "Labor organization" means any labor union or any organization or agency or employee representation, committee, or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) "Local" means any local agency or branch or dues or assessment collecting unit or affiliate of a labor organization. A labor organization shall also be a local when it collects dues or assessments directly from its members and not through the medium of a branch or another local.

(b) No labor organization and no local shall call or cause any strike, slowdown, or stoppage of work in this state until after 30 days' written notice is given by the labor organization or local to the employer, stating the intention to call the strike, slowdown, or stoppage of work and giving the reasons therefor.

(c) Nothing in this Code section shall apply to any labor organization or local in a seasonal industry such as the ladies' garment, hat and millinery, and men's clothing industry, nor shall any provision of this Code section apply to labor unions of railroad employees operating under the Railway Labor Act.

(d) Any person violating any of the provisions of this Code section shall be guilty of a misdemeanor. (Ga. L. 1941, p. 515, §§ 1-4, 8.)

Cross references. — Punishment for misdemeanors generally, § 17-10-3.

U.S. Code. — The Railway Labor Act,

referred to in subsection (c) of this Code section, is codified as 45 U.S.C. § 151 et seq.

JUDICIAL DECISIONS

Exemptions. — Seasonal industries exempted from the operation of the statute prohibiting strikes without 30 days written notice can only properly be taken to include such seasonal industries as are made so by natural causes, and mere peaks and lulls in consumer demand with respect to a given industry cannot properly be said to so distinguish it. *Local Union, Div. No. 1362 v.*

Howard Bus Lines, 202 Ga. 430, 43 S.E.2d 523 (1947).

County board of realtors. — County board of realtors was not a "labor organization" within the meaning of the right-to-work statutes. *Nixon v. Gwinnett County Bd. of Realtors, Inc.*, 249 Ga. 862, 295 S.E.2d 78 (1982).

Cited in *Melton v. City of Atlanta*, 324 F. Supp. 315 (N.D. Ga. 1971).

RESEARCH REFERENCES

Am. Jur. 2d. — 48 Am. Jur. 2d, Labor and Labor Relations, § 553. 48B Am. Jur. 2d, Labor and Labor Relations, §§ 2597 et seq., 2635 et seq., 2694 et seq.

C.J.S. — 51 C.J.S., Labor Relations, §§ 42, 52, 65 et seq., 73, 168. 51A C.J.S., Labor Relations, § 375.

ALR. — Employment of union members

at less than union rates, or otherwise in violation of rules of union, as justification for calling strike, 66 ALR 1085.

Suit between labor organizations or members thereof as involving a labor dispute within anti-injunction statutes, 138 ALR 287; 170 ALR 1096.

Employee committee or similar group as "labor organization" under the National Labor Relations Act (29 U.S.C.S. §§ 151 et seq.), 19 ALR2d 566; 75 ALR Fed. 262.

Interferences with production by concerted action of employees, short of formal strike, as affected by labor relations acts, 25 ALR2d 315.

Applicability of Norris-La Guardia Act and similar state statutes to injunction action by private complainant, 29 ALR2d 323.

Right of labor union to strike, picket, or impose boycott to compel payment by employer of fine or other penalty, 32 ALR2d 342.

Continuance or termination of labor union's status or authority as bargaining agent, 42 ALR2d 1415.

Stock purchase or stock bonus plan as within provision of federal labor relations acts requiring employer to bargain collectively, 58 ALR2d 843.

Measure and elements of damages recoverable against union for breach of no-strike provision in collective bargaining agreement, 92 ALR2d 1232.

Procedural rights of union members in union disciplinary proceedings — modern state cases, 79 ALR4th 941.

Employer's duty to furnish information regarding financial status to employees' representative under National Labor Relations Act, 106 ALR Fed. 694.

Reasonableness of qualifications for union office under § 401(c) of Labor-Management Reporting and Disclosure Act (29 U.S.C.A. § 481(c)), 147 ALR Fed. 389.

34-6-2. Use of force or threats to compel continuance in or departure from employment.

It shall be unlawful for any person, acting alone or in concert with one or more other persons, by the use of force, intimidation, violence, or threats thereof to prevent or attempt to prevent any individual from leaving or continuing in the employment of or from accepting or refusing employment by any employer or from entering or leaving any place of employment of such employer. (Ga. L. 1947, p. 620, § 1.)

Cross references. — Freedom of assembly, Ga. Const. 1983, Art. I, Sec. I, Para. IX.

Law reviews. — For article, "State Court

Injunctions in Labor Disputes," see 10 Ga. St. B.J. 559 (1974).

JUDICIAL DECISIONS

Picketing not violative of statute. — Picketing by a single picket posted on the highway in front of the employer's business, bearing a placard which stated that the employer was unfair to the labor union, who did no more than walk slowly back and forth on the public highway, and was guilty of no violence, intimidation, or other misconduct, did not violate this section. The court did not err in denying the prayer of the employer for an interlocutory injunction to

prohibit the picketing. *Hallman v. Painters Dist. Council No. 38*, 203 Ga. 175, 45 S.E.2d 414 (1947) (see O.C.G.A. § 34-6-2).

Cited in *Cain v. Phillips*, 211 Ga. 806, 89 S.E.2d 163 (1955); *International Longshoremen's Ass'n v. Georgia Ports Auth.*, 217 Ga. 712, 124 S.E.2d 733 (1962); *NAACP v. Overstreet*, 221 Ga. 16, 142 S.E.2d 816 (1965); *Fleming v. Terminal Transp. Co.*, 222 Ga. 583, 151 S.E.2d 137 (1966); *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969).

RESEARCH REFERENCES

Am. Jur. 2d. — 44B Am. Jur. 2d, Interference, § 44. 48A Am. Jur. 2d, Labor and Labor Relations, §§ 1128, 1695, 1699, 1670, 1708 et seq.

C.J.S. — 51 C.J.S., Labor Relations, § 12. 51A C.J.S., Labor Relations, §§ 371 et seq., 389, 429 et seq., 440, 617.

ALR. — The boycott as a weapon in industrial disputes, 32 ALR 779; 116 ALR 484.

Parades by strikers, 47 ALR 753.

Constitutionality, construction, and application of statute denouncing offense of interfering with or molesting mechanic or laborer, 123 ALR 316.

Rights in union label, shop card, or other insignia denoting union shop or workmanship, 42 ALR2d 709.

Discontinuance or suspension by employer of all or part of his operations, or lockout of employees, as unfair labor practice, 20 ALR3d 403.

Application of Garmon preemption doctrine by state courts — Construction and transportation industries, 110 ALR5th 111.

“Mass discharge” of employees as evidence of unfair labor practice under § 8 (a)(1) and (3) of National Labor Relations Act (29 U.S.C.S. § 158(a)(1), (3)), 137 ALR Fed 445.

34-6-3. Unlawful assemblages near site of labor dispute.

It shall be unlawful for any person, acting in concert with one or more other persons, to assemble at or near any place where a labor dispute exists and by force, intimidation, violence, or threats thereof to prevent or attempt to prevent any person from engaging in any lawful vocation or for any person acting either by himself, or as a member of any group or organization or acting in concert with one or more other persons to promote, encourage, or aid any such unlawful assemblage. (Ga. L. 1947, p. 620, § 2.)

Cross references. — Freedom of assembly, Ga. Const. 1983, Art. I, Sec. I, Para. IX.

Law reviews. — For article, “State Court

Injunctions in Labor Disputes,” see 10 Ga. St. B.J. 559 (1974).

JUDICIAL DECISIONS

Staging locations for pickets upheld. — A trial court’s order placing conditions on the use of a staging location for pickets, designed to control the potential for violence and traffic impediments, was held not to be

an abuse of discretion. *Union Camp Corp. v. Savannah Bldg. Trades Council*, 257 Ga. 518, 361 S.E.2d 178 (1987).

Cited in *Fleming v. Terminal Transp. Co.*, 222 Ga. 583, 151 S.E.2d 137 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 44B Am. Jur. 2d, Interference, § 44. 48B Am. Jur. 2d, Labor and Labor Relations, § 2644 et seq.

C.J.S. — 51A C.J.S., Labor Relations, §§ 366, 382, 385 et seq.

ALR. — The boycott as a weapon in industrial disputes, 32 ALR 779; 116 ALR 484.

Parades by strikers, 47 ALR 753.

Validity of statute or ordinance against picketing, 125 ALR 963; 130 ALR 1303.

Right of labor union to strike, picket, or impose boycott to compel payment by employer of fine or other penalty, 32 ALR2d 342.

Liability, under statute, of labor union or

its membership for torts committed in connection with primary labor activities — state cases, 85 ALR4th 979.

Construction of Freedom of Speech and Assembly Provisions of § 101(a)(2) of

Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C.S. § 411(a)(2)), included in Bill of Rights of Member of Labor Organizations, 143 ALR Fed. 1.

34-6-4. Interference with lawful exercise of business activity.

It shall be unlawful for any person, acting alone or in concert with one or more other persons, by the use of force, intimidation, violence, or threats thereof to prevent or attempt to prevent any employer from lawfully engaging or continuing to engage in any proper and lawful business activity; from properly, lawfully, or peaceably using or enjoying his property used or useful in the conduct of such business; from acquiring materials or supplies for the purposes of such business; or from disposing of the goods, wares, or products of such business. It shall further be unlawful to prevent or attempt to prevent any carrier or other person from supplying or delivering materials or supplies to any such employer or from receiving or accepting delivery on the premises of such business of the goods, wares, or products of such business. (Ga. L. 1947, p. 620, § 5.)

Cross references. — Freedom of assembly, Ga. Const. 1983, Art. I, Sec. I, Para. IX.

Injunctions in Labor Disputes,” see 10 Ga. St. B.J. 559 (1974).

Law reviews. — For article, “State Court

JUDICIAL DECISIONS

Cited in *Brown Transp. Corp. v. Truck Drivers & Helpers Local 728*, 218 Ga. 581, 129 S.E.2d 767 (1963); *Fleming v. Terminal*

Transp. Co., 222 Ga. 583, 151 S.E.2d 137 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 44B Am. Jur. 2d, Interference, §§ 1, 4, 6, 48. 48 Am. Jur. 2d, Labor and Labor Relations, § 539. 74 Am. Jur. 2d, Torts, §§ 32, 33.

C.J.S. — 51A C.J.S., Labor Relations, §§ 341 et seq., 366, 371, 389 et seq. 86 C.J.S., Torts, § 42 et seq.

ALR. — The boycott as a weapon in industrial disputes, 16 ALR 230; 27 ALR 651; 32 ALR 779; 116 ALR 484.

Liability of labor organization for inducing breach of contract to furnish or accept material, 29 ALR 562.

Right of union to refuse to work on materials produced or transported by nonunion labor, 52 ALR 1144; 54 ALR 806.

Constitutionality, construction, and application of statute denouncing offense of in-

terfering with or molesting mechanic or laborer, 123 ALR 316.

Right of labor union to publicize that commodity is nonunion-made, or that competing commodity is union-made, 131 ALR 1068.

Constitutionality of statute respecting employer's control of or interference with political affiliations or activities of employees, 166 ALR 707.

Applicability of Norris-La Guardia Act and similar state statutes to injunction action by private complainant, 29 ALR2d 323.

Right of labor union to strike, picket, or impose boycott to compel payment by employer of fine or other penalty, 32 ALR2d 342.

Rights and remedies of workmen black-listed by labor union, 46 ALR2d 1124.

Liability, under statute, of labor union or

its membership for torts committed in connection with primary labor activities — state cases, 85 ALR4th 979.

34-6-5. Interference with public ways of travel, transportation, or conveyance by mass picketing near site of labor dispute.

It shall be unlawful for any person to engage in mass picketing at or near any place where a labor dispute exists in such number or manner as to obstruct or interfere with or constitute a threat to obstruct or interfere with the entrance to or egress from any place of employment or the free and uninterrupted use of public roads, streets, highways, railroads, airports, or other ways of travel, transportation, or conveyance. (Ga. L. 1947, p. 620, § 3.)

Cross references. — Freedom of assembly, Ga. Const. 1983, Art. I, Sec. I, Para. IX. Obstruction of, encroachment upon, or injuring public roads generally, § 32-6-1.

Law reviews. — For article, "State Court Injunctions in Labor Disputes," see 10 Ga. St. B.J. 559 (1974).

JUDICIAL DECISIONS

Staging location for pickets permitted. — A trial court's order placing conditions on the use of a staging location for pickets, designed to control the potential for violence and traffic impediments, was held not

to be an abuse of discretion. *Union Camp Corp. v. Savannah Bldg. Trades Council*, 257 Ga. 518, 361 S.E.2d 178 (1987).

Cited in *Fleming v. Terminal Transp. Co.*, 222 Ga. 583, 151 S.E.2d 137 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 48 Am. Jur. 2d, Labor and Labor Relations, § 553 et seq.

C.J.S. — 51A C.J.S., Labor Relations, §§ 367, 380 et seq.

ALR. — Validity of statute or ordinance against picketing, 35 ALR 1200; 108 ALR 1119; 122 ALR 1043; 125 ALR 963; 130 ALR 1303.

Parades by strikers, 47 ALR 753.

Violation of injunction against unlawful picketing as affecting allowable scope of subsequent injunction, 73 ALR 677.

Lawfulness of, or right to enjoin, picketing as affected by considerations relating to practical termination or inability to attain object of labor dispute, 122 ALR 1292.

Legality of, and injunction against, peaceable picketing by labor union, of plant

whose employees are represented by another union as statutory bargaining agent, 166 ALR 185.

Right of third party in area picketed during labor dispute, who has no connection with the dispute, to relief against such picketing, 15 ALR2d 1396.

Applicability of Norris-La Guardia Act and similar state statutes to injunction action by private complainant, 29 ALR2d 323.

Right of labor union to strike, picket, or impose boycott to compel payment by employer of fine or other penalty, 32 ALR2d 342.

Nonlabor picketing or boycott, 93 ALR2d 1284.

Legality of peaceful labor picketing on private property, 10 ALR3d 846.

34-6-6. Use of force or threats to compel or prevent labor organization membership or to compel or prevent strike participation.

It shall be unlawful for any person, acting alone or in concert with one or more other persons, to compel or attempt to compel any person to join or refrain from joining any labor organization or to strike or refrain from striking against his will by any threatened or actual interference with his person, immediate family, or physical property or by any threatened or actual interference with the pursuit of lawful employment by such person or by his immediate family. (Ga. L. 1947, p. 620, § 4.)

Cross references. — Freedom of assembly, Ga. Const. 1983, Art. I, Sec. I, Para. IX.

Law reviews. — For comment on Woodard v. Collier, 210 Ga. 239, 78 S.E.2d 526 (1953), see 17 Ga. B.J. 128 (1954). For

comment on Curry v. Construction & Gen. Laborers Union Local 438, 217 Ga. 512, 123 S.E.2d 653 (1962), see 14 Mercer L. Rev. 456 (1963).

JUDICIAL DECISIONS

Infringement upon individual's rights. — It is unlawful to infringe upon an individual's employment rights either because the individual is or is not a member of a union. International Bhd. of Elec. Workers v. Briscoe, 143 Ga. App. 417, 239 S.E.2d 38 (1977).

Constitutional guarantee. — Peaceful picketing is authorized under the constitutional guarantee of free speech. It is not unlawful unless it is for an illegal purpose. Curry v. Construction & Gen. Laborers Union Local 438, 217 Ga. 512, 123 S.E.2d 653 (1962), commented on in 14 Mercer L. Rev. 456 (1963).

Interference with right to picket. — The right to peacefully picket cannot be interfered with by courts unless it is for an unlawful purpose. Woodard v. Collier, 210 Ga. 239, 78 S.E.2d 526 (1953), commented on in 17 Ga. B.J. 128 (1954).

Picketing for unlawful purpose. — Where the evidence demands a finding that a picket was placed on the job for the purpose of forcing the employer to employ only union labor, or be unable to comply with the terms of the employer's contract because of the refusal of the members of other unions employed in the work to cross the picket line, this constituted picketing for an unlawful purpose. International Longshoremen's Ass'n v. Georgia Ports Auth., 217 Ga. 712, 124 S.E.2d 733 (1962), cert. denied, 370 U.S. 922, 82 S. Ct. 1561, 8 L. Ed. 2d 503 (1962).

Picketing for the purpose of forcing an employer to employ only union labor, or be unable to comply with the terms of the employer's contract because of the refusal of the members of other unions employed in the work to cross the picket line, and thereby slow the project to a virtual standstill, is for an unlawful purpose. Powers v. Courson, 213 Ga. 20, 96 S.E.2d 577 (1957); Curry v. Construction & Gen. Laborers Union Local 438, 217 Ga. 512, 123 S.E.2d 653 (1962), reversed on other grounds, 371 U.S. 542, 83 S. Ct. 531, 9 L. Ed. 2d 514 (1963), commented on in 14 Mercer L. Rev. 456 (1963).

Injunction. — If picketing is for an unlawful purpose it can and should be enjoined. Woodard v. Collier, 210 Ga. 239, 78 S.E.2d 526 (1953), commented on in 17 Ga. B.J. 128 (1954).

Right to work law violation under state law. — In a state which has a "right to work" law, such as the one provided for in this section the right to work is a state-conferred right, and a violation of this right creates a cause of action which arises under state law rather than under the Taft-Hartley Act, 29 U.S.C. § 141 et seq. McDowell v. Clement Bros. Co., 260 F. Supp. 817 (N.D. Ga. 1966) (see O.C.G.A. § 34-6-6).

State court jurisdiction. — A state court has no jurisdiction to issue an injunction or to adjudicate a controversy which lies within the exclusive powers of the National Labor Relations Board. Local 438 Constr. & Gen.

Laborers' Union v. Curry, 371 U.S. 542, 83 S. Ct. 531, 9 L. Ed. 2d 514 (1963).

Cited in Cook v. Huckabee Transp. Corp., 215 Ga. 9, 108 S.E.2d 710 (1959); International Longshoremen's Ass'n v. Georgia Ports Auth., 217 Ga. 712, 124 S.E.2d 733 (1962); Brown Transp. Corp. v. Truck Drivers & Helpers Local 728, 218 Ga. 581, 129 S.E.2d 767 (1963); Local 225 United Bhd. of Carpenters v. Briggs, 218 Ga. 742, 130 S.E.2d 707 (1963); Carpenters Local Union No.

3024 v. United Bhd. of Carpenters, 220 Ga. 596, 140 S.E.2d 876 (1965); NAACP v. Overstreet, 221 Ga. 16, 142 S.E.2d 816 (1965); Fleming v. Terminal Transp. Co., 222 Ga. 583, 151 S.E.2d 137 (1966); Hudgens v. Retail, Whse. & Dep't Store Local 315, 133 Ga. App. 329, 210 S.E.2d 821 (1974); Nixon v. Gwinnett County Bd. of Realtors, Inc., 249 Ga. 862, 295 S.E.2d 78 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 48A Am. Jur. 2d, Labor and Labor Relations, §§ 1545 et seq., 1624 et seq., 1689 et seq.

C.J.S. — 51 C.J.S., Labor Relations, §§ 12, 13, 80 et seq. 51A C.J.S., Labor Relations, §§ 370 et seq., 390, 430, 437, 687.

ALR. — Validity and construction of contract by labor unions to continue salary or wages in whole or part or pay benefits if other party loses employment or position because of joining union, 114 ALR 1300; 125 ALR 1260.

Constitutionality, construction, and application of statute denouncing offense of interfering with or molesting mechanic or laborer, 123 ALR 316.

Unfair labor practice, within National Labor Relations Act or similar state statute, predicated upon expressions of opinion or statements by employer concerning labor unions, 146 ALR 1024.

Unfair labor practice, within National Labor Relations Act or similar state statute, predicated upon statements or acts by employees not expressly authorized by employer, 146 ALR 1062.

Closed shops and closed unions, 160 ALR 918.

Inviting or soliciting return of striking employees to work as unfair labor practice, 4 ALR2d 1356.

Right of union rival of collective bargain-

ing agent union to act for individual employee or group of employees as regards grievances, 9 ALR2d 696.

Applicability of Norris-La Guardia Act and similar state statutes to injunction action by private complainant, 29 ALR2d 323.

Validity and construction of statutes regulating or prohibiting coercive action by labor unions in jurisdictional disputes, 33 ALR2d 340.

Rights in union label, shop card, or other insignia denoting union shop or workmanship, 42 ALR2d 709.

Discontinuance or suspension by employer of all or part of his operations, or lockout of employees, as unfair labor practice, 20 ALR3d 403.

Peaceful picketing of private residence, 42 ALR3d 1353.

Procedural rights of union members in union disciplinary proceedings — modern state cases, 79 ALR4th 941.

Construction of Freedom of Speech and Assembly Provisions of § 101(a)(2) of Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C.S. § 411(a)(2)), included in Bill of Rights of Member of Labor Organizations, 143 ALR Fed. 1.

Job placement of returning strikers as unfair labor practice under § 8(a) of National Labor Relations Act (29 U.S.C.A. § 158(a)), 145 ALR Fed. 619.

34-6-7. Penalty for unlawful picketing and for unlawful interference with employment or business activity.

Any person who violates any provision of Code Sections 34-6-2 through 34-6-6 shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished as provided in Code Section 17-10-3. (Ga. L. 1947, p. 620, § 6.)

Cross references. — Freedom of assembly,
Ga. Const. 1983, Art. I, Sec. I, Para. IX.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. —
16 Am. Jur. Pleading and Practice Forms,
Labor and Labor Relations, § 307.

34-6-8. Payment of charges by carriers or shippers for movement of motor vehicles to or by rail facilities; receipt by labor organizations of such payments; penalties.

(a) As used in this Code section, the term “labor organization” means any organization of any kind or any agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) It shall be unlawful for any carrier or shipper of property or any association of carriers or shippers to agree to pay or to pay to or for the benefit of a labor organization, directly or indirectly, any charge by reason of the placing upon, delivery to, or movement by rail or by railroad car of a motor vehicle, trailer, or container which is also capable of being moved or propelled upon the highways.

(c) It shall be unlawful for any labor organization to accept or receive from any carrier or shipper of property, or any association of such carriers or shippers, any payment described in subsection (b) of this Code section.

(d) Any corporation, association, organization, or person who agrees to pay, or who does pay, or who agrees to receive, or who does receive, any payment described in subsection (b) of this Code section shall be guilty of a misdemeanor. Each act of violation and each day during which such an agreement remains in effect shall constitute a separate and distinct offense. (Ga. L. 1962, p. 448, §§ 1-4.)

Cross references. — Punishment for misdemeanors generally, § 17-10-3.

RESEARCH REFERENCES

Am. Jur. 2d. — 48 Am. Jur. 2d, Labor and Labor Relations, § 34 et seq. et seq., 83. 51A C.J.S., Labor Relations, §§ 316, 435, 469 et seq.

C.J.S. — 51 C.J.S., Labor Relations, §§ 61

ARTICLE 2

MEMBERSHIP IN LABOR ORGANIZATIONS

Law reviews. — For article, “State Court Injunctions in Labor Disputes,” see 10 Ga. St. B.J. 559 (1974). For article, “Georgia’s

Right-to-Work Laws: Their Meaning and Effect,” see 13 Ga. St. B.J. 164 (1977).

RESEARCH REFERENCES

ALR. — Attempt to unionize employees under contract not to join union, as wrong to employer, 26 ALR 158; 63 ALR 198.

Validity of stipulation in contract of employment against connection with labor union or employers’ association, and power of Legislature to prohibit such contract, 68 ALR 1267.

Validity and construction of contract by labor unions to continue salary or wages in whole or part or pay benefits if other party loses employment or position because of joining union, 114 ALR 1300; 125 ALR 1260.

Validity, construction, and application of statute or ordinance regarding solicitation of persons to join an organization or society or to pay membership fees or dues, 144 ALR 1346; 167 ALR 697; 167 ALR 697.

Disproportionate treatment of union and nonunion workers, or of workers belonging to different unions, as factor in determining charge of unfair labor practices under National Labor Relations Act, 153 ALR 841.

Notice of meeting of voluntary association, 167 ALR 1233.

What constitutes “financial or other support” within 29 U.S.C. § 158(a)(2) making such support of a union an unfair labor practice, 10 ALR2d 861.

Effect of Taft-Hartley Act exclusion of supervisors as employees under National Labor Relations Act, 40 ALR2d 415.

Unfair labor practices: discrimination between union members and nonmembers as to wage increases, vacations, and the like, 41 ALR2d 654.

34-6-20. Definitions.

As used in this article, the term:

(1) “Employee” includes any employee and shall not be limited to the employees of a particular employer.

(2) “Employer” includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, a state or any political subdivision thereof, any person subject to the Railway Labor Act, as amended, any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) “Employment” means employment by an employer.

(4) “Labor organization” means any organization of any kind or any agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. (Ga. L. 1947, p. 616, § 1.)

U.S. Code. — The Railway Labor Act, referred to in paragraph (2) of this Code section, is codified as 45 U.S.C. § 151 et seq.

JUDICIAL DECISIONS

County board of realtors. — County board of realtors was not a “labor organization” within the meaning of the right-to-work stat-

utes. *Nixon v. Gwinnett County Bd. of Realtors, Inc.*, 249 Ga. 862, 295 S.E.2d 78 (1982).

OPINIONS OF THE ATTORNEY GENERAL

American Nurses Association. — The prohibition against requiring membership in a labor organization is not applicable to the

American Nurses Association. 1965-66 Op. Att’y Gen. No. 66-67.

RESEARCH REFERENCES

Am. Jur. 2d. — 48 Am. Jur. 2d, Labor and Labor Relations, §§ 1, 15 et seq. 35 et seq. 27 Am. Jur. 2d, Employment Relationship, § 1.

Am. Jur. Pleading and Practice Forms. — 16 Am. Jur. Pleading and Practice Forms, Labor and Labor Relations, § 307.

C.J.S. — 51 C.J.S., Labor Relations, §§ 6, 57, 61 et seq., 83.

ALR. — Validity, construction, and application of state right-to-work provisions, 105 ALR5th 243.

34-6-21. Membership in or resignation from labor organization as condition of employment or continuation of employment.

No individual shall be required as a condition of employment or continuance of employment to be or remain a member or an affiliate of a labor organization or to resign from or to refrain from membership in or affiliation with a labor organization. (Ga. L. 1947, p. 616, § 2.)

Law reviews. — For article discussing right of Georgia public employees to organize into labor unions, bargain collectively, and engage in concerted activity, see 4 Ga. L. Rev. 110 (1969). For article suggesting that Georgia’s prohibition against closed shops may be

an incentive for establishment of non-Georgia business enterprises in the state, see 27 Mercer L. Rev. 629 (1976).

For note advocating reassessment of state authority towards injunctions in labor disputes, see 18 Mercer L. Rev. 461 (1967).

JUDICIAL DECISIONS

Remedy for discharged employees is action for damages. — Where employees have been wrongfully, but finally, discharged by the employer, the remedy available to the employees so discharged is an action for damages; a mandatory injunction will not be granted against the completed acts of discharge. *Sandt v. Mason*, 208 Ga. 541, 67 S.E.2d 767 (1951).

Upon general rules of law. — If employees, in violation of this section were wrong-

fully discharged, their right to damages, if any, would rest upon the general rules of law of Georgia. *Sandt v. Mason*, 208 Ga. 541, 67 S.E.2d 767 (1951) (see O.C.G.A. § 34-6-21).

Amount of damages. — Where petitioners were employed on a week-to-week basis, being paid weekly, and their discharge was based on their affiliation with a labor union and contrary to the pronouncement of this section, the most that the petitioners could collect in damages would be the full term of

their employment (one week). *Sandt v. Mason*, 208 Ga. 541, 67 S.E.2d 767 (1951) (see O.C.G.A. § 34-6-21).

Right to work law violation under state law. — In a state which has a “right to work” law, such as the one provided for in this section, the right to work is a state-conferred right, and a violation of this right creates a cause of action which arises under state law rather than under the Taft-Hartley Act, 29 U.S.C. § 141 et seq. *McDowell v. Clement*

Bros. Co., 260 F. Supp. 817 (N.D. Ga. 1966) (see O.C.G.A. § 34-6-21).

Cited in *Carpenters Local Union No. 3024 v. United Bhd. of Carpenters*, 220 Ga. 596, 140 S.E.2d 876 (1965); *Martell v. Atlanta Biltmore Hotel Corp.*, 114 Ga. App. 646, 152 S.E.2d 579 (1966); *Stein Printing Co. v. Atlanta Typographical Union* 48, 329 F. Supp. 754 (N.D. Ga. 1971); *Nixon v. Gwinnett County Bd. of Realtors, Inc.*, 249 Ga. 862, 295 S.E.2d 78 (1982).

OPINIONS OF THE ATTORNEY GENERAL

Union shop agreement. — A union shop is not legal in Georgia. 1952-53 Op. Att’y Gen. p. 124.

A union shop agreement between a railroad and a union is enforceable in Georgia

in light of the amendment to the federal Railway Labor Act, 45 U.S.C. § 151 et seq., authorizing union shop agreements notwithstanding any state right to work law. 1970 Op. Att’y Gen. No. 70-12.

RESEARCH REFERENCES

Am. Jur. 2d. — 48 Am. Jur. 2d, Labor and Labor Relations, §§ 1068, 1095. 48A Am. Jur. 2d, Labor and Labor Relations, § 2268 et seq.

C.J.S. — 51 C.J.S., Labor Relations, § 13. 51A C.J.S., Labor Relations, § 462.

ALR. — Who are entitled to benefit of statutes giving right to combine, 166 ALR 161.

Rights in union label, shop card, or other insignia denoting union shop or workmanship, 42 ALR2d 709.

Labor relations acts: discharge of employee as reprisal or retaliation for union organizational activities, 83 ALR2d 532.

Validity, construction, and application of state right-to-work provisions, 105 ALR5th 243.

Damages for allegedly wrongful interference with employment rights as received “on account of personal injuries,” so as to be excludible from income tax under 26 USC § 104(a)(2), 106 ALR Fed. 321.

34-6-22. Payment to labor organization of fee or assessment as condition of employment.

No individual shall be required as a condition of employment or continuance of employment to pay any fee, assessment, or other sum of money whatsoever to a labor organization. (Ga. L. 1947, p. 616, § 3.)

JUDICIAL DECISIONS

Right to work law violation under state law. — In a state which has a “right to work” law, such as the one provided for in Ga. L. 1947, p. 616, § 3 (see O.C.G.A. § 34-6-22), the right to work is a state-conferred right, and a violation of this right creates a cause of action which arises under state law rather than under the Taft-Hartley Act, 29 U.S.C.

§ 141 et seq. *McDowell v. Clement Bros. Co.*, 260 F. Supp. 817 (N.D. Ga. 1966).

Cited in *Sandt v. Mason*, 208 Ga. 541, 67 S.E.2d 767 (1951); *Carpenters Local Union No. 3024 v. United Bhd. of Carpenters*, 220 Ga. 596, 140 S.E.2d 876 (1965); *Nixon v. Gwinnett County Bd. of Realtors, Inc.*, 249 Ga. 862, 295 S.E.2d 78 (1982).

OPINIONS OF THE ATTORNEY GENERAL

Union shop agreement. — A union shop agreement between a railroad and a union is enforceable in Georgia in light of the amendment to the federal Railway Labor

Act, 45 U.S.C. § 151 et seq., authorizing union shop agreements notwithstanding any state right to work law. 1970 Op. Att'y Gen. No. 70-12.

RESEARCH REFERENCES

Am. Jur. 2d. — 48A Am. Jur. 2d, Labor and Labor Relations, §§ 1691 et seq., 1706.

C.J.S. — 51 C.J.S., Labor Relations, § 101 et seq.

ALR. — Closed shops and closed unions, 160 ALR 918.

Refusal of member of labor union to pay assessment imposed by it for purposes of promoting or defeating contemplated legislation as ground for suspension or expulsion, 175 ALR 397.

Rights in union label, shop card, or other insignia denoting union shop or workmanship, 42 ALR2d 709.

Procedural rights of union members in union disciplinary proceedings — modern state cases, 79 ALR4th 941.

Validity, construction, and application of state right-to-work provisions, 105 ALR5th 243.

34-6-23. Contracts contrary to public policy.

Any provision in a contract between an employer and a labor organization which requires as a condition of employment or continuance of employment that any individual be or remain a member or an affiliate of a labor organization or that any individual pay any fee, assessment, or other sum of money whatsoever to a labor organization is declared to be contrary to the public policy of this state; and any such provision in any such contract heretofore or hereafter made shall be absolutely void. (Ga. L. 1947, p. 616, § 4.)

JUDICIAL DECISIONS

Right to work law violation under state law. — In a state which has a "right to work" law, such as the one provided for in this section, the right to work is a state-conferred right; and a violation of this right creates a cause of action which arises under state law rather than under the Taft-Hartley Act, 29 U.S.C. § 141 et seq. McDowell v. Clement

Bros. Co., 260 F. Supp. 817 (N.D. Ga. 1966) (see O.C.G.A. § 34-6-23).

Cited in Sandt v. Mason, 208 Ga. 541, 67 S.E.2d 767 (1951); NLRB v. Atlanta Coca-Cola Bottling Co., 293 F.2d 300 (5th Cir. 1961); Stein Printing Co. v. Atlanta Typographical Union 48, 329 F. Supp. 754 (N.D. Ga. 1971).

OPINIONS OF THE ATTORNEY GENERAL

Union shop agreement. — A union shop agreement between a railroad and a union is enforceable in Georgia in light of the amendment to the federal Railway Labor

Act, 45 U.S.C. § 151 et seq., authorizing union shop agreements notwithstanding any state right to work law. 1970 Op. Att'y Gen. No. 70-12.

RESEARCH REFERENCES

Am. Jur. 2d. — 48 Am. Jur. 2d, Labor and Labor Relations, §§ 10, 11.

C.J.S. — 51 C.J.S., Labor Relations, §§ 12, 101 et seq. 51A C.J.S., Labor Relations, §§ 311, 321 et seq.

ALR. — Validity and effect of statutes restricting remedy by injunction in industrial disputes, 35 ALR 460; 97 ALR 1333; 106 ALR 361; 120 ALR 316; 124 ALR 751; 127 ALR 868; 150 ALR 819.

Closed shops and closed unions, 160 ALR 918.

Collective bargaining agreement discriminating against certain employees as infringement of their rights, 172 ALR 1351.

Refusal of member of labor union to pay assessment imposed by it for purposes of

promoting or defeating contemplated legislation as ground for suspension or expulsion, 175 ALR 397.

Right of union rival of collective bargaining agent union to act for individual employee or group of employees as regards grievances, 9 ALR2d 696.

Legality of, and injunction against, peaceful picketing to force employees to join union or to compel employer to enter into a contract which would in effect compel them to do so, in the absence of a dispute between employer and employees as to terms or conditions of employment, 11 ALR2d 1338.

Rights in union label, shop card, or other insignia denoting union shop or workmanship, 42 ALR2d 709.

34-6-24. Contracts requiring membership in or payments to labor organizations as condition of employment.

It shall be unlawful for any employer to contract with any labor organization and for any labor organization to contract with any employer so as to require as a condition of employment or continuance of employment that any individual be or remain a member of a labor organization or that any individual pay any fee, assessment, or other sum of money whatsoever to a labor organization. (Ga. L. 1947, p. 616, § 5.)

JUDICIAL DECISIONS

Right to work law violation under state law. — In a state which has a "right to work" law, such as the one provided for in this section, the right to work is a state-conferred right, and a violation of this right creates a cause of action which arises under state law rather than under the Taft-Hartley Act, 29 U.S.C. § 141 et seq. *McDowell v. Clement Bros. Co.*, 260 F. Supp. 817 (N.D. Ga. 1966) (see O.C.G.A. § 34-6-24).

Cited in *Sandt v. Mason*, 208 Ga. 541, 67 S.E.2d 767 (1951); *Carpenters Local Union No. 3024 v. United Bhd. of Carpenters*, 220 Ga. 596, 140 S.E.2d 876 (1965); *Stein Printing Co. v. Atlanta Typographical Union* 48, 329 F. Supp. 754 (N.D. Ga. 1971); *Local 926, Int'l Union of Operating Eng'rs v. Jones*, 460 U.S. 669, 103 S. Ct. 1453, 75 L. Ed. 2d 368 (1983).

OPINIONS OF THE ATTORNEY GENERAL

Union shop agreement. — A union shop agreement between a railroad and a union is enforceable in Georgia in light of the amendment to the federal Railway Labor

Act, 45 U.S.C. § 151 et seq., authorizing union shop agreements notwithstanding any state right to work law. 1970 Op. Att'y Gen. No. 70-12.

RESEARCH REFERENCES

Am. Jur. 2d. — 48 Am. Jur. 2d, Labor and Labor Relations, §§ 10, 11.

C.J.S. — 51 C.J.S., Labor Relations, §§ 12, 101 et seq. 51A C.J.S., Labor Relations, §§ 311, 321 et seq.

ALR. — Collective bargaining agreement discriminating against certain employees as infringement of their rights, 172 ALR 1351.

34-6-25. Deductions from employees' earnings of fees of labor organizations.

No employer shall deduct from the wages or other earnings of any employee any fee, assessment, or other sum of money whatsoever to be held for or to be paid over to a labor organization except on the individual order or request of the employee, which shall not be irrevocable for a period of more than one year. (Ga. L. 1947, p. 616, § 6.)

JUDICIAL DECISIONS

Period of irrevocability. — The authorization for a deduction of union dues is irrevocable for not more than one year, as set forth under federal law. *SeaPak v. Industrial Employees, Div. of Nat'l Maritime Union*, 300 F. Supp. 1197 (S.D. Ga. 1969), aff'd, 423 F.2d 1229 (5th Cir. 1970), 400 U.S. 985, 91 S. Ct. 452, 27 L. Ed. 2d 434 (1971).

Compulsory unionism. — Checkoff authorizations irrevocable for year after date do not amount to compulsory unionism as to

employees who wish to withdraw from membership prior to that time. *SeaPak v. Industrial Employees, Div. of Nat'l Maritime Union*, 300 F. Supp. 1197 (S.D. Ga. 1969), aff'd, 423 F.2d 1229 (5th Cir. 1970), 400 U.S. 985, 91 S. Ct. 452, 27 L. Ed. 2d 434 (1971).

Cited in *Sandt v. Mason*, 208 Ga. 541, 67 S.E.2d 767 (1951); *Martell v. Atlanta Biltmore Hotel Corp.*, 114 Ga. App. 646, 152 S.E.2d 579 (1966); *McDowell v. Clement Bros. Co.*, 260 F. Supp. 817 (N.D. Ga. 1966).

OPINIONS OF THE ATTORNEY GENERAL

Union shop agreement. — A union shop agreement between a railroad and a union is enforceable in Georgia in light of the amendment to the federal Railway Labor

Act, 45 U.S.C. § 151 et seq., authorizing union shop agreements notwithstanding any state right to work law. 1970 Op. Att'y Gen. No. 70-12.

RESEARCH REFERENCES

Am. Jur. 2d. — 48 Am. Jur. 2d, Labor and Labor Relations, § 15.

C.J.S. — 51 C.J.S., Labor Relations, § 101 et seq. 51A C.J.S., Labor Relations, § 345.

ALR. — Constitutionality, construction, and application of statute prohibiting employer from deducting from wages of employees dues or assessments payable to labor organization, or otherwise assisting in collection thereof, 108 ALR 1133.

Deduction or collection of labor union dues from wages of employees, 135 ALR 507.

Contract provisions for deduction of union dues from wages of employees and their payment to union as within statute prohibiting or regulating assignment of future earnings or wages, 14 ALR2d 177.

34-6-26. Contracts allowing deductions from employees' earnings of fees of labor organizations.

It shall be unlawful for any employer to contract with any labor organization and for any labor organization to contract with any employer for the deduction of any fee, assessment, or other sum of money whatsoever from the wages or other earnings of an employee to be held for or to be paid over to a labor organization except upon the condition to be embodied in said contract that such deduction will be made only on the individual order or request of the employee, which shall not be irrevocable for a period of more than one year. (Ga. L. 1947, p. 616, § 7.)

JUDICIAL DECISIONS

Cited in *Sandt v. Mason*, 208 Ga. 541, 67 S.E.2d 767 (1951); *McDowell v. Clement Bros. Co.*, 260 F. Supp. 817 (N.D. Ga. 1966).

OPINIONS OF THE ATTORNEY GENERAL

Union shop agreement. — A union shop agreement between a railroad and a union is enforceable in Georgia in light of the amendment to the federal Railway Labor

Act, 45 U.S.C. § 151 et seq., authorizing union shop agreements notwithstanding any state right to work law. 1970 Op. Att'y Gen. No. 70-12.

RESEARCH REFERENCES

Am. Jur. 2d. — 48 Am. Jur. 2d, Labor and Labor Relations, § 15.

C.J.S. — 51 C.J.S., Labor Relations, § 101 et seq. 51A C.J.S., Labor Relations, §§ 328, 345.

ALR. — Contract provisions for deduction of union dues from wages of employees and

their payment to union as within statute prohibiting or regulating assignment of future earnings or wages, 14 ALR2d 177.

Rights in union label, shop card, or other insignia denoting union shop or workmanship, 42 ALR2d 709.

34-6-27. Injunctive relief where contracts made unlawful by article; application for injunction; assessment of court costs.

The remedy of injunction, in addition to any other available remedy, is given to any individual whose employment is affected, or may be affected, by any contract which is declared in whole or in part to be void by any provision of this article. The application for injunction may be filed in any court of appropriate jurisdiction, and service shall be made upon the parties in the manner now or hereafter provided by law. In any such proceeding, the plaintiff shall be entitled to his costs and reasonable attorneys' fees and shall recover actual damages sustained by him. The court shall assess such costs, attorneys' fees, and damages between the parties to the contract under equitable rules and principles. (Ga. L. 1947, p. 616, § 8.)

Law reviews. — For note advocating reassessment of state authority towards injunc-

tions in labor disputes, see 18 Mercer L. Rev. 461 (1967).

JUDICIAL DECISIONS

Penalties and remedies. — Neither the remedy of injunction provided in Ga. L. 1947, p. 616, § 8 (see O.C.G.A. § 34-6-27) nor the declaration that certain acts in Ga. L. 1947, p. 616, § 9 (see O.C.G.A. § 34-6-28)

shall amount to a misdemeanor was made applicable to Ga. L. 1947, p. 616, § 2 (see O.C.G.A. § 34-6-21). *Sandt v. Mason*, 208 Ga. 541, 67 S.E.2d 767 (1951).

RESEARCH REFERENCES

Am. Jur. 2d. — 48 Am. Jur. 2d, Labor and Labor Relations, §§ 13, 20.

C.J.S. — 51B C.J.S., Labor Relations, § 913.

ALR. — Validity and effect of statutes restricting remedy by injunction in industrial disputes, 35 ALR 460; 97 ALR 1333; 106 ALR 361; 120 ALR 316; 124 ALR 751; 127 ALR 868; 150 ALR 819.

Right to injunction in labor dispute as affected by misconduct of complainant, 66 ALR 1090.

Right of member to recover against or enjoin union where, without fault on his part, he has been damaged by its act, not specifically directed against him, 117 ALR 823.

What amounts to seizure and holding of employer's plant, equipment, machinery, or other property within statutory exception to inhibition on injunctions in labor disputes, 163 ALR 668.

Refusal of member of labor union to pay assessment imposed by it for purposes of promoting or defeating contemplated legislation as ground for suspension or expulsion, 175 ALR 397.

Legality of, and injunction against, peaceful picketing as affected by employer's lack of opportunity to negotiate with union or employees, 11 ALR2d 1069.

Applicability of Norris-La Guardia Act and similar state statutes to injunction action by private complainant, 29 ALR2d 323.

Applicability of Norris-La Guardia Act and similar state statutes to injunction action by governmental unit or agency, 29 ALR2d 431.

State's power to enjoin violation of collective labor contract as affected by federal labor relations acts, 32 ALR2d 829.

State court's power to enjoin picketing as affected by Labor Management Relations Act, 32 ALR2d 1026.

Amount of attorneys' compensation, 57 ALR3d 475; 57 ALR3d 550; 57 ALR3d 584; 58 ALR3d 201; 58 ALR3d 317; 17 ALR5th 366; 23 ALR5th 241.

Procedural rights of union members in union disciplinary proceedings — modern state cases, 79 ALR4th 941.

Excessiveness or adequacy of attorneys' fees in matters involving real estate — modern cases, 10 ALR5th 448.

What circumstances are sufficient to warrant granting of injunctive relief under "boys market" exception to operation of anti-injunction provisions of Norris-LaGuardia Act, 66 ALR Fed. 11.

Calculations of attorneys' fees under Federal Tort Claims Act — 28 USCS § 2678, 86 ALR Fed. 866.

34-6-28. Penalty for violations of Code Sections 34-6-24 through 34-6-26.

Any employer or labor organization and any person acting for an employer or labor organization who violates any of the provisions of Code Section 34-6-24, 34-6-25, or 34-6-26 shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished as provided in Code Section 17-10-3. (Ga. L. 1947, p. 616, § 9.)

JUDICIAL DECISIONS

Penalties and remedies. — Neither the remedy of injunction provided in Ga. L. 1947, p. 616, § 8 (see O.C.G.A. § 34-6-27) nor the declaration that certain acts in Ga. L. 1947, p. 616, § 9 (see O.C.G.A. § 34-6-28) shall amount to a misdemeanor was made applicable to Ga. L. 1947, p. 616, § 2 (see O.C.G.A. § 34-6-21). *Sandt v. Mason*, 208 Ga. 541, 67 S.E.2d 767 (1951).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 16 Am. Jur. Pleading and Practice Forms, Labor and Labor Relations, § 307.

ALR. — Deduction or collection of labor union dues from wages of employees, 135 ALR 507.

Interferences with production by concerted action of employees, short of formal strike, as affected by labor relations acts, 25 ALR2d 315.

Rights and remedies of workmen black-listed by labor union, 46 ALR2d 1124.

Validity and construction of "right-to-work" laws, 92 ALR2d 598.

CHAPTER 6A

EQUAL EMPLOYMENT FOR PERSONS WITH DISABILITIES

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| Sec. | | Sec. | |
| 34-6A-1. | Short title. | 34-6A-5. | Retaliation by employers against employees; labor organization members. |
| 34-6A-2. | Definitions. | 34-6A-6. | Actions against persons engaged in unfair employment practices; remedies, court costs, and attorneys' fees. |
| 34-6A-3. | Inquiries by employer as to existence of disability; employment decisions based on disability. | | |
| 34-6A-4. | Prohibited discriminatory activities. | | |

Editor's notes. — The intent of this chapter was expressed in Ga. L. 1981, p. 1803, § 1, as follows: "It is the intent of the General Assembly to guarantee to handicapped individuals the fullest participation in the social and economic life of the state and to guarantee their right to engage in remunerative employment. The right to lawful employment, without discrimination because of handicap, where the reasonable demands of the position do not require such

a distinction, is hereby recognized as and declared to be the right of all the people of this state and it is the policy of this state to protect such rights."

Law reviews. — For annual eleventh circuit survey of employment discrimination, see 42 Mercer L. Rev. 1381 (1991). For survey of 1995 Eleventh Circuit cases on employment discrimination, see 47 Mercer L. Rev. 797 (1996).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Discrimination Against the Obese, 36 POF2d 249.

Proof of Discriminatory Termination of HIV-Positive Employee, 26 POF3d 341.

Defense of Claim Under the Americans With Disabilities Act, 42 POF3d 1.

Employment Discrimination of the Basis of Mental Disability Under the Americans with Disabilities Act, 49 POF3d 1.

Am. Jur. Trials. — Employment Discrimination Action under Federal Civil Rights Acts, 21 Am. Jur. Trials 1.

Defense of Claim Brought Under the Americans with Disabilities Act, 49 Am. Jur. Trials 171.

Disability Discrimination Based on Dyslexia in Employment Actions Under the

Americans with Disabilities Act, 74 Am. Jur. Trials 255.

ALR. — Accommodation requirement under state legislation forbidding job discrimination on account of handicap, 76 ALR4th 310.

Handicap as job disqualification under state legislation forbidding job discrimination on account of handicap, 78 ALR4th 265.

What constitutes handicap under state legislation forbidding job discrimination on account of handicap, 82 ALR4th 26.

Employee's protection under § 15(a)(3) of Fair Labor Standards Act (29 USC § 215(a)(3)), 101 ALR Fed. 220.

34-6A-1. Short title.

This chapter shall be known and may be cited as the "Georgia Equal Employment for Persons With Disabilities Code." (Code 1933, § 66-501, enacted by Ga. L. 1981, p. 1803, § 2; Ga. L. 1995, p. 1302, § 4.)

Law reviews. — For survey of 1987 Eleventh Circuit cases on constitutional law — civil, see 39 Mercer L. Rev. 1169 (1988).

JUDICIAL DECISIONS

Cited in *Humphreys v. Riverside Mfg. Co.*, 169 Ga. App. 18, 311 S.E.2d 223 (1983); *Johnson v. Kut Kwick Corp.*, 620 F. Supp. 748 (S.D. Ga. 1984); *Veal v. Memorial Hosp.*, 894 F. Supp. 448 (M.D. Ga. 1995).

RESEARCH REFERENCES

ALR. — Visual impairment as handicap or disability under state employment discrimination law, 77 ALR5th 595.

Who is “qualified individual” under Americans with Disabilities Act provisions defining and extending protection against employment discrimination to qualified individual with disability (42 U.S.C.A. §§ 12111(8), 12112(a)), 146 ALR Fed. 1.

What constitutes federal financial assistance for purposes of § 504 of Rehabilitation Act (29 U.S.C.A. § 794), which prohib-

its any program or activity receiving federal financial assistance from discriminating on basis of disability, 147 ALR Fed. 205.

Action under Americans with Disabilities Act (42 U.S.C.A. § 12101 et seq.) to remedy alleged harassment or hostile work environment, 162 ALR Fed. 603.

What constitutes employment discrimination by public entity in violation of Americans with Disabilities Act (ADA), 42 U.S.C.A. § 12132, 164 ALR Fed. 433.

34-6A-2. Definitions.

As used in this chapter, the term:

(1) “Disability” means any condition or characteristic that renders a person an individual with disabilities but shall not include addiction to any drug or illegal or federally controlled substance nor addiction to the use of alcohol.

(2) “Employer” means a person or governmental unit or officer in this state having in his, her, or its employ 15 or more individuals or any person acting as an agent of an employer.

(3) “Individual with disabilities” means any person who has a physical or mental impairment which substantially limits one or more of such person’s major life activities and who has a record of such impairment. The term “individual with disabilities” shall not include any person who is addicted to the use of any drug or illegal or federally controlled substance nor addiction to the use of alcohol.

(4) “Labor organization” means an organization of any kind; agents of such organization; an agency or employee representation committee, group, association, or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment; or a conference, general committee,

joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(5) “Major life activities” means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(6) “Persons” means one or more individuals, partnerships, this state, municipalities or other political subdivisions within the state, associations, labor organizations, or corporations.

(7) “Physical or mental impairment” means:

(A) Any physiological disorder or condition or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, or endocrine; or

(B) Mental retardation and specific learning disabilities.

(8) “Substantially limits” means that the impairment so affects a person as to create a likelihood that such person will experience difficulty in securing, retaining, or advancing in employment because of a disability.

(9) “Unfair employment practice” means an act that is prohibited under this chapter. (Code 1933, § 66-502, enacted by Ga. L. 1981, p. 1803, § 2; Ga. L. 1982, p. 3, § 34; Ga. L. 1995, p. 1302, § 4.)

Code Commission notes. — Pursuant to § 28-9-5, in 1988, hyphens were deleted in paragraphs (2) and (3).

JUDICIAL DECISIONS

Handicapped individual illustrated. — An employee’s sensitivity to pipe smoke of employer’s vice president was not an impairment that affected the employee’s ability generally to secure employment and the employee did not meet the definition of “handicapped individual” under O.C.G.A. § 34-6A-2. *Hennly v. Richardson*, 264 Ga. 355, 444 S.E.2d 317 (1994).

Claustrophobia and depression. — The trial court correctly concluded that plaintiff’s condition of claustrophobia and depression did not constitute a “handicap” within the meaning of the Georgia Equal

Employment for the Handicapped Code (GEEHC). The statute clearly and unambiguously manifests the General Assembly’s intent to exclude emotional and mental disorders of that type from the coverage of the GEEHC by limiting the definition of mental impairment to any physiological disorder or condition or anatomical loss affecting certain body systems or mental retardation and specific learning disabilities. *Bowers v. Estep*, 204 Ga. App. 615, 420 S.E.2d 336, cert. denied, 204 Ga. App. 921, 420 S.E.2d 336 (1992).

RESEARCH REFERENCES

ALR. — Who is “individual with handicaps” under Rehabilitation Act of 1973 (29 USCS §§ 701 et seq.), 97 ALR Fed. 40.

34-6A-3. Inquiries by employer as to existence of disability; employment decisions based on disability.

(a) Nothing in this chapter shall be construed to prevent an employer from making any job related inquiry about the existence of the disability of an applicant for employment and about the extent to which that disability has been overcome by treatment, medication, appliances, or other rehabilitation.

(b) Nothing in this chapter shall be construed to prohibit the rejection of an applicant for employment on the basis of:

(1) A disability which interferes with a person’s ability to perform assigned job duties adequately; or

(2) Any communicable disease, either carried by or afflicting the applicant.

(c) Nothing in this chapter shall be construed to prevent or otherwise make illegal any employment decision affecting any person where such decision is based upon an employer’s good faith reliance upon a professional opinion rendered by a licensed physician, rehabilitation specialist, psychologist, physical therapist, dentist, or other similar licensed health care professional concerning that person. (Code 1933, § 66-503, enacted by Ga. L. 1981, p. 1803, § 2; Ga. L. 1995, p. 1302, § 4.)

Cross references. — Policy of state with regard to employment of the disabled by state or political subdivisions, § 30-1-2. Ac-

cess to and use of public buildings and facilities by the handicapped, Ch. 3, T. 30.

JUDICIAL DECISIONS

Good faith. — An employer proved it acted in good faith when it relied on a doctor’s opinion regarding a diabetic warehouse employee’s ability to work, where the employer’s affidavit stated that the decision to terminate the employee was not based on any personal animosity towards the employee but was made “only” out of concern for potential safety problems posed by the employee’s medical condition. *Spicer v. Martin-Brower Co.*, 177 Ga. App. 197, 338 S.E.2d 773 (1985).

Employer may rely on licensed physician’s professional recommendation. — Summary judgment for an employer was affirmed where the employer submitted evidence tending to establish without dispute both that its employment decision was made in reliance upon the professional recommendation of a licensed physician and that its preference of that physician’s opinion over the contrary opinion of the employee’s personal physician was based upon safety concerns rather than upon an unlawful, discrim-

inatory motive. *Daugherty v. Metropolitan Atlanta Rapid Transit Auth.*, 187 Ga. App. 864, 371 S.E.2d 677 (1988).

RESEARCH REFERENCES

- C.J.S.** — 14 C.J.S., Civil Rights, §§ 109, 110. (42 U.S.C.A. § 12112(d)) pertaining to medical examinations and inquiries, 159
- ALR.** — Construction and application of § 102(d) of Americans with Disabilities Act ALR Fed. 89.

34-6A-4. Prohibited discriminatory activities.

(a) No employer shall fail or refuse to hire nor shall any employer discharge or discriminate against any individual with disabilities with respect to wages, rates of pay, hours, or other terms and conditions of employment because of such person's disability unless such disability restricts that individual's ability to engage in the particular job or occupation for which he or she is eligible; nor shall any employer limit, segregate, or classify individuals with disabilities in any way which would deprive or tend to deprive any individual with disabilities of employment opportunities or otherwise affect employee status because of such person's disability, unless such disability constitutes a bona fide and necessary reason for such limitation, segregation, or classification. This subsection shall not be construed to require any employer to modify his or her physical facilities or grounds in any way or exercise a higher degree of caution for an individual with disabilities than for any person who is not an individual with disabilities, nor shall this subsection be construed to prohibit otherwise lawful employment practices or requirements merely because such practices or requirements affect a greater proportion of individuals with disabilities than individuals without disabilities within the area from which the employer customarily hires his or her employees.

(b) No employment agency, placement service, training school or center, or labor organization shall fail or refuse to refer for employment or otherwise discriminate against individuals because of their disability.

(c) No labor organization shall exclude or expel from its membership or otherwise discriminate against individuals because of their disability; nor shall a labor organization limit, segregate, or classify its membership or classify or fail or refuse to refer for employment any individual with disabilities in any way which would deprive or tend to deprive any individual with disabilities of employment opportunities, would otherwise affect such person's employee status or employment applicant status, or would adversely affect such person's wages, hours, or conditions of employment because of such person's disability.

(d) No employer, labor organization, or joint labor-management committee controlling apprenticeship programs or other training or retraining,

including on-the-job training programs, shall discriminate against any individual because of such individual's disability, in the admission to or the employment in any program established to provide apprenticeship or other training.

(e) It is discrimination for an employer to print or publish or cause to be printed or published a notice or advertisement relating to employment by such employer, which advertisement or notice indicates any preference, limitation, specification, or discrimination based on disability, except that such a notice or advertisement may indicate a limitation or specification based upon disability if the criteria is job related. (Code 1933, § 66-504, enacted by Ga. L. 1981, p. 1803, § 2; Ga. L. 1989, p. 14, § 34; Ga. L. 1995, p. 1302, § 4.)

Cross references. — Policy of state with regard to employment of the disabled by state or political subdivisions, § 30-1-2. Access to and use of public buildings and facilities by the handicapped, Ch. 3, T. 30.

Code Commission notes. — Pursuant to § 28-9-5, in 1989, "opportunities" was substituted for "opportunities" in subsection (c).

JUDICIAL DECISIONS

Opportunity by employee to select job. — O.C.G.A. § 34-6A-4 does not impose on an employer a duty to provide a handicapped employee with the opportunity to select a job which the employee would be able to perform. *Dugger v. Delta Air Lines*, 173 Ga. App. 16, 325 S.E.2d 394 (1984), cert. denied, 471 U.S. 1103, 105 S. Ct. 2330, 85 L. Ed. 2d 847 (1985).

Rebuttal of presumption of unlawful discrimination. — A presumption of discrimination arising from a handicapped employ-

ee's prima facie case of disparate treatment is rebutted where the employer proffers nondiscriminatory reasons for an employment decision; therefore, an employee is not entitled to a verdict as a matter of law simply by establishing a prima facie case, but must prove that a proffered reason is not the true reason for an employment decision. *Shaw v. W.M. Wrigley, Jr., Co.*, 183 Ga. App. 699, 359 S.E.2d 723 (1987).

Cited in *Garrett v. K-Mart Corp.*, 197 Ga. App. 374, 398 S.E.2d 302 (1990).

RESEARCH REFERENCES

C.J.S. — 14 C.J.S., Civil Rights, §§ 92, 98, 108.

ALR. — Handicap as job disqualification under state legislation forbidding job discrimination on account of handicap, 78 ALR4th 265.

Discrimination "because of handicap" or "on the basis of handicap" under state statutes prohibiting job discrimination on account of handicap, 81 ALR4th 144.

Visual impairment as handicap or disability under state employment discrimination law, 77 ALR5th 595.

When must specialized equipment or other workplace modifications be provided to qualified disabled employee or applicant

as reasonable accommodation, 125 ALR Fed. 629.

When must employer offer qualified disabled employee or applicant opportunity to change employee's workplace or work at home as means of fulfilling reasonable accommodation requirement, 133 ALR Fed. 521.

When does job restructuring constitute reasonable accommodation of qualified disabled employee or applicant, 142 ALR Fed 311.

Who is "qualified individual" under Americans with Disabilities Act provisions defining and extending protection against employment discrimination to qualified in-

dividual with disability (42 U.S.C.A. §§ 12111(8), 12112(a)), 146 ALR Fed. 1.

When is individual regarded as having or perceived to have, impairment within meaning of Americans with Disabilities Act (42 U.S.C.A. § 12102(2)(c)), 148 ALR Fed. 305.

Propriety of treating separate entities as one for determining number of employees required by Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e(b)) for action against "employer", 160 ALR Fed. 441.

Action under Americans with Disabilities Act (42 U.S.C.A. §§ 12101 et seq.), to remedy alleged harassment or hostile work environment, 162 ALR Fed. 603.

What constitutes employment discrimination by public entity in violation of Americans with Disabilities Act (ADA), 42 U.S.C.A. § 12132, 164 ALR Fed. 433.

34-6A-5. Retaliation by employers against employees; labor organization members.

No employer shall discharge, expel, refuse to hire, or otherwise discriminate against any person or applicant for employment because such person has opposed any practice made an unfair employment practice by this chapter or because such person has filed a charge, testified, assisted, or participated in any manner in an investigation, action, proceeding, or hearing under this chapter; nor shall any employment agency discriminate against any person; nor shall a labor organization discriminate against any member or applicant for membership for such reasons. (Code 1933, § 66-505, enacted by Ga. L. 1981, p. 1803, § 2; Ga. L. 1995, p. 1302, § 4.)

RESEARCH REFERENCES

C.J.S. — 14 C.J.S., Civil Rights, §§ 92, 98, 108.

ALR. — Who has "participated" in investigation proceeding or hearing and is

thereby protected from retaliation under § 704(a) of Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e-3(a)), 149 ALR Fed. 431.

34-6A-6. Actions against persons engaged in unfair employment practices; remedies, court costs, and attorneys' fees.

(a) Any individual with disabilities who is aggrieved by an unfair employment practice against such individual may institute a civil action against the persons engaged in such prohibited conduct. Such action may be brought in any court of record in this state having jurisdiction over the defendant and shall be brought within 180 days after the alleged prohibited conduct occurred. However, no person shall be a party plaintiff to any such action unless such person gives his or her consent in writing and such consent is filed with the court in which the action is brought.

(b) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, including but not limited to hiring, reinstatement, or upgrading of employees; admission or restoration of the aggrieved individual to union membership; admission to or participation in a guidance program, apprenticeship training program, on-the-job training program, or other occupational

training or retraining program; and the utilization of training related criteria in the admission of individuals to such training programs and job related criteria for employment. The court may award to the plaintiff back pay. The court may award court costs and reasonable attorneys' fees to the prevailing party. (Code 1933, § 66-506, enacted by Ga. L. 1981, p. 1803, § 2; Ga. L. 1995, p. 1302, § 4.)

JUDICIAL DECISIONS

Application to claims under federal statute. — Although the specific claim of alleged wrongful termination for being HIV positive was one of employment discrimination to which O.C.G.A. § 34-6A-6(a) would have applied, the federal characterization of claims brought under 29 U.S.C. § 794 as "injuries to the person" makes O.C.G.A. § 9-3-33, the statute of limitations for personal injury, the most analogous. *Henrickson v. Sammons*, 263 Ga. 331, 434 S.E.2d 51 (1993).

Action filed more than 180 days after firing untimely. — An employee's filing of an action to recover damages for being terminated as a result of a handicap was untimely because it was not filed within 180 days of the date the employee was given oral notice of the employee's termination although the written notice was not received by mail until later. *Humphreys v. Riverside Mfg. Co.*, 169 Ga. App. 18, 311 S.E.2d 223 (1983).

Employee's complaint filed 182 days after the refusal of the employer to accept the employee back to work following an AIDS related illness was properly dismissed because it was time barred. *Beck v. Interstate Brands Corp.*, 953 F.2d 1275 (11th Cir. 1992).

Dismissed employee had no constitutional right to trial by jury on the employee's claim for back pay under O.C.G.A. Ch. 6A, T. 34.

Smith v. Milliken & Co., 189 Ga. App. 897, 377 S.E.2d 916 (1989).

Failure to comply with company policy regarding absence from work. — That handicapped employees may be expected to have more medically-related work absences than non-handicapped employees was no excuse for a handicapped employee's failure to have complied with a company policy requiring that all employees, as a condition of their continued employment, keep their employer currently informed as to an absence from work. *Kut-Kwick Corp. v. Johnson*, 189 Ga. App. 500, 376 S.E.2d 399 (1988), cert. denied, 189 Ga. App. 912, 376 S.E.2d 399 (1989).

Assignment of a visually impaired teacher to a school more distant than the one to which the teacher had been assigned previously did not violate O.C.G.A. Ch. 6A, T. 34, where the teacher produced no evidence to show the teacher was treated any differently from any able-bodied employee and the teacher testified to being unwilling to move from the teacher's apartment to one closer to the teacher's new school and that the teacher would not consider taking public transportation. *Allen v. Bergman*, 198 Ga. App. 57, 400 S.E.2d 347 (1990), cert. denied, 198 Ga. App. 897, 400 S.E.2d 347 (1991).

Cited in *Veal v. Memorial Hosp.*, 894 F. Supp. 448 (M.D. Ga. 1995).

RESEARCH REFERENCES

C.J.S. — 14A C.J.S., Civil Rights, § 722 et seq.

ALR. — Award of front pay under state job discrimination statutes, 74 ALR4th 746.

Damages and other relief under state legislation forbidding job discrimination on account of handicap, 78 ALR4th 435.

Right to jury trial in action under state civil rights law, 12 ALR5th 508.

Individual liability of supervisors, managers, officers or co-employees for discriminatory actions under state Civil Rights Act, 83 ALR5th 1.

Right of prevailing plaintiffs to recover attorneys' fees under § 706(k) of Civil Rights Act of 1964 (42 U.S.C.S. § 2000e5(k)), 132 ALR Fed. 345.

Right of prevailing defendant to recover

attorney's fees under § 706(k) of Civil Rights Act of 1964 (42 U.S.C.S. § 2000e-5 (k)), 134 ALR Fed 161.

Reductions to back pay awards under Title VII of Civil Rights Act of 1964 (42 U.S.C.S. § 2000e et seq.), 135 ALR Fed 1.

Period of time covered by back pay award under Title VII of Civil Rights Act of 1964 (42 U.S.C.S. § 2000e et seq.), 137 ALR Fed 1.

Allowance and rates of interest on backpay award under Title VII of Civil Rights Act of 1964 (42 U.S.C.S. § 2000e et seq.), 138 ALR Fed 1.

Factors or conditions in employment discrimination cases said to justify increase in attorney's fees awarded under § 706(k) of Civil Rights Act of 1964 (42 U.S.C.S. § 2000e-5(k)), 140 ALR Fed 301; 151 ALR Fed. 77.

Availability of nominal damages in action under Title VII of Civil Rights Act of 1964

(42 U.S.C.S. § 2000e et seq.), 143 ALR Fed. 269.

Availability of damages under § 504 of the Rehabilitation Act (29 U.S.C.A. § 794) in actions against persons or entities other than federal government or agencies thereof, 145 ALR Fed. 353.

Additions to back pay awards under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e et seq.), 146 ALR Fed. 403.

Punitive damages in actions for violations of Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. § 1981a; 42 U.S.C.A. § 2000e et seq.), 150 ALR Fed. 601.

Award of compensatory damages under 42 U.S.C.A. § 1981a for violation of Title VII of Civil Rights Act of 1964, 154 ALR Fed. 347.

Propriety of treating separate entities as one for determining number of employees required by Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e(b)) for action against "employer", 160 ALR Fed. 441.

CHAPTER 7

MASTER AND SERVANT

Article 1

General Provisions

- Sec.
34-7-1. Determination of term of employment; manner of termination of indefinite hiring.
- 34-7-2. Payment of wages by lawful money, checks, or credit transfer; selection of payment dates by employer.
- 34-7-3. Requirements where wages paid by written instrument; effect of protest or dishonor.
- 34-7-4. Payment of outstanding wages to beneficiary; payment as release from claims to funds or claims against employer.
- 34-7-5. Redemption of checks or other written evidences of indebtedness for wages.
- 34-7-6. Professional employer organizations; rights, powers, and responsibilities.

Article 2

Employer's Liability for Injuries Generally

- 34-7-20. Care by employer in selection of employees and in furnishing of safe machinery; employer's duty to warn.
- 34-7-21. Liability of employer for coemployees' negligence.

Sec.

- 34-7-22. Contracts exempting employer from liability are null and void.
- 34-7-23. Assumption of risk by employees; requirements for recovery of damages.

Article 3

Employer's Liability for Injuries to Railroad Employees

- 34-7-40. "Common carrier" defined.
- 34-7-41. Liability of common carrier by railroad for personal injury or death of employee generally.
- 34-7-42. Contributory negligence of employee.
- 34-7-43. Assumption of risk where employer is contributorily negligent.
- 34-7-44. Employer exemptions from liability void; allowable setoffs.
- 34-7-45. Liability of receivers, trustees, and assignees of railroad companies for coemployees' negligence; lien on railroad company income.
- 34-7-46. Limitation period for institution of action.
- 34-7-47. Liability of railroad company to its employees for negligence of employees of another railroad company using same track.
- 34-7-48. Recovery by employee working beyond limited hours of service.

Cross references. — Employer's duty to keep records, § 34-2-11.

RESEARCH REFERENCES

ALR. — Vacation and sick pay and other fringe benefits as within mechanic's lien statute, 20 ALR4th 1268.

Employee's protection under § 15(a)(3) of Fair Labor Standards Act (29 USC § 215(a)(3)), 101 ALR Fed. 220.

Pre-emption, by § 301(a) of Labor Management Relations Act of 1947 (29 USC § 185(a)), of employee's state-law action for infliction of emotional distress, 101 ALR Fed. 395.

ARTICLE 1

GENERAL PROVISIONS

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SERVANT'S DETOUR FROM DUTIES

EMPLOYEE'S RIGHTS AFTER TERMINATION OF EMPLOYMENT

General Consideration

Basis of master/servant relationship. — The relation of master and servant arises out of a contract of employment expressed or implied between a master or employer upon the one hand, and the servant upon the other hand. *Small v. Nu Grape Co. of Am.*, 46 Ga. App. 306, 167 S.E. 607 (1933).

Characteristics of masters. — The master has a superior choice, control, and direction of the servant, and whose will the servant represents not merely in the ultimate results of the work but in the details. *Small v. Nu Grape Co. of Am.*, 46 Ga. App. 306, 167 S.E. 607 (1933).

Characteristics of servants. — The servant is a person employed to labor for the pleasure or the interest of another. *Small v. Nu Grape Co. of Am.*, 46 Ga. App. 306, 167 S.E. 607 (1933).

Work of servant generally related to manual service. — It has been generally said that agency relates to business transactions, while the work of a servant relates to manual service. *Headrick v. Fordham*, 154 Ga. App. 415, 268 S.E.2d 753 (1980).

Test to determine relationship of parties. — The crucial test to be applied in determining whether the relationship of the parties under a contract for the performance of labor is that of master and servant, or that of employer and independent contractor, lies in whether the contract gives, or the employer assumes, the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract. *Federated Mut. Implement & Hdwe. Ins. Co. v. Elliott*, 88 Ga. App. 266, 76 S.E.2d 568 (1953).

A charge of the court to the jury to the effect that, if a used car lot owner retained the right to direct or control the time or

manner of executing the work of a salesman and had the right to discharge the salesman and to determine at any time the arrangement between them, their relationship would be that of employer and employee or that of master and servant; but that, if the dealer did not have these rights, then the relationship between the dealer and the salesman would be another relationship, "such as the relationship of independent contractor and principal," was an accurate statement of the law. *Hamilton v. Pulaski County*, 86 Ga. App. 705, 72 S.E.2d 487 (1952).

Specialization. — Specialization alone is not an infallible test in determining whether one is a servant or an independent contractor. *Federated Mut. Implement & Hdwe. Ins. Co. v. Elliott*, 88 Ga. App. 266, 76 S.E.2d 568 (1953).

Servant's Detour from Duties

Servant's detour and return. — Although a servant may have made a temporary departure from the service of a master, and in so doing may for the time have severed the relationship of master and servant, yet, where the object of the servant's departure has been accomplished and the servant has resumed the discharge of the duties to the master, the responsibility of the master for the acts of the servant reattaches. *Atlanta Furn. Co. v. Walker*, 51 Ga. App. 781, 181 S.E. 498 (1935).

If a servant whose duty is to drive a truck and to make delivery of an article of merchandise at a designated place makes a temporary departure from the service of a master on a mission of the servant's own, but resumes the servant's duties and has a wreck, the servant's negligence is the negligence of the master. *Atlanta Furn. Co. v. Walker*, 51 Ga. App. 781, 181 S.E. 498 (1935).

Employee's Rights After Termination of Employment

Competition with former employer. — After termination of employment, an employee normally is free to engage in competition with a former employer and to solicit the employer's customers, in the absence of an agreement to the contrary. *Southeast Consultants, Inc. v. McCrary Eng'r Corp.*, 246 Ga. 503, 273 S.E.2d 112 (1980).

Person may take skill, knowledge, and information. — A person who leaves the employment of another has a right to take with the person all the skill the person has

acquired, all the knowledge the person has obtained, and all the information that the person has received, so long as nothing is taken that is the property of the employer. *Southeast Consultants, Inc. v. McCrary Eng'r Corp.*, 246 Ga. 503, 273 S.E.2d 112 (1980).

Employer's property. — Trade secrets are the property of the employer and cannot be taken or used by the employee for the employee's own benefit, but knowledge on the part of the employee concerning the names and addresses of customers is not the property of the employer. *Southeast Consultants, Inc. v. McCrary Eng'r Corp.*, 246 Ga. 503, 273 S.E.2d 112 (1980).

RESEARCH REFERENCES

ALR. — Distribution of employees' relief fund on discontinuance of business or dissolution, 1 ALR 629.

Master's responsibility for injury to or death of servant during labor dispute, 1 ALR 673.

Wrongful discharge of servant — doctrine of "constructive service," 8 ALR 338; 17 ALR 629.

Validity and enforceability of restrictive covenants in contracts of employment, 9 ALR 1456; 20 ALR 861; 29 ALR 1331; 52 ALR 1362; 67 ALR 1002; 98 ALR 963.

Employer's right to earnings or profits made by employee, 13 ALR 905; 71 ALR 933.

Liability of master for injury to one whom servant, in violation of instructions, permits to ride on vehicle, 14 ALR 145; 62 ALR 1167; 74 ALR 163.

Statute prescribing damages for forcibly ejecting or excluding one from possession of real property as applying to possession held by one as servant or employee, 14 ALR 808.

Right to inventions as between employer and employee, 16 ALR 1177; 32 ALR 1027; 44 ALR 593; 85 ALR 1512; 153 ALR 983; 61 ALR2d 356.

Liability of employer for injuries inflicted by automobile while being driven by or for salesman or collector, 17 ALR 621; 29 ALR 470; 54 ALR 627; 107 ALR 419.

General discussion of the nature of the relationship of employer and independent contractor, 19 ALR 226.

Circumstances under which the existence of the relationship of employer and independent contractor is predicable, 19 ALR 1168.

Right of employee to bonus as affected by termination of employment before bonus becomes payable, 28 ALR 346.

Liability of employer for acts or omissions of independent contractor in respect of positive duties of former arising from or incidental to contractual relationships, 29 ALR 736.

Implied promise of employer to pay royalty for use of patented article invented by employee, 32 ALR 1045.

Nature and extent of master's duty under contract to furnish medical aid to servant, 33 ALR 1191.

Workmen's Compensation Act as affecting master's duty and liability under contract to furnish medical treatment to employees, 33 ALR 1204.

One doing work under a cost plus contract as an independent contractor, or a servant or an agent, 55 ALR 291.

One in general employment of contractee, but who at time of accident was assisting or cooperating with, an independent contractor, as employee of former or latter for the time, 55 ALR 1263.

Liability for refusal to give, or because of reasons assigned in, clearance card, service letter, or other statement of reasons for termination of employment, 57 ALR 1073.

Salesman employed on a percentage or commission basis as a servant or an independent contractor, 61 ALR 223.

Constitutionality of statute relating to purchase of capital stock by employees of corporation, 63 ALR 841.

One transporting children to or from

school as independent contractor, 66 ALR 724.

Employer's right to earnings or profits made by employee, 71 ALR 933.

Employer's offer to take back employee wrongfully discharged as affecting former's liability, 72 ALR 1049.

Right of employer to have former employee deliver up information obtained during the employment, 93 ALR 1323.

Rights and liabilities with respect to private pensions as between employer and employee, 96 ALR 1093.

Relationship of employer and employee between parties to contract not relating to employment itself, as creating presumption of fraud, 100 ALR 875.

Employee's or agent's acceptance of bonus, gratuity, or other personal benefit from one with whom he deals on employer's or principal's account as affecting his right to recover wages, salary, or commissions, 102 ALR 1115.

When cause of action between master and servant deemed to be upon a liability created by statute within contemplation of statute of limitations, 104 ALR 462.

Oral contract of employment terminable by either party at will as within statute of frauds relating to contracts not to be performed within year, 104 ALR 1006.

Grounds for discharge of servant or agent existing during lifetime of employer, but unknown to him, as available to his executor or administrator, 109 ALR 474.

One soliciting subscriptions for newspaper, magazine, or book, on commission basis as an independent contractor or employee, 126 ALR 1120.

Status as employee or servant as affected by misrepresentations in obtaining employment, 136 ALR 1124.

Provision of Fair Labor Standards Act for increased compensation for overtime, 140 ALR 1263; 152 ALR 1030; 169 ALR 1307.

Bylaw of corporation authorizing removal of officer, agent, or employee at any time, as affecting contract of employment for a specified period, 145 ALR 312.

Application and effect of "shop right rule" or license giving employer limited rights in employees' inventions and discoveries, 61 ALR2d 356.

Construction and application of provision of contract for compensation of employee

upon dismissal or discharge, 147 ALR 151; 40 ALR2d 1044.

Validity of statute or regulation in respect of tips, 147 ALR 1039.

Constitutionality, construction, and application of statutes prohibiting agreements to refund wages under employment contracts ("kickback" agreements), 149 ALR 495.

Enforceability of restrictive covenant, ancillary to employment contract, as affected by duration of restriction, 41 ALR2d 15.

Pleading mitigation of damages, or the like, in employee's action for breach of employment contract, 41 ALR2d 955.

Eviction of employee or threat thereof from housing furnished by employer as constituting unlawful coercion or unfair labor practice, 48 ALR2d 995.

Right of employer, liable for wrongful discharge or retirement, to reduce or mitigate damages by amount of social security or retirement benefits received by employee, 48 ALR2d 1293.

Assignability of statutory claim against employer for nonpayment of wages, 48 ALR2d 1385.

Application and effect of "shop right rule" or license giving employer limited rights in employees' inventions and discoveries, 61 ALR2d 356.

Liability of employer for agreed advances or drawing account which exceed commissions or share of profits earned, 95 ALR2d 504.

Provision in employment contract requiring written notice before instituting action, 4 ALR3d 439.

Pre-employment conduct as ground for discharge of civil service employee having permanent status, 4 ALR3d 488.

Who is "employee" under employee stock-option plan or contract, 57 ALR3d 787.

Validity and construction of contractual restrictions on right of medical practitioner to practice, incident to employment agreement, 62 ALR3d 1014.

Liability of member of unincorporated association for tortious acts of association's nonmember agent or employee, 62 ALR3d 1165.

Reduction in rank or authority or change of duties as breach of employment contract, 63 ALR3d 539.

Liability of charitable organization under respondeat superior doctrine for tort of unpaid volunteer, 82 ALR3d 1213.

Exchange of labor by farmers as creating employment relationship for liability insurance purposes, 89 ALR3d 834.

Vacation pay rights of private employees not covered by collective labor contract, 33 ALR4th 264.

Sufficiency of notice of modification in terms of compensation of at-will employee who continues performance to bind employee, 69 ALR4th 1145.

34-7-1. Determination of term of employment; manner of termination of indefinite hiring.

If a contract of employment provides that wages are payable at a stipulated period, the presumption shall arise that the hiring is for such period, provided that, if anything else in the contract indicates that the hiring was for a longer term, the mere reservation of wages for a lesser time will not control. An indefinite hiring may be terminated at will by either party. (Civil Code 1895, § 2614; Civil Code 1910, § 3133; Code 1933, § 66-101.)

History of Code section. — This section is derived from the decision in *Magarahan v. Wright*, 83 Ga. 773, 10 S.E. 584 (1889).

Law reviews. — For survey article on contracts — Employment at Will, see 34 Mercer L. Rev. 86 (1982). For article, “The Decline of Assent: At-Will Employment As a Case Study of the Breakdown of Private Law Theory,” see 20 Ga. L. Rev. 323 (1986). For annual survey of law of torts, see 38 Mercer L. Rev. 351 (1986). For annual survey of workers’ compensation, see 38 Mercer L. Rev. 431 (1986). For article, “‘Sometime the Road Less Traveled is Less Traveled for a Reason’: The Need For Change in Georgia’s

Employment-at-Will Doctrine and Refusal to Adopt the Public Policy Exception,” see 35 Ga. L. Rev. 1021 (2001). For article, “Labor and Employment Law,” see 53 Mercer L. Rev. 349 (2001). For survey article on labor and employment law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 303 (2003). For annual survey of labor and employment law, see 56 Mercer L. Rev. 291 (2004). For annual survey of labor and employment law, see 57 Mercer L. Rev. 251 (2005). For annual survey of labor and employment law, see 58 Mercer L. Rev. 211 (2006).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PERIOD OF EMPLOYMENT

DISCHARGE

1. IN GENERAL

2. ILLUSTRATIVE CASES

RECOVERY FOR DISCHARGE

General Consideration

Employment for indefinite period is terminable at will of either party. — In the absence of a controlling contract between the parties, employment for an indefinite period — a “permanent job” — is terminable at the will of either party, and a discharge in such circumstances affords no cause of

action for breach of contract. *Land v. Delta Air Lines*, 130 Ga. App. 321, 203 S.E.2d 316 (1973).

An indefinite hiring may be terminated at will by either party, and a rule of the employer that an employee will be discharged if the employee’s wages are garnished by a creditor does not alter the situation. *Elliott v.*

Delta Air Lines, 116 Ga. App. 36, 156 S.E.2d 656 (1967).

An employee under a contract of hiring indefinite in its duration may lawfully be discharged at the will of an employer with no cause of action for breach of contract. *Lambert v. Georgia Power Co.*, 181 Ga. 624, 183 S.E. 814 (1936); *Snyder v. Savannah Union Station Co.*, 85 Ga. App. 851, 70 S.E.2d 382 (1952).

A contract for permanent employment is a contract to continue indefinitely, and is terminable at any time by either of the parties. *Ely v. Stratoflex, Inc.*, 132 Ga. App. 569, 208 S.E.2d 583 (1974).

An executory contract of service for no fixed period of time is obviously too indefinite to be capable of enforcement, and it is only by a fiction that the courts are enabled to hold that an engagement at a fixed salary per month, but with no stipulation as to its duration, is a legally binding contract for one month's employment at the agreed wage; but the employment, after the expiration of the first month, being indefinite as to its duration, may be terminated at the will of either party. *Floyd v. Lamar Ferrell Chevrolet, Inc.*, 159 Ga. App. 756, 285 S.E.2d 218 (1981).

An indefinite hiring may be terminated at will by either party, with or without cause, and there is no cause of action against an employer for an alleged wrongful termination. *Meeks v. Pfizer, Inc.*, 166 Ga. App. 815, 305 S.E.2d 497 (1983); *Stanford v. Paul W. Heard & Co.*, 240 Ga. App. 869, 525 S.E.2d 419 (1999).

In Georgia, an "at will" employee may be removed with or without cause, and regardless of motive. *Morast v. Lance*, 631 F. Supp. 474 (N.D. Ga. 1986), *aff'd*, 807 F.2d 926 (11th Cir. 1987).

No executory obligations are created. — If the contract in a dispute over failure to promote on basis of seniority was for an indefinite term and was terminable at will, no claim for failure to promote can be maintained as it is the general rule that a hiring indefinite as to time is terminable at the will of either party and creates no executory obligations. *Murphine v. Hospital Auth.*, 151 Ga. App. 722, 261 S.E.2d 457 (1979).

Effect of procedural default. — By deeming claims of wrongful termination and slan-

der as admitted due to a defendant's default in the action for failing to answer, a trial court erred by precluding the defendant from offering evidence to contradict those claims at a hearing on damages since the well-pled allegations of the complaint failed to establish that the plaintiff was anything other than an at-will employee, as no employment contract was alleged; therefore, the plaintiff's complaint failed to state a claim for wrongful termination. *Fink v. Dodd*, 286 Ga. App. 363, 649 S.E.2d 359 (2007).

If no terms of contract of employment are set out, the petition must be construed as alleging that the employee was working under a contract terminable at the will of the employer. *Elliott v. Delta Air Lines*, 116 Ga. App. 36, 156 S.E.2d 656 (1967).

Oral contract for indefinite period. — An oral contract of employment for an indefinite period of time is terminable at will and is not inhibited by the statute of frauds. *Guinn v. Conwood Corp.*, 185 Ga. App. 41, 363 S.E.2d 271 (1987), *cert. denied*, 185 Ga. App. 910, 363 S.E.2d 271 (1988).

Oral executory promises relating to an employment contract for an indefinite period could not be enforced because the underlying employment contract, being terminable at will, was unenforceable. *Marshall v. W.E. Marshall*, 189 Ga. App. 510, 376 S.E.2d 393 (1988), *cert. denied*, 189 Ga. App. 913, 376 S.E.2d 393 (1989).

There was no exception to this section. *Goodroe v. Georgia Power Co.*, 148 Ga. App. 193, 251 S.E.2d 51 (1978) (see O.C.G.A. § 34-7-1).

A "franchised contractual relationship," when it consists of an oral agreement for an indefinite period, is terminable at will. *Arford v. Blalock*, 199 Ga. App. 434, 405 S.E.2d 698 (1991), *cert. denied*, 199 Ga. App. 906, 405 S.E.2d 698 (1991), *aff'd sub nom. Wilensky v. Blalock*, 262 Ga. 95, 414 S.E.2d 1 (1992).

Section was inapplicable and did not bar a chief executive officer's (CEO) breach of fiduciary duty claim as the CEO had a contract for a definite term. *Tidikis v. Network for Med. Commun. & Research, LLC*, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

If employment contract unenforceable, fraud claim inapplicable. — Although fraud may not generally be predicated on state-

General Consideration (Cont'd)

ments which are promissory in nature as to future acts or events, it can be predicated on such representations where there is a present intention not to perform or a present knowledge that the future event will not occur, but such an exception has no application where the promises upon which the plaintiff relies for establishing fraud are unenforceable because the underlying employment contract, being terminable at will, is unenforceable. *Taylor v. Amisub, Inc.*, 186 Ga. App. 834, 368 S.E.2d 791 (1988).

Executive promises pertaining to employment unenforceable. — An employee whose employment was for an indefinite term, and for that reason was terminable at the will of the employer, had no cause of action for the employer's alleged failure to honor the terms of the employee's employment contract under the doctrine of promissory estoppel. The doctrine of promissory estoppel codified at O.C.G.A. § 13-3-44(a) has no application to enforce executory promises pertaining to employment for an indefinite term. Also, any promises upon which the employee relied to show misrepresentation were unenforceable because the employee's underlying employment contract, being terminable at will, was unenforceable. *Johnson v. Metropolitan Atlanta Rapid Transit Auth.*, 207 Ga. App. 869, 429 S.E.2d 285 (1993).

Property interest. — An at-will employee typically does not have a reasonable expectation of continued employment sufficient to form a protectable property interest. However, a property interest does arise whenever a public employee can be terminated only for cause. *Wofford v. Glynn Brunswick Mem. Hosp.*, 864 F.2d 117 (11th Cir. 1989); *Nolin v. Douglas County*, 903 F.2d 1546 (11th Cir. 1990), overruled on other grounds, 32 F.3d 1521 (11th Cir. 1994), overruled in part on other grounds, *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), cert. denied, *McKinney v. Osceola County Bd. of County Comm'rs*, 513 U.S. 1110, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995).

Deputy sheriffs in a county that had not adopted a civil service program were employees at will and lacked a property interest in their employment. *Zimmerman v. Cherokee County*, 925 F. Supp. 777 (N.D. Ga. 1995).

Employees of federal credit unions are not public employees within the meaning of O.C.G.A. § 34-7-1. *Robins Fed. Credit Union v. Brand*, 234 Ga. App. 519, 507 S.E.2d 185 (1998).

Age discrimination. — An at-will employee may not sue in tort under O.C.G.A. § 51-1-6 or § 51-1-8 for wrongful discharge based upon age discrimination. *Reilly v. Alcan Aluminum Corp.*, 272 Ga. 279, 528 S.E.2d 238 (2000).

The provisions of O.C.G.A. §§ 51-1-6 and 51-1-8 do not create a civil action for age discrimination for an employee-at-will based upon a violation of either O.C.G.A. § 34-1-2 or the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. *Reilly v. Alcan Aluminum Corp.*, 221 F.3d 1170 (11th Cir. 2000).

Summary judgment. — Whether employment contract was created is genuine issue of material fact which would make the grant of summary judgment erroneous under O.C.G.A. § 34-7-1. *Floyd v. Lamar Ferrell Chevrolet, Inc.*, 159 Ga. App. 756, 285 S.E.2d 218 (1981).

Cited in *Odom v. Bush*, 125 Ga. 184, 53 S.E. 1013 (1906); *Bentley v. Smith*, 3 Ga. App. 242, 59 S.E. 720 (1907); *Phillips Lumber Co. v. Smith*, 7 Ga. App. 222, 66 S.E. 623 (1909); *Webb v. McCranie*, 12 Ga. App. 269, 77 S.E. 175 (1913); *Foundation Co. v. Brannen*, 25 Ga. App. 120, 102 S.E. 833 (1920); *Davidson v. Citizens' Bank & Trust*, 46 Ga. App. 78, 166 S.E. 775 (1932); *Smith v. Chicopee Mfg. Corp.*, 56 Ga. App. 294, 192 S.E. 481 (1937); *Bailey v. Nashville, Chattanooga & St. Louis Ry.*, 60 Ga. App. 142, 3 S.E.2d 112 (1939); *Crow v. Southern Ry.*, 66 Ga. App. 608, 18 S.E.2d 690 (1942); *Fellton v. Orkin Exterminating Co.*, 92 Ga. App. 186, 88 S.E.2d 463 (1955); *Campbell v. Carroll*, 121 Ga. App. 497, 174 S.E.2d 375 (1970); *Alexander-Seewald Co. v. Questa*, 121 Ga. App. 611, 175 S.E.2d 92 (1970); *Stegall v. S.S. Kresge Co.*, 128 Ga. App. 679, 197 S.E.2d 737 (1973); *Lowe v. Royal Crown Cola Co.*, 132 Ga. App. 37, 207 S.E.2d 620 (1974); *Kingsbury v. Exxon Co., U.S.A.*, 136 Ga. App. 146, 220 S.E.2d 481 (1975); *Rhodes v. Levitz Furn. Co.*, 136 Ga. App. 514, 221 S.E.2d 687 (1975); *Hill v. Delta Air Lines*, 143 Ga. App. 103, 237 S.E.2d 597 (1977); *West v. First Nat'l Bank*, 145 Ga. App. 808, 245 S.E.2d 46 (1978); *Wright v. Great Lakes Dredge &*

Dock Co., 156 Ga. App. 537, 275 S.E.2d 89 (1980); *White v. I.T.T.*, 718 F.2d 994 (11th Cir. 1983); *Taliaferro v. S & A Restaurant Corp.*, 172 Ga. App. 399, 323 S.E.2d 271 (1984); *Anderberg v. Georgia Elec. Membership Corp.*, 175 Ga. App. 14, 332 S.E.2d 326 (1985); *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987); *Alston v. Brown Transp. Corp.*, 182 Ga. App. 632, 356 S.E.2d 517 (1987); *Thomason v. Mitsubishi Elec. Sales Am., Inc.*, 701 F. Supp. 1563 (N.D. Ga. 1988); *Warren v. Crawford*, 927 F.2d 559 (11th Cir. 1991); *Burton v. John Thurmond Constr. Co.*, 201 Ga. App. 10, 410 S.E.2d 137 (1991); *Johnson v. Hames Contracting, Inc.*, 208 Ga. App. 664, 431 S.E.2d 455 (1993); *Golden v. National Serv. Indus.*, 210 Ga. App. 53, 435 S.E.2d 270 (1993); *Jones v. Destiny Indus., Inc.*, 226 Ga. App. 6, 485 S.E.2d 225 (1997); *Hiers v. ChoicePoint Servs.*, 270 Ga. App. 128, 606 S.E.2d 29 (2004).

Period of Employment

Presumption of hiring for period stipulated for payment of wages. — Unless there is something to the contrary in an express contract of employment, a provision merely for the payment of wages at a stipulated period raises the presumption that the hiring was for that period. *National Manufacture & Stores Corp. v. Dekle*, 48 Ga. App. 515, 173 S.E. 408 (1934).

A person who has been previously employed by the year or other fixed interval who is permitted to continue in the employment after the period limited by the original employment has expired will, in the absence of anything to show a contrary intention, be presumed to be employed until the close of the current interval, and upon the same terms. Such a presumed renovation of the contract from the period at which the former expired is held to arise from implied consent of the parties, and in consequence of their not having signified their intention that the agreement should terminate at the period stipulated. Whether the first hiring has its duration fixed by express or implied contract, if it be fixed in either way, the term (if not longer than one year) admits of duplication by tacit as well as express agreement. *National Manufacture & Stores Corp. v. Dekle*, 48 Ga. App. 515, 173 S.E. 408 (1934).

An offer of employment at so much per month will, in the absence of anything further indicating the period of employment intended, be treated as meaning employment for a term of one month. *Floyd v. Lamar Ferrell Chevrolet, Inc.*, 159 Ga. App. 756, 285 S.E.2d 218 (1981).

Appellant's allegations that appellant was employed by appellee for an indefinite period at a fixed monthly wage sets forth a legally binding contract for one month's employment at the agreed wage, breach of which prior to the end of the first month is actionable. *Floyd v. Lamar Ferrell Chevrolet, Inc.*, 159 Ga. App. 756, 285 S.E.2d 218 (1981).

Fact that wages are payable weekly raises presumption that contract of hiring was by week. *Sandt v. Mason*, 208 Ga. 541, 67 S.E.2d 767 (1951).

If the presumption under O.C.G.A. § 34-7-1 is to arise, the employment contract must provide that the "wages are payable at a stipulated period." Therefore, an annual salary provision in an employment contract will not establish the presumption unless the employee is also paid on an annual basis. If the employee is paid on a weekly, bi-monthly or monthly basis, the statement of an annual salary will not create a binding one-year contract. *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491 (11th Cir. 1989).

Hiring period on basis of annual salary. — Documents referring to an employee's annual salary do not give rise to a presumption that the employee is hired on a quarterly basis. *American Std., Inc. v. Jessee*, 150 Ga. App. 663, 258 S.E.2d 240 (1979).

Reference to an employee's annual salary in a written agreement merely establishes the total amount of the employee's salary during a 12-month period and does not establish a pay period requiring application of the presumption under O.C.G.A. § 34-7-1. *Fortenberry v. Haverty Furn. Cos.*, 176 Ga. App. 360, 335 S.E.2d 460 (1985); *Ikemiya v. Shibamota Am., Inc.*, 213 Ga. App. 271, 444 S.E.2d 351 (1994).

Period of employment deemed indefinite. — A promise to employ a person until the employer becomes insolvent is an offer of employment for an indefinite term and is insufficient to support a cause of action for

Period of Employment (Cont'd)

breach of an employment contract. *Barker v. CTC Sales Corp.*, 199 Ga. App. 742, 406 S.E.2d 88 (1991), cert. denied, 199 Ga. App. 905, 406 S.E.2d 88 (1991).

Minimum period of employment specified in contract. — Where an employment contract specified that the term of employment was to be “for a period of not less than three years,” the contract was not terminable at will prior to the expiration of that three year period. *Wojcik v. Lewis*, 204 Ga. App. 301, 419 S.E.2d 135 (1992).

If a definite minimum contract period has been established by the contract of employment, only such minimum employment period falls outside the employment at will and any future contract period comes under the employment at will. *Schuck v. Blue Cross & Blue Shield of Ga., Inc.*, 244 Ga. App. 147, 534 S.E.2d 533 (2000).

Although an employment contract set up a two-week pay period, that provision did not define the employment term because the contract specifically stated that it “will run from October 10th, 1994 through January 10th, 1995,” a three month period. *Mail Adv. Sys., Inc. v. Shroka*, 249 Ga. App. 484, 548 S.E.2d 461 (2001).

Breach of promise not to fire. — Trial court did not err in finding that the terminated employees did not state a claim upon which relief could be granted for their claim that they were wrongfully discharged based on the businesses’ alleged breach of a promise-not-to-fire, as the terminated employees did not show that Georgia law recognized a “freedom of contract” public policy exception to the general rule of at-will employment in Georgia that dictated that an employee was not hired for a specific period of employment and could be terminated for any or no reason. *Balmer v. Elan Corp.*, 261 Ga. App. 543, 583 S.E.2d 131 (2003), aff’d, 278 Ga. 227, 599 S.E.2d 158 (2004).

Ambiguity. — Where an ambiguity in a contract as to the contemplated duration of a subcontractor’s services remained even after application of applicable statutory rules of construction, construction of the contract was for the jury rather than the trial court. *Lineberger v. Williams*, 195 Ga. App. 186, 393 S.E.2d 23 (1990).

Discharge**1. In General**

Employer may discharge employee without liability. — Where a plaintiff’s employment is terminable at will, the employer, with or without cause and regardless of its motives, may discharge the employee without liability. *Clark v. Prentice-Hall, Inc.*, 141 Ga. App. 419, 233 S.E.2d 496 (1977); *Grace v. Roan*, 145 Ga. App. 776, 245 S.E.2d 17 (1978); *Taylor v. Foremost-McKesson, Inc.*, 656 F.2d 1029 (5th Cir. 1981); *Hall v. Answering Serv., Inc.*, 161 Ga. App. 874, 289 S.E.2d 533 (1982).

Trial court’s dismissal of a city employee’s wrongful discharge action was proper because the complaint failed to state a claim upon which relief could be granted; the employee was an at-will employee and, pursuant to O.C.G.A. § 34-7-1 and as a matter of law, the employee could not assert a wrongful discharge claim. *Reid v. City of Albany*, 276 Ga. App. 171, 622 S.E.2d 875 (2005).

No actionable conspiracy out of exercising right to discharge employee. — Granting that the allegations of the plaintiff are sufficient to sustain the conclusion of conspiracy, there could be no actionable conspiracy growing out of the exercise, in a lawful manner, of the legal right to discharge the plaintiff. *Clark v. Prentice-Hall, Inc.*, 141 Ga. App. 419, 233 S.E.2d 496 (1977).

No actionable conspiracy arises from the authorized exercise of a legal right to discharge. *Meeks v. Pfizer, Inc.*, 166 Ga. App. 815, 305 S.E.2d 497 (1983).

Absent a racial or other motive in violation of public policy, an employer may discharge an at will employee for any reason or no reason. *Phinazee v. Interstate Nationalease, Inc.*, 237 Ga. App. 39, 514 S.E.2d 843 (1999).

Oral promise not to fire not enforceable. — Noting that Georgia courts have refused to acknowledge any exceptions not encompassed by the employment at-will statute, O.C.G.A. § 34-7-1, a court applied the well-settled doctrines of Georgia law and held that an employer’s oral promise not to fire employees for cooperating with government inspection did not modify the terms of their at-will employment relationship and did not create an enforceable contract. *Balmer v. Elan Corp.*, 278 Ga. 227, 599 S.E.2d 158 (2004).

Impermissible discharge on grounds of public policy. — An at-will employee cannot maintain a successful wrongful discharge suit against an employer on grounds of public policy. *Jellico v. Effingham County*, 221 Ga. App. 252, 471 S.E.2d 36 (1996).

2. Illustrative Cases

Employment terminable at will. — As appellant's employment was terminable at will and the evidence clearly shows that appellant was discharged by one who had the authority to do so, appellant's lengthy allegations as to improper motive for firing are legally irrelevant and present no genuine issues of material fact. *Hall v. Answering Serv., Inc.*, 161 Ga. App. 874, 289 S.E.2d 533 (1982).

As an at-will employee terminable with or without cause pursuant to O.C.G.A. § 34-7-1, plaintiff employee had no enforceable employment contract rights with which to interfere and, thus, had no basis for a claim that defendant president tortuously interfered with the employee's employment for an insurance company. *Culpepper v. Thompson*, 254 Ga. App. 569, 562 S.E.2d 837 (2002).

Because under Georgia law, absent contractual or statutory exception, employment is terminable at will by either party, pursuant to O.C.G.A. § 34-7-1, an employee of a state university was an at-will employee with no reasonable expectation in continued employment that would give rise to a property interest; therefore, because the employee did not have an identifiable property interest in the employment, the employee could not prevail on a claim for denial of procedural due process. *Braswell v. Bd. of Regents of the Univ. Sys. of Ga.*, 369 F. Supp. 2d 1362 (N.D. Ga. Apr. 26, 2005).

Despite the fact that a teacher's contract provided for a yearly salary, such only referred to the pay system and any presumption that such contract was for one year was rebutted by the next sentence of the contract that, "should employment be terminated prior to the end of the school year, the termination pay will be prorated on the number of days worked." *Taylor v. Calvary Baptist Temple*, 279 Ga. App. 71, 630 S.E.2d 604 (2006).

Probationary period. — Where contract between parties provided that first year of

employment was a probationary period, and terms of contract did not specify duration of employment, employer had right to discharge employee without cause. *Gunn v. Hawaiian Airlines*, 162 Ga. App. 474, 291 S.E.2d 779 (1982).

Promise of lifetime employment unenforceable. — Employment in Georgia is generally considered to be at will, and a trial court properly dismissed an employee's breach of contract suit based on a termination of employment; since an alleged promise of lifetime employment was unenforceable, the employee's claim of fraud could not have been predicated on that alleged promise. *Jenkins v. Georgia Dep't of Corr.*, 279 Ga. App. 160, 630 S.E.2d 654 (2006).

Employee's investigations into company activities. — O.C.G.A. § 34-7-1 will not allow action for wrongful discharge by a terminable-at-will employee, despite allegations by the employee that the employee's discharge was caused by the employee's investigations into possibly criminal company activities. *Taylor v. Foremost-McKesson, Inc.*, 656 F.2d 1029 (5th Cir. 1981).

Oral contract between attorney and client. — Trial court's denial of a client's summary judgment motion was reversed as the oral contract between an attorney and the client was unenforceable in that: (1) there was no definition of what was to be considered the ultimate or logical conclusion of any given case assigned to the attorney, nor were there standards for determining if the attorney "didn't do the job"; (2) there was no stated duration of the agreement, and the public policy of Georgia was clear that, absent a definite term of employment, the contract was terminable at will under O.C.G.A. § 34-7-1; and (3) the attorney's claimed damages, the attorney's hourly rate times the number of hours it would have taken the attorney to bring each case to its ultimate or logical conclusion, were speculative and not objectively ascertainable from the oral contract. *Ga. Farm Bureau Mut. Ins. Co. v. Croley*, 263 Ga. App. 659, 588 S.E.2d 840 (2003).

Exercising workers' compensation rights. — There is no public policy exception to an employer's right to discharge an employee at will when the right is exercised in retaliation for the employee's assertion of the employ-

Discharge (Cont'd)**2. Illustrative Cases (Cont'd)**

ee's rights under the Workers' Compensation Act. *Evans v. Bibb Co.*, 178 Ga. App. 139, 342 S.E.2d 484 (1986).

Termination due to application for disability benefits. — Even if an employer's decision to separate an employee from the employee's employment was prompted by the employee's application for full-time disability benefits, this would not give rise to a cause of action for wrongful termination. *Bendix Corp. v. Flowers*, 174 Ga. App. 620, 330 S.E.2d 769 (1985).

Termination due to pregnancy. — Summary judgment for employer was affirmed in former at-will employee's action for "wrongful discharge" allegedly based on employee's pregnancy, where there was no existing "public policy" exception for termination of at-will employees because of gender in general or pregnancy in specific. *Borden v. Johnson*, 196 Ga. App. 288, 395 S.E.2d 628 (1990).

Discharge for violations of employment directive. — Where an employee manual provided that dismissal "shall result from a serious infraction of a company rule involving misconduct such as ...", it was neither the intent nor the effect of the manual to limit terminations to infractions listed but rather the list of infractions was for illustrative purposes only so that the employee had notice of the types of offenses which the company believed were of such a serious nature that termination would be warranted. *Swanson v. Lockheed Aircraft Corp.*, 181 Ga. App. 876, 354 S.E.2d 204 (1987).

Company handbook. — Even if company handbook was considered to be a contract, as it was for no specific term, employees remained as at will and their employment was terminable at will. *Jackson v. Nationwide Credit, Inc.*, 206 Ga. App. 810, 426 S.E.2d 630 (1992).

Negligent hiring and retention claim. — An employee's claim of negligent hiring and retention could not be used to circumvent the employment-at-will doctrine since the employment was for an indefinite period and was terminable at the will of either party to the employment relationship. *Dong v. Shepard Community Blood Ctr.*, 240 Ga. App. 137, 522 S.E.2d 720 (1999).

Violation of termination procedures. —

The fact that an at-will employee had notice of certain policies and procedures regarding discipline and termination of employees which the employee alleges were not followed in the employee's discharge would not give rise to an action for wrongful termination. *Garmon v. Health Group of Atlanta, Inc.*, 183 Ga. App. 587, 359 S.E.2d 450 (1987).

Evidence of wrongful discharge. — Evidence that a former fellow employee, who did not have the absolute right to discharge without consulting superiors, attempted to suborn perjury from an employee, asking the employee to lie at a deposition hearing with reference to a lawsuit then in progress involving the employer, and thereafter threatened the employee that "he would never expect to get anything out of this company again," and that subsequently the employee was terminated, supported the liability of that fellow employee for wrongful discharge. *Troy v. Interfinancial, Inc.*, 171 Ga. App. 763, 320 S.E.2d 872 (1984).

President of limited liability company with contract. — Trial court erred in entering a judgment on the pleadings for a limited liability company, its founder, and a corporation, as O.C.G.A. § 34-7-1 did not bar the president's breach of fiduciary duty claim since the president had a contract for a definite term; further, the founders were bound by the contract, which contained a clause purporting to establish a fiduciary relationship. *Tidikis v. Network for Med. Communs. & Research, LLC*, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Recovery for Discharge

Employee's suit on contract for compensation due. — Parol agreement in a contract to begin in praesenti for an indefinite period, terminable at will, was not inhibited by the statute of frauds; and where an employee sued on the contract for the amount of compensation due the employee, based upon services actually performed by the employee up to the time of the employee's discharge, and not for damages or for compensation for services not performed or for any breach of contract, it was not necessary that the employee sue on a quantum meruit for services actually performed. *Brazzeal v.*

Commercial Cas. Ins. Co., 51 Ga. App. 471, 180 S.E. 853 (1935).

Where there is a contract of employment and the employee thereunder sues on the contract for the amount of compensation due the employee, based upon services actually performed by the employee up to the time of the employee's discharge, and not for damages or for compensation for services not performed or for any breach of contract, the contract is conclusive on the matter and it is not necessary that the plaintiff sue on a quantum meruit for services actually performed. *Van Houten v. Standard Fed. Sav. & Loan Ass'n*, 93 Ga. App. 774, 92 S.E.2d 731 (1956).

An oral contract of employment at will for an indefinite time, even though it may not be performed within one year, is not within the statute of frauds; and when the employee has actually performed services thereunder the employee may recover of the employer the compensation due the employee for the services rendered. *Trade City G.M.C., Inc. v. May*, 154 Ga. App. 371, 268 S.E.2d 421 (1980).

The trial court did not err by granting summary judgment to the defendant, a former employer, on the plaintiff's claims that plaintiff was wrongfully terminated, that the plaintiff was entitled to one year's salary,

that plaintiff was entitled to participate in the profit sharing plan, or that plaintiff was entitled to purchase stock in the company, where the record was clear that the plaintiff had no contract for a stated period. The mere reference to the position's annual salary is not sufficient to invoke the presumption set forth in O.C.G.A. § 34-7-1. *Foreman v. Eastern Foods, Inc.*, 195 Ga. App. 332, 393 S.E.2d 695 (1990).

Damages for wrongful discharge. — Where an employee is wrongfully discharged before the end of the employee's term and elects to sue for a breach of the contract of employment, the employee may do so immediately and claim any special injury which the employee may have sustained in consequence of the breach; in such an action the measure of damages is the actual loss from the breach of the contract, and, in estimating the amount, all facts down to the time of the trial may be considered. *Sandt v. Mason*, 208 Ga. 541, 67 S.E.2d 767 (1951).

No right of action for federal credit union employees. — Federal credit union employees had no right of action for wrongful termination since they had no vested property right under federal law, and there was no state law public exception to the at-will doctrine. *Robins Fed. Credit Union v. Brand*, 234 Ga. App. 519, 507 S.E.2d 185 (1998).

OPINIONS OF THE ATTORNEY GENERAL

Length of notice or compensation. — Georgia law does not provide for a specific length of time or compensation when an employee is discharged; the length of notice or compensation when discharged would depend entirely upon the agreement or

contract between the employer and employee. 1948-49 Op. Att'y Gen. p. 242.

The length of employment, wages therefor and termination of employment depends entirely upon the contract between parties. 1948-49 Op. Att'y Gen. p. 242.

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Relationship, §§ 10, 29 et seq.

Am. Jur. Trials. — Defending Wrongful Discharge Cases, 36 Am. Jur. Trials 419.

ALR. — Constitutionality of law regulating right to tips as between master and servant, 3 ALR 310.

Duration of contract of hiring which specifies no term, but fixes compensation at a certain amount per day, week, month, or year, 11 ALR 469; 100 ALR 834; 161 ALR 706.

Payment as condonation preventing discharge of servant for breach of duty, 44 ALR 532.

Injunction against discharge of employee, 44 ALR 1443.

Negligence or incompetency as a ground for discharge of an employee, 49 ALR 472.

Changes in personnel or conditions of business as justification for termination of contract of employment, 59 ALR 294.

Expenses incurred in seeking or in obtaining other employment as element of dam-

ages in an action for wrongful discharge of employee, 84 ALR 171.

Specification in employment contract of grounds or causes of discharge as exclusive of other grounds or causes, 100 ALR 507.

Servant's right to compensation for extra work or overtime, 107 ALR 705.

Operation of negative or restrictive covenant in contract of employment for a specific period, as extended by continuance in the employment after the expiration of that period, 163 ALR 405.

Validity, construction, and effect of statutory or contractual provision in, government construction contract referring to Secretary of Labor questions respecting wage rates or classification of employees of contractor, 163 ALR 1300.

Right of employer to terminate contract because of employee's illness or physical incapacity, 21 ALR2d 1247.

Oral contract for personal services so long as employee is able to continue in work, to do satisfactory work, or the like, as within statute of frauds relating to contracts not to be performed within year, 28 ALR2d 878.

Power of corporate officer or agent to hire employees for life, 28 ALR2d 929.

Discharge from private employment on ground of political views or conduct, 51 ALR2d 742; 29 ALR4th 287; 38 ALR5th 39.

What law governs employee's right to damages for wrongful discharge, 61 ALR2d 917.

Employer's damages for breach of employment contract by employee's terminating employment, 61 ALR2d 1008.

Recovery of damages by employee wrongfully discharged before expiration of time period fixed in employment contract as embracing entire term of contract or as limited to those damages sustained up to time of trial, 91 ALR2d 682.

Termination by principal of distributorship contract containing no express provision for termination, 19 ALR3d 196.

Employer's termination of professional athlete's services as constituting breach of employment contract, 57 ALR3d 257.

Validity and duration of contract purporting to be for permanent employment, 60 ALR3d 226.

Right of corporation to discharge employee who asserts rights as stockholder, 84 ALR3d 1107.

Modern status as to duration of employment where contract specifies no term but fixes daily or longer compensation, 93 ALR3d 659.

Liability for discharging at-will employee for refusing to participate in, or for disclosing, unlawful or unethical acts of employer or coemployees, 9 ALR4th 329.

Discharge from employment on ground of political views or conduct as affecting right to unemployment compensation, 29 ALR4th 287; 38 ALR5th 39.

Judicial review of termination of pastor's employment by local church or temple, 31 ALR4th 851.

Recovery for discharge from employment in retaliation for filing workers' compensation claim, 32 ALR4th 1221.

Right to discharge allegedly "at-will" employee as affected by employer's promulgation of employment policies as to discharge, 33 ALR4th 120.

Damages recoverable for wrongful discharge of at-will employee, 44 ALR4th 1131.

Liability for retaliation against at-will employee for public complaints or efforts relating to health or safety, 75 ALR4th 13.

Liability for discharge of at-will employee for refusal to submit to drug testing, 79 ALR4th 105.

Effectiveness of employer's disclaimer of representations in personnel manual or employee handbook altering at-will employment relationship, 17 ALR5th 1.

Pre-emption by workers' compensation statute of employee's remedy under state "whistleblower" statute, 20 ALR5th 677.

Pre-emption of wrongful discharge cause of action by civil rights laws, 21 ALR5th 1.

Liability for breach of employment severance agreement, 27 ALR5th 1.

After-acquired evidence of employee's misconduct as barring or limiting recovery in action for wrongful discharge, 34 ALR5th 699.

Liability for discharge of employee from private employment on ground of political views or conduct, 38 ALR5th 39.

Wrongful discharge based on public policy derived from professional ethics codes, 52 ALR 5th 405.

Negligent discharge of employee, 53 ALR5th 219.

Wrongful discharge based on employer's fraternization policy, 71 ALR5th 257.

Federal pre-emption of whistleblower's state-law action for wrongful retaliation, 99 ALR Fed. 775.

34-7-2. Payment of wages by lawful money, checks, or credit transfer; selection of payment dates by employer.

Every person, firm, or corporation, including steam and electric railroads, but not including farming, sawmill, and turpentine industries, employing skilled or unskilled wageworkers in manual, mechanical, or clerical labor, including all employees except officials, superintendents, or other heads or subheads of department who may be employed by the month or year at stipulated salaries, shall make wage and salary payments to such employees or to their authorized representatives (1) by lawful money of the United States, (2) by check, or (3) with the consent of the employee, by authorization of credit transfer to his account with a bank, trust company, or other financial institution authorized by the United States or one of the several states to receive deposits in the United States. Such payments shall be made on such dates during the month as may be decided upon by such person, firm, or corporation; provided, however, that the dates so selected shall be such that the month will be divided into at least two equal periods; and provided, further, that the payments made on each such date shall in every case correspond to the full net amount of wages or earnings due the employees for the period for which the payment is made. (Ga. L. 1919, p. 388, § 1; Code 1933, § 66-102; Ga. L. 1973, p. 672, § 1; Ga. L. 1982, p. 3, § 34; Ga. L. 1984, p. 22, § 34.)

Law reviews. — For annual survey of labor and employment law, see 57 Mercer L. Rev. 251 (2005).

For comment criticizing *Messenger v. State*, 209 Ga. 340, 72 S.E.2d 460 (1952), see 4 Mercer L. Rev. 371 (1953).

JUDICIAL DECISIONS

Liability for violations of wage payment provisions. — A consultant employed by a labor pool was not an “employer” under Georgia law and, therefore, was not subject to liability for violations of O.C.G.A. §§ 34-7-2 and 34-7-3. *Sakas v. Settle Down Enters., Inc.*, 90 F. Supp. 2d 1267 (N.D. Ga. 2000).

Action claiming forfeiture based on clause in incentive contract. — Trial court properly granted judgment on the pleadings to companies in a former employee's action alleg-

ing violations of O.C.G.A. § 34-7-2 because the employee did not file an action claiming that a forfeiture clause in a stock incentive plan constituted a violation of wage requirements within the relevant two-year statute of limitations provided by O.C.G.A. § 9-3-22, and the action was therefore time barred. *Milhollin v. Salomon Smith Barney, Inc.*, 272 Ga. App. 267, 612 S.E.2d 72 (2005).

Cited in *Shirley v. State*, 208 Ga. 614, 68 S.E.2d 597 (1952).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Relationship, § 59 et seq.

ALR. — Right of employee to bonus as affected by termination of employment before bonus becomes payable, 28 ALR 346.

Corporation's payment of bonus to officers or employees, 88 ALR 751; 164 ALR 1125.

Employee's or agent's acceptance of bonus, gratuity, or other personal benefit from one with whom he deals on employer's or principal's account as affecting his right to recover wages, salary, or commissions, 102 ALR 1115.

Statutes prescribing medium of payment of wages or salary as prohibiting compensation by corporate stock or other interest in business, 137 ALR 846.

Validity, construction, and effect of statutory or contractual provision in, government construction contract referring to Secretary of Labor questions respecting wage rates or classification of employees of contractor, 163 ALR 1300.

Validity, construction, and effect of state laws requiring payment of wages on resignation of employee immediately or within specified period, 11 ALR5th 715.

Validity, construction, and effect of state laws requiring payment of wages on discharge of employee immediately or within specified period, 18 ALR5th 577.

Employer's liability to employee or agent for injury or death resulting from assault or criminal attack by third person, 40 ALR5th 1.

34-7-3. Requirements where wages paid by written instrument; effect of protest or dishonor.

(a) Any order, check, draft, note, or other instrument issued in payment of wages or salary due or to become due must be negotiable and payable in cash, on demand, without discount, at some established place of business in the United States, the name and address of which must appear on the instrument. At the time of issuance of such instrument and for a reasonable time thereafter (which must be at least 30 days), the maker or drawer must have sufficient funds or credit or an arrangement or understanding with the drawee as to its payment.

(b) Where an instrument described in this Code section is protested or dishonored, the notice or memorandum of protest or dishonor is admissible as proof of presentation, nonpayment, and protest and is presumptive evidence of knowledge of insufficiency of funds or credit with the drawee. (Code 1933, § 66-102.1, enacted by Ga. L. 1973, p. 672, § 2.)

Cross references. — Negotiable instruments generally, Art. 3, T. 11.

JUDICIAL DECISIONS

Liability for violations of wage payment provisions. — A consultant employed by a labor pool was not an "employer" under Georgia law and, therefore, was not subject

to liability for violations of O.C.G.A. §§ 34-7-2 and 34-7-3. *Sakas v. Settle Down Enters., Inc.*, 90 F. Supp. 2d 1267 (N.D. Ga. 2000).

RESEARCH REFERENCES

ALR. — Validity, construction, and effect of statutory or contractual provision in, government construction contract referring to Secretary of Labor questions respecting wage rates or classification of employees of contractor, 163 ALR 1300.

Validity, construction, and effect of state

laws requiring payment of wages on resignation of employee immediately or within specified period, 11 ALR5th 715.

Validity, construction, and effect of state laws requiring payment of wages on discharge of employee immediately or within specified period, 18 ALR5th 577.

34-7-4. Payment of outstanding wages to beneficiary; payment as release from claims to funds or claims against employer.

(a)(1) Upon the death of any person who was employed by any political subdivision of the state or by any railroad company or other corporation, individual, or partnership doing business in this state, if the deceased employee had wages or other moneys due from such employer, it shall be lawful for such employer to pay all of such sums if they do not exceed \$2,500.00, or to pay the sum of \$2,500.00 if such sums exceed \$2,500.00 or upon the death of any person who was employed by the state, if the deceased employee had wages or other moneys due from the state, it shall be lawful for the state to pay all of such sums, as follows:

(A) In the absence of a beneficiary designated in writing by the employee, then to the employee's surviving spouse;

(B) In the absence of a beneficiary designated in writing by the employee and where the employee left no surviving spouse but left a surviving minor child or children, then to the duly qualified guardian of the minor child or children without any administration upon the estate of the employee; or

(C) Where a beneficiary has been designated in writing by the employee to receive such sums and such beneficiary is under no legal incapacity to prevent him from receiving such sums, then to such beneficiary, or, if such beneficiary is under such legal incapacity, then to his duly qualified guardian.

Such funds to the amount of \$2,500.00 shall be exempt from any and all process of garnishment.

(2) It shall be the responsibility of the employee to provide and the responsibility of the employer to request the name and current address of the employee's spouse or, if there is no spouse, the name and current address of each minor child of the employee. If the employee, at his election, designates a beneficiary to receive such sums, such designation shall be in writing, shall include the name and address of such beneficiary, and shall be signed by the employee. The employer shall inform the employee that any sums payable under this Code section may be paid pursuant to the designation made by the employee to a beneficiary, or to

the employee's spouse, or to the employee's minor child or children as provided in this Code section and shall request the employee to furnish and keep any such information and designation current. The employer shall not be subject to any penalty for failure to inform and request that the employee furnish such information and designation, or for the failure of the employer to pay such sums in accordance with the provisions of this Code section.

(b) Any employer described in subsection (a) of this Code section may pay over any sums due under subsection (a) of this Code section upon the demand of such designated beneficiary or guardian thereof, or, if no such beneficiary is designated, then upon the demand of the surviving spouse, or, if in the absence of such designated beneficiary and where there is no surviving spouse, upon the demand of the minor child or children or the guardian thereof.

(c) The paying over of any sums due as permitted under subsections (a) and (b) of this Code section to the proper party or parties as set forth in this Code section shall operate as a release from all claims to such sums or as a release from all claims against the state, political subdivision thereof, railroad company, or other corporate, partnership, or individual employer by the estate of the employee, the creditors thereof, the surviving spouse or minor child or children or the guardian thereof, or any other person. (Ga. L. 1898, p. 91, § 1; Ga. L. 1901, p. 60, §§ 1-3; Civil Code 1910, §§ 3134, 3135, 3136; Ga. L. 1915, p. 21, § 1; Code 1933, §§ 66-103, 66-104, 66-105; Ga. L. 1958, p. 641, § 1; Ga. L. 1963, p. 434, § 1; Ga. L. 1975, p. 1191, § 1; Ga. L. 1981, p. 639, § 1; Ga. L. 1983, p. 659, § 1.)

Law reviews. — For article discussing nonjudicial settlement of a decedent's estate, see 6 Ga. L. Rev. 74 (1971).

JUDICIAL DECISIONS

Cited in *Sanders v. State*, 151 Ga. App. 590, 260 S.E.2d 504 (1979).

OPINIONS OF THE ATTORNEY GENERAL

Payment to executor in representative capacity. — While payment to the surviving spouse or guardian of a minor child is permissible, it is not recommended; payment should be made to the executor in the executor's representative capacity in order that the estate be administered in a more orderly fashion. 1965-66 Op. Att'y Gen. No. 66-208.

Surviving spouse in state hospital. — Earnings due a deceased state employee are payable to a widow if less than \$2,500.00

even though the widow is in a state hospital. 1962 Op. Att'y Gen. p. 459.

Power of attorney. — In the absence of a contractual relationship or authorizing legislation, a state agency may not properly honor a power of attorney authorizing collection by the state employee's credit union of the unpaid wages due a terminated state employee in satisfaction of the unpaid balance on the employee's loan; however, should the employee die before the loan's repayment, the unpaid compensation due

the employee, not to exceed \$2,500.00, may be paid to the employee's surviving spouse or minor children. 1976 Op. Att'y Gen. No. 76-18.

Cap on payment owed to deceased employee. — There is no longer a cap on the

amount of accrued but unpaid wages, or other sums owing a deceased employee, which the Board of Regents may, at its option, pay directly to the surviving spouse of the deceased employee under O.C.G.A. § 34-7-4. 1986 Op. Att'y Gen. No. 86-41.

RESEARCH REFERENCES

ALR. — Right of employee to bonus as affected by termination of employment before bonus becomes payable, 28 ALR 346.

Constitutionality of retroactive statute providing compensation for death in service of state, 28 ALR 1100; 126 ALR 102.

Scope and effect of statutory provision extending debtors' exemptions to claims, or proceeds of claims, for personal injuries or death, 62 ALR 1004; 116 ALR 1481.

Income tax: employer's payment to widow

of employee as taxable income of widow, 95 ALR2d 520.

Rights in survival benefits under public pension or retirement plan as between designated beneficiary and heirs, legatees, or personal representative of deceased employee, 5 ALR3d 644.

What constitutes duress rendering employee's release of employer or former employer subject to avoidance, 30 ALR4th 294.

34-7-5. Redemption of checks or other written evidences of indebtedness for wages.

Any corporation or person doing business of any kind in this state who shall issue checks or written evidences of indebtedness for the wages of laborers shall redeem at full value, in cash, such written evidences of indebtedness on demand and presentation to the proper person on the regular monthly payday; and, if there shall be no regular monthly payday, then such written evidences shall be redeemed upon demand and presentation on any regular business day after 30 days from the issuance thereof. For every failure to redeem such evidences of indebtedness, such corporation or person shall be liable to the owner thereof in the sum of \$10.00, to be recovered by suit, unless the corporation or person shall, upon the trial, prove insolvency or actual inability to redeem at the time of demand and presentation. (Ga. L. 1888, p. 48, § 1; Civil Code 1895, § 1871; Civil Code 1910, § 2235; Code 1933, § 66-106; Ga. L. 1998, p. 128, § 34.)

34-7-6. Professional employer organizations; rights, powers, and responsibilities.

(a) As used in this Code section, the term "professional employer organization" means an employee leasing company as defined in Code Section 34-8-32 that has established a coemployment relationship with another employer, pays the wages of the employees of the coemployer, reserves a right of direction and control over the employees of the coemployer, and assumes responsibility for the withholding and payment of payroll taxes of the coemployer.

(b) A professional employer organization may collect information to evaluate costs; may obtain life, accident and sickness, disability income,

workers' compensation, and other types of insurance coverage; may establish retirement plans; may have other types of employee benefits; and may discuss such benefits with prospective coemployers and their employees.

(c) A coemployer of a professional employer organization shall retain sufficient direction and control over the employees involved in a coemployment relationship as is necessary to conduct its business operations and fulfill its obligations to such employees. Unless otherwise agreed in writing, such coemployer shall be considered to be the sole employer of such employees for licensing purposes, provided that nothing contained in this Code section shall be deemed to prohibit a professional employer organization and its coemployer from agreeing that the professional employer organization shall be considered to be an employer for licensing purposes. The professional employer organization shall give written notice of such an agreement to the appropriate licensing agency and to the employees involved.

(d) It is the intent of this Code section that professional employer organizations shall be considered to be employers under this title and are required to comply with the provisions of Code Sections 34-8-32, 34-8-34, and 34-8-172. Professional employer organizations and their coemployer clients are entitled to exclusive remedy under Code Section 34-9-11. (Code 1981, § 34-7-6, enacted by Ga. L. 1999, p. 519, § 1.)

Law reviews. — For survey article on labor and employment law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 303 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Relationship, § 5.

ARTICLE 2

EMPLOYER'S LIABILITY FOR INJURIES GENERALLY

Cross references. — Form of complaint for negligence under Federal Employers Liability Act, § 9-11-114. Protection of employees from improperly designed or erected scaffolding, staging, or other mechanical device, § 34-1-1. General duty of employer with respect to employment safety, § 34-2-10. Protection of employees from accidental contact with high-voltage lines, § 46-3-31.

JUDICIAL DECISIONS

Master's liability for tortious act of servant. — A master is liable for the tortious action of a servant when done within the time covered by the employment and in the prosecution of the master's business. *Pratt v. Melton*, 107 Ga. App. 127, 129 S.E.2d 346 (1962), later appeal, 109 Ga. App. 781, 137 S.E.2d 481 (1964).

Negligence of assistant employed by servant. — If a servant, who is employed to do certain work for the servant's master, employs another person to assist the servant,

the master is liable for the negligence of the assistant only when the servant had authority, express or implied, to employ the servant, or when the act of the employment is ratified by the master. *Hockmuth v. Perkins*, 55 Ga. App. 649, 191 S.E. 156 (1937).

Disconnected act of servant. — Where a servant steps aside from an employer's business for no matter how short a time, to do an act entirely disconnected with the employer's business, the master is not liable. *Pratt v. Melton*, 107 Ga. App. 127, 129 S.E.2d 346 (1962), later appeal, 109 Ga. App. 781, 137 S.E.2d 481 (1964).

RESEARCH REFERENCES

ALR. — Loaned servant doctrine under Federal Employers' Liability or Safety Appliance Act, 1 ALR2d 302.

Liability in damages for injury to or death of window washer, 17 ALR2d 637.

Liability of employer for injury resulting from games or other recreational or social activities, 18 ALR2d 1372.

General contractor's liability for injuries to employees of other contractors on the project, 20 ALR2d 868.

Duty and liability of employer to domestic servant for personal injury or death, 49 ALR2d 317.

Master's duty to care for or to furnish medical aid to servant stricken by illness or injury, 64 ALR2d 1108.

Master's liability for failure to inform servant of disease or physical condition disclosed by medical examination, 69 ALR2d 1213.

Liability for injury to one servicing airplane, 76 ALR2d 1070.

Liability of master for injury or death of servant on master's premises where injury occurred outside working hours, 76 ALR2d 1215.

Shipowner's liability to longshoreman for injuries due to aspects of unseaworthiness brought about by acts of stevedore company or latter's servants, 77 ALR2d 829.

Status of gasoline and oil distributor or dealer as agent, employee, independent contractor, or independent dealer as regards responsibility for injury to person or damage to property, 83 ALR2d 1282.

Validity, enforceability, and effect of provision in seamen's employment contract stip-

Protection of substitute for regular servant. — Where a person is employed and paid by a servant as a temporary substitute, with the express or implied knowledge of the master, or with a subsequent ratification by the master, the person employed is entitled to the same protection against injury while engaged in the master's work as the regular servant for whom the person is substituting, even though the person may not be entitled to recover wages from the master. *Spivey v. Lovett & Brinson*, 48 Ga. App. 335, 172 S.E. 658 (1934).

ulating the maximum recovery for scheduled personal injuries, 9 ALR3d 417.

Master's liability to agricultural worker injured other than by farm machinery, 9 ALR3d 1061.

Liability of owner or operator of motor vehicle for injury caused thereby while it is being repaired or serviced, 15 ALR3d 1387.

Master and servant: employer's liability for injury caused by food or drink purchased by employee in plant facilities, 50 ALR3d 505.

Imputation of servant's or agent's contributory negligence to master or principal, 53 ALR3d 664.

Liability for injury or death of participant in theatrical performance or spectacle, 67 ALR3d 451.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress, 86 ALR3d 454.

Employer's right of action for loss of services or the like against third person tortiously killing or injuring employee, 4 ALR4th 504.

Employer's liability for injury to babysitter in home or similar premises, 29 ALR4th 304.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress, 52 ALR4th 853.

Employer's liability to employee for failure to provide work environment free from tobacco smoke, 63 ALR4th 1021.

Tort liability for window washer's injury or death, 69 ALR4th 207.

Employer's liability for assault, theft, or similar intentional wrong committed by employee at home or business of customer, 13 ALR5th 217.

Employer's liability to employee or agent for injury or death resulting from assault or criminal attack by third person, 40 ALR5th 1.

Pre-emptive effect of Occupational Safety and Health Act of 1970 (29 USC §§ 651—678) and standards issued thereunder, 88 ALR Fed. 833.

34-7-20. Care by employer in selection of employees and in furnishing of safe machinery; employer's duty to warn.

The employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency; he shall use like care in furnishing machinery equal in kind to that in general use and reasonably safe for all persons who operate it with ordinary care and diligence. If there are latent defects in machinery or dangers incident to an employment, which defects or dangers the employer knows or ought to know but which are unknown to the employee, then the employer shall give the employee warning with respect thereto. (Civil Code 1895, § 2611; Civil Code 1910, § 3130; Code 1933, § 66-301.)

History of Code section. — This Code section is derived from the decisions in Georgia R.R. & Banking Co. v. Nelms, 83 Ga. 70, 9 S.E. 1049 (1889); Davis v. Augusta Factory, 92 Ga. 712, 18 S.E. 974 (1893); May v. Smith, 92 Ga. 95, 18 S.E. 360 (1893).

Law reviews. — For article discussing origin and construction of Georgia provisions

concerning master-servant relationship, see 14 Ga. L. Rev. 239 (1980). For survey article on labor and employment law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 303 (2003).

For comment criticizing Parry v. Davison-Paxon, 87 Ga. App. 51, 73 S.E.2d 59 (1952), see 4 Mercer L. Rev. 368 (1953).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SELECTION OF EMPLOYEES

SAFETY OF PLACE OF WORK

SAFETY OF TOOLS AND MACHINERY

SAFETY OF MATERIALS AND DANGER OF DISEASE

SERVANT'S TORTS

General Consideration

Duties of master. — As to place, appliances, instrumentalities, and fellow servants, the law places upon the master a personal or positive, sometimes called nondelegable, duty to provide for the employer's servant. Atkinson v. Empire Printing & Box Co., 76 Ga. App. 206, 45 S.E.2d 280 (1947).

Nondelegable duty. — The duty required by this section is nondelegable. Southern Ry. v. Roberts, 206 F.2d 508 (5th Cir. 1953) (see O.C.G.A. § 34-7-20).

Restatement of common law. — This section restated common-law care required of a master to a servant. Scott v. Crescent Tool

Co., 306 F. Supp. 884 (N.D. Ga. 1969) (see O.C.G.A. § 34-7-20).

Workers' Compensation Act provides exclusive remedy. — Employee could not bring a separate action against the employer independent of the exclusivity provisions of the Workers' Compensation Act (O.C.G.A. Ch. 9, T. 34) on the ground that the employer concealed work place hazards in violation of O.C.G.A. § 34-7-20, since the Act makes no statutory exception to the exclusive remedy provisions. Dugger v. Miller Brewing Co., 199 Ga. App. 850, 406 S.E.2d 484 (1991), cert. denied, 199 Ga. App. 905, 406 S.E.2d 484 (1991).

Duty of care inapplicable to selection of independent contractors. — The statutory duty to exercise ordinary care in the selection of employees applies, by definition, to employees and not to those hired as independent contractors. *Mason v. Gracey*, 189 Ga. App. 150, 375 S.E.2d 283 (1988).

Contractee/contractor relationship. — A contractee has the right to rely on the presumption that a contractor will discharge the legal duties owing to the contractor's employee. *Hodge v. United States*, 310 F. Supp. 1090 (M.D. Ga. 1969), *aff'd*, 424 F.2d 545 (5th Cir. 1970).

Employer's safety officer shares employer's statutory immunity. — In a contract with a subcontractor, as a person who was designated as the safety officer had the duty to supervise and inspect only in the person's capacity as the employer's representative but was not a party to the contract, the person shared statutory tort immunity under the Workers' Compensation Act (O.C.G.A. § 34-9-11) with the employer. *Pardue v. Ruiz*, 263 Ga. 146, 429 S.E.2d 912 (1993).

Stating cause of action. — In suits for injuries arising from the negligence of the employer in failing to comply with the duties imposed by this section, the employee's petition in order to set forth a cause of action must set out issuable facts constituting not only negligence on the part of the employer, causing the injuries, but also due care on the part of the employee; and it must also appear from the allegations that the injured employee did not know, and had no equal means of knowing, all that which is charged as negligence to the employer, and by the exercise of ordinary care could not have known. *A.F. King & Son v. Simmons*, 107 Ga. App. 628, 131 S.E.2d 214 (1963) (see O.C.G.A. § 34-7-20).

Injury as natural and probable consequence of negligence. — An injury to a servant must be the natural and probable consequence of an employer's negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from the wrongdoer's act. *Alford v. Zeigler*, 65 Ga. App. 294, 16 S.E.2d 69 (1941).

Equal means of knowing danger. — In a suit by a servant for an injury arising from the negligence of the master in failing to

furnish proper machinery or appliances or a safe place of work, the servant, to be entitled to recover, must show, among other things, that the servant did not have equal means with the master of knowing of the danger. *Abercrombie v. Ivey*, 59 Ga. App. 296, 200 S.E. 551 (1938).

An action brought under this section was one for negligence on the part of the master, and where it appears from the evidence that the servant has equal means with the master of knowing of the defects in machinery and the dangers of employment, and the danger is as obvious to the servant as it is to the master, the servant is not entitled to recovery, notwithstanding any assurances of safety by the master. *Swails v. Carpenter*, 112 Ga. App. 117, 144 S.E.2d 182 (1965) (see O.C.G.A. § 34-7-20).

Violation not negligence per se. — The provisions of this section were too general and abstract for their violation by a master or employer to constitute negligence per se. *A.F. King & Son v. Simmons*, 107 Ga. App. 628, 131 S.E.2d 214 (1963) (see O.C.G.A. § 34-7-20).

Limited liability. — The liability of a master to a servant for negligence is strictly limited. *Bray v. Westinghouse Elec. Corp.*, 102 Ga. App. 803, 117 S.E.2d 919 (1960).

Assumption of risk. — An employee has no absolute right of recovery but assumes ordinary risks of the employee's employment. *Scott v. Crescent Tool Co.*, 306 F. Supp. 884 (N.D. Ga. 1969).

An employee does not ordinarily assume the risk of negligence by an employer. *Louisville & N.R.R. v. Crapps*, 62 Ga. App. 437, 8 S.E.2d 413 (1940).

The provision of that section of former Code 1933, § 66-403 (see O.C.G.A. § 34-7-43) which abolished the defense of the assumption of risk where there had been a violation by the common carrier of any statute enacted for the safety of the employees had reference to statutes specifically applicable to the operations and equipment of such carriers and was not intended to, and cannot properly, apply to the provisions of former Code 1933, § 66-301 (see O.C.G.A. § 34-7-20). *Southern Ry. v. Roberts*, 206 F.2d 508 (5th Cir. 1953).

Standing in front of tractor operated by inexperienced driver. — Employee who sued employer for personal injuries should have

General Consideration (Cont'd)

been aware that standing in front of a large farming tractor, parked on an incline, while a person wholly inexperienced in operating the machinery started the tractor and "eased" the clutch out, was dangerous and was not entitled to recover against the employer as a matter of law. *Clayton v. Larisey*, 190 Ga. App. 512, 379 S.E.2d 789 (1989).

Negligent hiring and retention claim. — An employee's claim of negligent hiring and retention could not be used to circumvent the employment-at-will doctrine since the employment was for an indefinite period and was terminable at the will of either party to the employment relationship. *Dong v. Sheppard Community Blood Ctr.*, 240 Ga. App. 137, 522 S.E.2d 720 (1999).

Employment of minor. — Since a minor 12 years of age does not as a matter of law possess the capacity to appreciate and apprehend dangers which are ordinarily patent and obvious to adult persons, an adult person, in ordering a minor of that age as a servant to work at a place and under circumstances where the minor is exposed to a danger which is patent and obvious to the employer, may in so employing the minor, be guilty of negligence. *Jordan v. Batayias*, 53 Ga. App. 538, 186 S.E. 451 (1936).

A child under age 14 assumes only such ordinary risks of employment as the child is capable of appreciating and understanding, and a master who, personally or through an authorized agent, directs such a child to do an act which, if performed according to the means and method provided by the master, would be attended with danger, owes the duty of warning the child of the dangers incident to its performance, and in doing so must take into consideration the child's incapacity to appreciate and understand danger. The duty incumbent upon the child is to exercise due care according to the child's age and the child's own actual capacity, rather than the ordinary care exacted by the general rule of every prudent man. *Moore v. Ross*, 41 Ga. App. 509, 153 S.E. 575 (1930).

Detour from duties. — A servant may not wander at will to out of the way or dangerous places on premises, or use parts for purposes wholly disconnected from, and in no way pertaining to, the business in hand or the objects of the servant's employment; and if

in doing so the servant is injured, the liability of the master is no greater than it would be to a mere licensee. *Austin v. Henry Grady Hotel Co.*, 58 Ga. App. 861, 200 S.E. 466 (1938).

Duty owed to volunteers. — One who, without any employment whatever, but at the request of a servant who has no authority to employ other servants, voluntarily undertakes to perform service for a master, is a mere volunteer; and the master does not owe the servant any duty, except not to injure the servant willfully and wantonly after the servant's peril is discovered. *Callaham v. Carlson*, 85 Ga. App. 4, 67 S.E.2d 726 (1951).

Action for damages against employer. — If the workers' compensation law does not apply to an "occupational disease" caused by injuries which are not the result of an accident and are not compensable under the provisions of the chapter, the employee may maintain an ordinary or common-law action for damages against the employer, provided a cause of action exists in the employee's favor under the law relating to the liability of a master, independently of the Workmen's Compensation Act (see O.C.G.A. § 34-9-1 et seq.). *Covington v. Berkeley Granite Corp.*, 182 Ga. 235, 184 S.E. 871, answer conformed to, 53 Ga. App. 269, 185 S.E. 386 (1936).

Questions for jury resolution. — Ordinarily, what constitutes ordinary care, or the lack of it, whether a servant assumed a risk which caused the injury, and similar questions, are mixed issues of law and fact peculiarly for jury resolution, and to some extent must be based on inferences to be drawn from the evidence. *Jones v. Aaron*, 124 Ga. App. 738, 186 S.E.2d 132 (1971).

Cited in *King Mfg. Co. v. Walton*, 1 Ga. App. 403, 58 S.E. 115 (1907); *King v. Seaboard Air-Line Ry.*, 1 Ga. App. 88, 58 S.E. 252 (1907); *Southern States Portland Cement Co. v. Helms*, 2 Ga. App. 308, 58 S.E. 524 (1907); *Seaboard Air-Line Ry. v. Chapman*, 4 Ga. App. 706, 62 S.E. 488 (1908); *Brown v. Rome Mach. & Foundry Co.*, 5 Ga. App. 142, 62 S.E. 720 (1908); *Hubbard v. Macon Ry. & Light Co.*, 5 Ga. App. 223, 62 S.E. 1018 (1908); *Southern Bell Tel. & Tel. Co. v. Covington*, 139 Ga. 566, 77 S.E. 382 (1913); *Rome Scale Mfg. Co. v. Harvey*, 15 Ga. App. 381, 83 S.E. 434 (1914); *Whitehurst v. Standard Oil Co.*, 8 F.2d 728 (5th Cir. 1925);

Flippin v. Central of Ga. Ry., 35 Ga. App. 243, 132 S.E. 918 (1926); Fulton Bakery, Inc. v. Williams, 37 Ga. App. 780, 141 S.E. 922 (1928); Southern Ry. v. Jenkins, 39 Ga. App. 585, 147 S.E. 800 (1929); Tanner v. Louisville & N.R.R., 45 Ga. App. 734, 165 S.E. 761 (1932); Brannan v. City of Brunswick, 49 Ga. App. 62, 174 S.E. 186 (1934); Estridge v. Hanna, 55 Ga. App. 159, 189 S.E. 364 (1936); Paul v. Georgia R.R. & Banking Co., 60 Ga. App. 461, 4 S.E.2d 99 (1939); Story v. Crouch Lumber Co., 61 Ga. App. 210, 6 S.E.2d 86 (1939); Kidd v. Williamson, 61 Ga. App. 890, 8 S.E.2d 590 (1940); Davis v. Georgia Coating Clay Co., 63 Ga. App. 265, 11 S.E.2d 60 (1940); Daugherty v. Summerall, 64 Ga. App. 638, 13 S.E.2d 705 (1941); Harris v. Price, 95 Ga. App. 521, 98 S.E.2d 118 (1957); Martin v. Henson, 95 Ga. App. 715, 99 S.E.2d 251 (1957); Milam v. Miss Ga. Dairies, Inc., 118 Ga. App. 791, 165 S.E.2d 463 (1968); Webb v. Standard Oil Co., 414 F.2d 320 (5th Cir. 1969); Taylor v. Bolton, 121 Ga. App. 141, 173 S.E.2d 96 (1970); Dodd v. Clary, 135 Ga. App. 296, 217 S.E.2d 397 (1975); Barnes v. Allen Kane's Major Dodge, Inc., 148 Ga. App. 332, 250 S.E.2d 876 (1978); Butler v. Shirah, 154 Ga. App. 111, 267 S.E.2d 647 (1980); Ray v. Edwards, 557 F. Supp. 664 (N.D. Ga. 1982); Cherry v. Kelly Servs., Inc., 171 Ga. App. 235, 319 S.E.2d 463 (1984); Patterson v. Southeastern Newspapers, Inc., 243 Ga. App. 241, 533 S.E.2d 119 (2000).

Selection of Employees

Competency of employees. — The word "competent" should be given a comprehensive interpretation and include within its range of meaning all that "is essential to make up a reasonably safe person, considering the nature of the work, and the general safety of those who are required to associate with such person in the common general employment." *Swift Mfg. Co. v. Phillips*, 8 Ga. App. 425, 69 S.E. 585 (1910).

The selection of incompetent servants is an act of negligence as will authorize a cause of action in favor of any person who is injured as the direct and proximate result thereof. *Elrod v. Ogles*, 78 Ga. App. 396, 50 S.E.2d 791 (1948); *Parry v. Davison-Paxon Co.*, 87 Ga. App. 51, 73 S.E.2d 59 (1952). For comment, see 4 Mercer L. Rev. 368 (1953).

Employer's degree of care. — A master is not required to anticipate that a servant may be negligent, and to warn the servant of dangers which may arise from the possible negligence of others. *Crown Cotton Mills v. McNally*, 123 Ga. 35, 51 S.E. 13 (1905).

As the liability of the master depends on the exercise of ordinary care it is necessary to determine a standard, and the well established rule is that the master must exercise such care as every prudent man would exercise under the circumstances. This criterion, as to what would be done under the circumstances, varies according to the time, place, and conditions. *Otis Elevator Co. v. Rogers*, 159 Ga. 53, 125 S.E. 60 (1924).

The means a master could have been reasonably expected to take in order to prevent the driver of the master's automobile from causing a collision by improperly driving the automobile in the master's absence was the use of ordinary care in selecting the driver. *Roberts v. Ethridge*, 73 Ga. App. 400, 36 S.E.2d 883 (1946).

Inasmuch as negligence was the basis of the master's liability for injuries to the master's employees, recovery may be had only when the master failed to exercise ordinary care in the selection and retention of servants and this rule was further qualified and restricted by this section. *Southern Ry. v. Roberts*, 206 F.2d 508 (5th Cir. 1953) (see O.C.G.A. § 34-7-23).

The duty of a master to select and retain only competent servants is not absolute, but is to be measured by knowledge, actual or constructive, of the probable results of the master's conduct. Likewise, where a servant has knowledge, or has an equal opportunity with the master to acquire knowledge, of the incompetency of servant's fellow servant there can be no recovery; in such a case the servant will be said to have "waived" the negligence of the master. *Southern Ry. v. Roberts*, 206 F.2d 508 (5th Cir. 1953).

There was nothing in the record which showed that the hospital failed to exercise ordinary care in the hiring process or in its retention of the alleged sexual molester; therefore, summary judgment was properly granted in favor of the hospital. *Bunn-Penn v. Southern Regional Medical Corp.*, 227 Ga. App. 291, 488 S.E.2d 747 (1997).

Trial court properly granted summary judgment to the health center on the pa-

Selection of Employees (Cont'd)

tient's claim that it was responsible for the negligent hiring/retention of the mental health assistant who allegedly raped the patient, as the health center showed that it exercised ordinary care not to hire a person who posed a reasonably foreseeable risk of inflicting harm on others by hiring a professional investigation service to do a background check on the mental health assistant; as a result of that background check, the service advised the health center that the mental health assistant had not been involved in criminal activity and the patient did not show that the health center otherwise knew that the mental health assistant posed a risk of harm to its patients. *Munroe v. Universal Health Servs., Inc.*, 277 Ga. 861, 596 S.E.2d 604 (2004).

Leaving servant in dangerous emergency. — There is a plain breach of the master's nondelegable duty, when the master leaves the servant in a dangerous emergency through the lack of an adequacy of helpers. *Sparta Oil Mill v. Russell*, 6 Ga. App. 293, 65 S.E. 37 (1909).

Inadequacy of fellow servant and misrepresentation by master. — See *Beard v. Georgia Mfg. Co.*, 8 Ga. App. 618, 70 S.E. 57 (1911).

Psychological testing of employees. — Where an employee has absolutely no background of prior criminal or dangerous propensities and, during the employee's employment for a substantial number of years, the employee has had a good work record without a single complaint from customers, the employer may not be found negligent in hiring and retaining such an employee because of a failure to require such an employee to submit to psychological testing or interviews. *Southern Bell Tel. & Tel. Co. v. Sharara*, 167 Ga. App. 665, 307 S.E.2d 129 (1983).

Presumption that master's duty is discharged. — It is always presumed that the master has discharged the master's duties to the servant, and this includes the duty to provide a sufficient force of competent workmen as well as all the other personal duties of the master. *Baxley v. Satilla Mfg. Co.*, 114 Ga. 720, 40 S.E. 730 (1902).

When liability arises. — The liability of a master arises because of the omission of the

duty to provide competent fellow servants, and not because the negligence of the latter is, in law, imputable to the master. *Ingram v. Hilton & Dodge Lumber Co.*, 108 Ga. 194, 33 S.E. 961 (1899); *Corcoran v. Merchants & Miners Transp. Co.*, 1 Ga. App. 741, 57 S.E. 962 (1907), later appeal, 4 Ga. App. 654, 62 S.E. 130 (1908); *Strickland v. Foughner*, 63 Ga. App. 805, 12 S.E.2d 371 (1940).

Proof of employer's negligence. — It is incumbent upon an injured servant to show the following facts: (1) that the fellow servant was incompetent; (2) that the injury complained of resulted directly or proximately from such incompetency; (3) either (a) that the master knew of such incompetency, or (b) that by the exercise of ordinary care the master could have known of it; (4) that the injured servant did not know of such incompetency; (5) that by the exercise of ordinary care the injured servant could not have known of it; and (6) the servant did not have equal means with the master of acquiring knowledge of such fact. *Camilla Cotton Oil & Fertilizer Co. v. Walker*, 21 Ga. App. 603, 94 S.E. 855 (1918); *Strickland v. Foughner*, 63 Ga. App. 805, 12 S.E.2d 371 (1940).

Before recovery can be had against a master for negligently employing an incompetent fellow servant it must appear that the master knew, or by the exercise of due diligence should have known, of the incompetency at the time of the employment; or else that the master negligently retained such fellow servant after the master was fairly chargeable with knowledge of such incompetency. *Strickland v. Foughner*, 63 Ga. App. 805, 12 S.E.2d 371 (1940).

Employer's knowledge of discrimination. — School district was not liable under O.C.G.A. § 34-7-20 because there was no evidence to show that the district knew or should have known about the discriminatory tendencies of a superintendent as the employee did not inform the school board of the alleged discrimination until three days before the employee was terminated, nor was there evidence of complaints by other individuals. *Palmer v. Stewart County Sch. Dist.*, F. Supp. 2d , 2005 U.S. Dist. LEXIS 35511 (M.D. Ga. June 17, 2005).

Servant's degree of care. — A servant cannot recover if by the exercise of ordinary care the servant could have known of the

incompetency. *Strickland v. Foughner*, 63 Ga. App. 805, 12 S.E.2d 371 (1940).

Jury charge distinguishing negligence and incompetency. — In a case so requiring, the distinction between the negligence of a competent servant and the unskillfulness of an incompetent servant should be clearly pointed out to the jury. *Ingram v. Hilton & Dodge Lumber Co.*, 108 Ga. 194, 33 S.E. 961 (1899).

Safety of Place of Work

Applicability of Workers' Compensation Act. — Where an employer and employee are under the provisions of the Workers' Compensation Act, a claim by the employee that the employer failed to furnish the employee with a safe place to work, even if wilfully done, is encompassed within the Act. *Garrett v. K-Mart Corp.*, 197 Ga. App. 374, 398 S.E.2d 302 (1990).

Master's duty to insure safety. — Among the nonassignable duties of the master is that of providing the servant a reasonably safe place to work. *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S.E. 443 (1903); *Colley v. Southern Cotton Oil Co.*, 120 Ga. 258, 47 S.E. 932 (1904); *Turner v. Seville Gin & Whse. Co.*, 127 Ga. 555, 56 S.E. 739 (1907); *Eagle & Phenix Mills v. Johnson*, 131 Ga. 44, 61 S.E. 990 (1908); *International Cotton Mills v. Webb*, 22 Ga. App. 309, 96 S.E. 16 (1918).

The master is bound to make reasonable provision for the protection of the servant against dangers to which the servant is exposed while engaged in the work the servant is employed to perform. *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S.E. 443 (1903); *Jackson v. Merchants & Miners Transp. Co.*, 118 Ga. 651, 45 S.E. 254 (1903); *Colley v. Southern Cotton Oil Co.*, 120 Ga. 258, 47 S.E. 932 (1904).

The duty of the master to furnish a safe place for the servant to work is not absolute and unqualified. Some kinds of work are necessarily attended with dangers against which the master cannot by any degree of diligence provide. In such case the law does not require of the master impossibilities; but if, by exercising ordinary care, the master can make safe the place wherein the servant is to labor, it is the master's duty to do so. *Merchants & Miners Transp. Co. v. Jackson*, 120 Ga. 211, 47 S.E. 522 (1904); *Otis Eleva-*

tor Co. v. Rogers, 159 Ga. 53, 125 S.E. 60 (1924).

It is a master's duty to exercise ordinary and reasonable care to furnish a safe place to work. *Whitehurst v. Standard Oil Co.*, 8 F.2d 728 (5th Cir. 1925); *Holman v. American Auto. Ins. Co.*, 201 Ga. 454, 39 S.E.2d 850 (1946); *Owensby v. Jones*, 109 Ga. App. 398, 136 S.E.2d 451 (1964).

A master is under an absolute duty to a servant to furnish the servant a safe working place and to warn of unusual or newly developed dangers which arise in the course of the employment and which are likely to escape an ordinarily prudent servant's knowledge under the circumstances. The servant may, without creating an imputation of personal negligence, rely upon the master's performance of these duties until such time as the servant shall discover, or in the exercise of ordinary diligence should discover, that there has been a failure in this respect upon the master's part. *Simowitz v. Register*, 60 Ga. App. 180, 3 S.E.2d 231 (1939).

An employer is not the insurer of an employees' safety and is bound only to the exercise of reasonable care in this connection. *Carter v. Callaway*, 87 Ga. App. 754, 75 S.E.2d 187 (1953).

Master's specific duty of care. — A master's specific duty to furnish a safe place to work relates to the equipment of houses, plants and other similar structures, though, of course, it is a general duty of the master, as to all times and all places, not to expose the servant to an extraordinary hazard, of which the master has knowledge, actual or constructive, and of which the servant is ignorant, and could not by ordinary diligence acquire knowledge. *Atkinson v. Empire Printing & Box Co.*, 76 Ga. App. 206, 45 S.E.2d 280 (1947).

Latent defects. — Under this section "if there are latent defects in the construction of the place of work which are, or in the exercise of ordinary care could be, known to the master, and which are unknown to the servant, it is the duty of the master to warn the servant thereof." *Crown Cotton Mills v. McNally*, 123 Ga. 35, 51 S.E. 13 (1905); *Southern Cotton Oil Co. v. Horton*, 22 Ga. App. 155, 95 S.E. 765 (1918) (see O.C.G.A. § 34-7-20).

Master's duty of inspection. — Where the presence of the defect in the premises is

Safety of Place of Work (Cont'd)

latent, the master is held to a higher standard of conduct than the servant, since the master owes to the servant the duty of inspection; if its presence is hidden, the master would be bound to discover the fact sooner than the servant, because the duty of inspection rests upon the master and not upon the servant. *Nashville, C. & St. L. Ry. v. Hilderbrand*, 48 Ga. App. 140, 172 S.E. 87 (1933).

Places to which duty applies. — The duty of the master to furnish a safe place to work is usually applied to a permanent place, or one which is quasi-permanent. It does not apply to such places as are constantly shifting and being transformed as a direct result of the servant's labor, and where the work in its progress necessarily changes the character for safety of the place in which it is performed as it progresses. *Upchurch v. Culpepper*, 17 Ga. App. 577, 87 S.E. 834 (1916).

The general rule in regard to the duty of the master to furnish a safe place to work is not rendered inapplicable merely because the servant was engaged in construction work, and that at the time of the injury the object being constructed was in an unfinished state, to some extent changing from day to day. If it were otherwise, it would be difficult to find a case where a workman was engaged in performing labor for a master where the rule would apply. Practically all labor normally tends to change the condition of the thing labored upon; otherwise it would be useless. *Terry Shipbuilding Corp. v. Griffian*, 153 Ga. 390, 112 S.E. 374 (1922); *Tufts v. Threlkeld*, 31 Ga. App. 452, 121 S.E. 120 (1923).

Church members. — Summary judgment was not proper where a question of fact remained regarding member's competence to undertake a project and the evidence presented a question of fact as to whether a church negligently created a hazard on the property which precipitated a member's injuries. *Piney Grove Baptist Church v. Goss*, 255 Ga. App. 380, 565 S.E.2d 569 (2002).

Buildings. — A master is not obligated to keep a building, which the master's servants are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends on the due performance of

that work by them and their fellow servants. *Byrd v. Thompson*, 146 Ga. 300, 91 S.E. 100 (1916).

City sewers. — A city acting under authority of its charter in the repairing or construction of sewers is bound to the same rule of diligence as to providing a reasonably safe place for its employees to work that applies in the case of a private contractor. *City of Atlanta v. Trussell*, 21 Ga. App. 340, 94 S.E. 649 (1917).

Platforms and scaffolds. — A master is not, under the master's general duty of respecting the servant's safety, held to the same quantum of care in the erection of platforms and scaffolds intended only for temporary use as the master is in the building and maintenance of more permanent structures. *Riverside Mills v. Brooks*, 6 Ga. App. 67, 64 S.E. 282 (1909); *Dunn & Bro. v. Morris*, 132 Ga. 440, 64 S.E. 321 (1909).

Servant's reliance upon performance of duty. — Pursuant to the provisions of this section, a servant can rely upon the performance of the duty of furnishing a safe place in which to work. Danger arising from an unsafe place is not included within the risks assumed by the servant. *International Cotton Mills v. Carroll*, 22 Ga. App. 26, 95 S.E. 472 (1918); *Southern Cotton Oil Co. v. Horton*, 22 Ga. App. 155, 95 S.E. 765 (1918); *Tufts v. Threlkeld*, 31 Ga. App. 452, 121 S.E. 120 (1923) (see O.C.G.A. § 34-7-20).

A servant has the right to assume that the servant's master has performed the duty of furnishing the servant with a safe place to work, and is under no obligation to inspect the same in order to discover latent defects not open to ordinary observation; a danger arising from an unsafe place is not included among the risks assumed by the servant and the duty of inspection rests upon the master and not upon the servant. *Nashville, C. & St. L. Ry. v. Hilderbrand*, 48 Ga. App. 140, 172 S.E. 87 (1933); *Dessau v. Achord*, 50 Ga. App. 426, 178 S.E. 396 (1935).

A servant can rely upon the performance of the duty of furnishing a safe place in which to work; danger arising from an unsafe place is not included within the risks assumed by the servant. *Middlebrooks v. Atlanta Metallic Casket Co.*, 63 Ga. App. 620, 11 S.E.2d 682 (1940).

Duty of servant. — A servant is bound to observe open and obvious dangers such as

would be disclosed by the exercise of ordinary care. *Nashville, C. & St. L. Ry. v. Hilderbrand*, 48 Ga. App. 140, 172 S.E. 87 (1933).

A servant or an employee is not required to make a special inspection of the condition of the working place furnished to the servant, but if, by exercising ordinary care, the servant can discover the condition of it, it is the servant's duty to do so. *Spivey v. Lovett & Brinson*, 48 Ga. App. 335, 172 S.E. 658 (1934).

A servant must exercise like care in discovering defects therein. *Carter v. Callaway*, 87 Ga. App. 754, 75 S.E.2d 187 (1953).

Evidence. — Where no facts were alleged to show that the defendant had knowledge that the dog on the premises was vicious, or that it would be unsafe for the employee to work in the house with the dog present, the employee failed to set out a cause of action because of the failure to allege facts showing the defendant knew, or should have known of the danger. *Hays v. Anchors*, 71 Ga. App. 280, 30 S.E.2d 646 (1944).

Jury charge. — A charge to the jury which omits to qualify the word "safe" by "reasonably" is inaccurate, but will not constitute reversible error if the evidence is clear and convincing. *Eagle & Phenix Mills v. Moncrief*, 17 Ga. App. 10, 86 S.E. 260 (1915).

Safety of Tools and Machinery

Care of master in general. — A master is not an insurer with reference to character of machinery. *Merchants & Miners Transp. Co. v. Jackson*, 120 Ga. 211, 47 S.E. 522 (1904).

It is not incumbent upon the master to procure the best and safest machinery which can be made. It is sufficient if the machinery is of a kind in general use, and reasonably safe for all persons who operate it with ordinary care and diligence. *Vinson v. Willingham Cotton Mills*, 2 Ga. App. 53, 58 S.E. 413 (1907); *Belk v. Lee Roy Myers Co.*, 17 Ga. App. 684, 87 S.E. 1089 (1916).

A master is bound to exercise ordinary care in furnishing machinery and appliances equal to those in general use, and reasonably safe for all persons who operate them with ordinary care and diligence in furtherance of the purposes for which such instrumentalities are intended and if the proximate cause of an injury consists in the failure of

the master to perform the duty thus actually devolving upon the master, the master is liable to the injured servant, provided the servant, by the exercise of ordinary care, could not have prevented the injury personally. *Walters v. Berry Schools*, 40 Ga. App. 751, 151 S.E. 544 (1930).

While an employer is required to exercise ordinary care to furnish a safe place to work, the employer is not required to furnish the newest, safest, or best tools or methods of operation, or adopt extraordinary or unusual safeguards against risks and dangers. *Hollingsworth v. Thomas*, 148 Ga. App. 38, 250 S.E.2d 791 (1978).

Purposes for which machinery obtained.

— Ordinary diligence requires a master to furnish to the master's servant appliances reasonably suited for the uses intended, but the law does not exact of the master the extraordinary diligence which would be demanded if it were required that instrumentalities intended for one use should be safe and suitable for every unintended use to which they might be casually or unexpectedly applied. *Babcock Bros. Lumber Co. v. Johnson*, 120 Ga. 1030, 48 S.E. 438 (1904).

Appliances used for other than intended purpose. — If the master requires a servant to use or knows that the servant will necessarily use, an appliance originally intended for another purpose, the servant will thereby be held responsible, as if the instrumentality had originally been intended for such new use. *Babcock Bros. Lumber Co. v. Johnson*, 120 Ga. 1030, 48 S.E. 438 (1904).

Defective tools. — This section was now applicable in cases of injuries arising from defective tools. *Williams v. Garbutt Lumber Co.*, 132 Ga. 221, 64 S.E. 65 (1909) (see O.C.G.A. § 34-7-20).

It is actionable negligence for a master to order a servant to work with an unsafe instrumentality, and an assurance of safety, coupled with the order, not only aggravates the master's negligence, but also relieves the servant from the assumption of the risk; the assurance of safety likewise makes the question of the servant's contributory negligence one for solution by the jury, unless the danger is so obvious that to undertake to encounter it amounts to plain rashness. *Atlanta, Birmingham & Coast R.R. v. King*, 55 Ga. App. 1, 189 S.E. 580 (1936).

Negligent inspection or maintenance of appliances. — Among the absolute duties of

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the master is that of making inspections for the discovery of defects and dangers in those instrumentalities within the range of which the servant is likely to come in the discharge of the servant's duties; hence, by law, the master ought to know of such defects as a reasonable inspection would disclose. *Moore v. Dublin Cotton Mills*, 127 Ga. 609, 56 S.E. 839, 10 L.R.A. (n.s.) 772 (1907); *Southern States Portland Cement Co. v. Helms*, 2 Ga. App. 308, 58 S.E. 524 (1907), later appeal, 6 Ga. App. 153, 64 S.E. 494 (1909); *Southern Bell Tel. & Tel. Co. v. Shamos*, 12 Ga. App. 463, 77 S.E. 312 (1913); *Spencer v. Lauer & Harper Co.*, 14 Ga. App. 35, 81 S.E. 387 (1913).

If the appliance actually furnished, even though not legally required, is or becomes dangerous for use by the servant, and by its own positive act, as distinguished from a harmless failure to act or function, injures the servant, the master will become liable for negligent inspection or maintenance, under recognized principles of the common law applicable in such cases. *Southern Ry. v. Goree*, 54 Ga. App. 134, 187 S.E. 297 (1936), later appeal, 57 Ga. App. 63, 194 S.E. 609 (1937).

A master owes a servant the duty of inspection. *Rogers v. Bragg*, 117 Ga. App. 295, 160 S.E.2d 217 (1968).

Employee's knowledge of defect. — In a farm employee's action for negligence against an employer, there was no basis for a recovery under O.C.G.A. § 34-7-20, where the evidence was uncontroverted that the employee had equal knowledge with the employer of a defect in the "power takeoff" of the tractor; the employee's claim was barred by the plain language of O.C.G.A. § 34-7-23 and the trial court erred in giving a separate instruction on the liability for furnishing defective machinery which was not adjusted to the evidence. *Strickland v. Howard*, 214 Ga. App. 307, 447 S.E.2d 637 (1994).

Inspection for latent defects. — Where defects in machinery or appliances are such as to deceive human judgment, the master as well as the servant stands excused for a failure to discover them. *Baxley v. Satilla Mfg. Co.*, 114 Ga. 720, 40 S.E. 730 (1902); *Holland v. McRae Oil & Fertilizer Co.*, 134 Ga. 678, 68 S.E. 555 (1910).

A master who, after purchasing a permanent structure or plant for a particular business, puts a servant to work therein or thereon, is not liable to such servant for injuries sustained by reason of a latent defect therein, if the master has exercised ordinary and reasonable care to detect the latent defect and has failed to discover it. *Atlantic & Birmingham R.R. v. Reynolds*, 117 Ga. 47, 43 S.E. 456 (1903).

It would be negligent, under this section, not to warn the servant of a latent defect, if the master knew, or by the exercise of ordinary care, could have known of its existence. *Lawrenceville Oil Mill v. Walton*, 143 Ga. 259, 84 S.E. 584 (1915) (see O.C.G.A. § 34-7-20).

In the case of the latent defects which are discoverable by proper inspection, the master is necessarily held to a higher standard of conduct than the servant, since the master owes to the servant the duty of inspection. *Owensby v. Jones*, 109 Ga. App. 398, 136 S.E.2d 451 (1964).

The principle regarding latent defects is applicable also in the relationship of employer to independent contractor. *Seagraves v. Abco Mfg. Co.*, 118 Ga. App. 414, 164 S.E.2d 242 (1968), later appeal, 121 Ga. App. 224, 173 S.E.2d 416 (1970).

In a case of latent defects (those which are only discoverable by proper inspection) the master is necessarily held to a higher standard of conduct than the servant, since the master owes to the servant the duty of inspection. *Harris v. Strickland*, 204 Ga. App. 889, 421 S.E.2d 91 (1992).

Trial court erred in giving the charge on the "equal means" of plaintiff's son of knowing of the alleged defect in the tractor seat where there was no evidence that plaintiff's son had actual knowledge of the allegedly defective tractor seat. There was no evidence that inspecting the tractor was part of the assigned duties of plaintiff's son. *Harris v. Strickland*, 204 Ga. App. 889, 421 S.E.2d 91 (1992).

Loose bolt as latent defect. — The looseness of the bolt attaching a seat to a mower frame which allowed it to slip out and thus permitted the seat to fall off was a latent defect. *Chastain v. Fuqua Indus., Inc.*, 156 Ga. App. 719, 275 S.E.2d 679 (1980).

Where latent defect not in machinery itself. — Where the evidence does not show a

latent defect in the machinery itself, but the evidence was sufficient to support appellees' theory that there was a latent defect in the manner in which the machinery was installed, or in the appellants' failure to install a warning device on the machinery, the trial court did not err in giving a jury charge under this section. *McClurd v. Reddick*, 135 Ga. App. 136, 217 S.E.2d 163 (1975) (see O.C.G.A. § 34-7-20).

Newly developed dangers. — The master is under an absolute duty to the servant to warn the servant of any unusual or newly developed changes which arise in the course of the employment and which are likely to escape an ordinary prudent servant's knowledge under the circumstances. *Southern Cotton-Oil Co. v. Gladman*, 1 Ga. App. 259, 58 S.E. 249 (1907).

Machinery to be repaired. — Where a master employed a servant not to work with machinery, but to repair it when defective or out of order, the provisions of this section did not apply to the machinery to be repaired. *Green v. Babcock Bros. Lumber Co.*, 130 Ga. 469, 60 S.E. 1062 (1908) (see O.C.G.A. § 34-7-20).

Liability of master due to third person. — If the master uses the instrumentality in the master's business, and so deals with it as to practically adopt it as the master's own, the master becomes, relative to a servant injured, the owner, and is under the same duty to the servant as an owner would be. *Central of Ga. Ry. v. McClifford*, 120 Ga. 90, 47 S.E. 590 (1904); *Southern Bell Tel. & Tel. Co. v. Covington*, 139 Ga. 566, 77 S.E. 382 (1913).

Inspection by servant. — A servant is under no obligation to inspect appliances to discover concealed dangers which would not be disclosed by superficial observation. *Southern States Portland Cement Co. v. Helms*, 2 Ga. App. 308, 58 S.E. 524 (1907), later appeal, 6 Ga. App. 153, 64 S.E. 494 (1909); *Decatur Lumber Co. v. Fulton*, 26 Ga. App. 499, 106 S.E. 609 (1921); *Alford v. Zeigler*, 65 Ga. App. 294, 16 S.E.2d 69 (1941).

Not only is it true that the duty of inspecting for defects which would not be disclosed by superficial observation is not primarily imposed upon a servant who is employed merely to operate a machine or to see that it is operated, except where the injured employee is an inspector, the master's means of

knowledge of latent defects in the machinery furnished are primarily to be considered as greater than those of the servant. *Decatur Lumber Co. v. Fulton*, 26 Ga. App. 499, 106 S.E. 609 (1921).

Instruction of servants. — The purpose of instruction by the master to inexperienced servants is to inform them of the danger. *Crown Cotton Mills v. McNally*, 123 Ga. 35, 51 S.E. 13 (1905).

The instruction of servants is the nonassignable duty of the master. *Moore v. Dublin Cotton Mills*, 127 Ga. 609, 56 S.E. 839, 10 L.R.A. (n.s.) 772 (1907).

The master is bound to instruct inexperienced servants, without reference to their age, in the operation of machinery and appliances with which they are not acquainted. *Moore v. Dublin Cotton Mills*, 127 Ga. 609, 56 S.E. 839, 10 L.R.A. (n.s.) 772 (1907).

Servant's standard of care. — If a danger is obvious and as easily known to the servant as to the master, the latter will not be liable for a failure to warn. *Crown Cotton Mills v. McNally*, 123 Ga. 35, 51 S.E. 13 (1905); *Hendrix v. Vale Royal Mfg. Co.*, 134 Ga. 712, 68 S.E. 483 (1910); *Tufts v. Threlkeld*, 31 Ga. App. 452, 121 S.E. 120 (1923).

When a peril is obvious or so patent as to be readily understood by the employee by the reasonable use of the employee's senses, having in view the employee's age, intelligence, and experience, the employee will not be heard to say that the employee did not realize or appreciate it. *Atlanta, Birmingham & Coast R.R. v. King*, 55 Ga. App. 1, 189 S.E. 580 (1936).

If the danger from the continued use of a defective tool or instrument is so obvious or apparent that an ordinarily prudent person would not continue to use the instrument, a servant, although the servant may have received assurances of safety from the master, may not continue its use and hold the master liable for ensuing injury, as the use by the servant of an obviously dangerous instrument amounts to the failure to use ordinary care to avoid the consequences of the master's negligence. *Atlanta, Birmingham & Coast R.R. v. King*, 55 Ga. App. 1, 189 S.E. 580 (1936).

Compliance with master's specific command. — A servant is bound to obey a master's order unless the command includes

Safety of Tools and Machinery (Cont'd)

a violation of the law, or the act required is so obviously dangerous that no person of ordinary prudence would undertake to perform it and where the master personally gives the order and the servant obeys it, and is injured as a consequence thereof, of course, the master is liable. *Padgett v. Southern Ry.*, 48 Ga. App. 214, 172 S.E. 597 (1934).

Whether or not a master is negligent in ordering a servant to work under dangerous and hazardous conditions may depend upon the capacity of the servant, due to the servant's age or otherwise, known to the master, to appreciate the danger of the conditions of the employment. *Jordan v. Batayias*, 53 Ga. App. 538, 186 S.E. 451 (1936).

If an order was negligent and the servant knew of the peril of complying with it, or if the servant had equal means with the master of knowing of the peril, or by the exercise of ordinary care might have known thereof, then the servant could not recover for an injury received in complying with the order. *Abercrombie v. Ivey*, 59 Ga. App. 296, 200 S.E. 551 (1938).

In an action for injuries to a servant resulting from the servant's compliance with a direct and specific command of the master given with reference to an instrumentality by which the master's work is to be performed, the danger or risk incurred by the servant is not assumed by virtue of the employment, unless it involves a violation of law or the act required is so obviously dangerous that no person of ordinary prudence would undertake to perform it. *Louisville & N.R.R. v. Crapps*, 62 Ga. App. 437, 8 S.E.2d 413 (1940).

If a servant points out a danger and the master orders the servant to pursue a dangerous activity anyway, the master is liable for any injury which results. *Webb v. Standard Oil Co.*, 451 F.2d 284 (5th Cir. 1971).

Master's assurance of safety. — Where the master says, "it is safe," the law will construe these words as such a warranty that a breach of it will release the servant from the assumption of the risk. *Dessau v. Achord*, 50 Ga. App. 426, 178 S.E. 396 (1935).

An employee, in using a defective appliance furnished the servant by the master, does not necessarily assume the risk where

the servant is assured by the master that the appliance is in a safe and proper condition for use. *Louisville & N.R.R. v. Crapps*, 62 Ga. App. 437, 8 S.E.2d 413 (1940).

Where the master commanded the servant to proceed with work which the master knew was dangerous with the assurance to the servant that it was not dangerous, such act on the part of the master relieved the servant of the implied agreement of assumption of risk as to the particular activity warranted as safe, and the master cannot set up as a defense the assumption of risk set forth in former Code 1933, § 66-303 (see O.C.G.A. § 34-7-23). *Swails v. Carpenter*, 112 Ga. App. 117, 144 S.E.2d 182 (1965).

A servant cannot reasonably rely on a master's "assurances" that a hazardous condition will be corrected, and a servant must bear the loss from any injury resulting from obvious dangers, despite the fact that the servant's actions were sanctioned by the master. *Webb v. Standard Oil Co.*, 451 F.2d 284 (5th Cir. 1971).

Assumption of risk. — Where a servant for 20 years voluntarily undertook the duty of climbing a ladder which the servant described as a very dangerous activity and knew to be risky, the employer is not liable despite the employer's assurances to the servant that the ladder's dangerous condition would be repaired, since the servant assumed the risk. *Webb v. Standard Oil Co.*, 451 F.2d 284 (5th Cir. 1971).

Suspension of assumption of risk. — The fault or "assumption of risk" implied from a servant's knowledge that a tool, instrument, appliance, piece of machinery, or place of work is defective or dangerous is suspended by the master's promise to repair, made in response to the servant's complaint, so that if the servant is induced by such promise to continue at work, the servant may recover for any injury which the servant sustains by reason of such defect within a reasonable time after the making of the promise. *Atlanta, Birmingham & Coast R.R. v. King*, 55 Ga. App. 1, 189 S.E. 580 (1936).

Abrogation of assumption of risk. — While ordinarily the law reads into contracts of employment an agreement on the servant's part to assume the known risks of the employment so far as the servant has the capacity to realize and comprehend them, this implication may be abrogated by an

express or implied agreement to the contrary; if the servant complains to the master that the instrumentality appears to be dangerous, and thereupon the master commands the servant to proceed with the work and assures the servant there is no danger, the law implies a quasi-new agreement whereby the master relieves the servant of the servant's former assumption of the risk and places responsibility for the ensuing injury upon the master. *Atlanta, Birmingham & Coast R.R. v. King*, 55 Ga. App. 1, 189 S.E. 580 (1936).

Where a servant complained to the master that the instrumentality supplied by the master for the servant to accomplish the servant's assigned task appeared to be dangerous, and thereupon the master commanded the servant to proceed with the work, and assured the servant there was no danger, then, unless the danger was so obvious and manifest that no prudent man would expose himself thereto, the law implied a quasi-new agreement whereby the master relieves the servant from the servant's former assumption of risk under former Code 1933, § 66-303 (see O.C.G.A. § 34-7-23) and placed responsibility for resulting injuries upon the master. *Alford v. Zeigler*, 65 Ga. App. 294, 16 S.E.2d 69 (1941).

Employee's appreciation of danger bars action. — If a servant's knowledge of danger is equal to that of the master, a nonsuit is proper. *Central of Ga. Ry. v. Henderson*, 6 Ga. App. 459, 65 S.E. 297 (1909).

Although an employee may have had knowledge, as of a physical fact, of the defective condition of a tool, appliance or place, by reason of which the employee has sustained an injury, it by no means follows that the employee must have appreciated the danger to which the employee was exposed thereby; if this is shown to have been the case, the employee's right of recovery is not defeated, for it is an appreciation of the danger, not mere knowledge of the defect by which the danger is threatened, that bars the employee's action. *Atlanta, Birmingham & Coast R.R. v. King*, 55 Ga. App. 1, 189 S.E. 580 (1936); *Simowitz v. Register*, 60 Ga. App. 180, 3 S.E.2d 231 (1939).

It is the employee's appreciation of the danger, not mere knowledge of the defect by which the danger is threatened, that bars the

employee's action. When, however, a peril is obvious or so patent as to be readily understood by the employee by the reasonable use of the employee's senses, having in view the employee's age, intelligence, and experience, the employee will not be heard to say that the employee did not realize or appreciate it. *Simowitz v. Register*, 60 Ga. App. 180, 3 S.E.2d 231 (1939).

Pleadings. — A deficiency may be sufficiently alleged by stating that the particular contrivance was so constructed or maintained that it gave forth a result which it was designed to prevent, and which such contrivances, as they are usually constructed and maintained, do prevent. *Alford v. Zeigler*, 65 Ga. App. 294, 16 S.E.2d 69 (1941).

A defect may be described by showing that a machine was in a condition that produced certain definitely described results, which a machine not defective would not and should not produce. It is not necessary to describe minutely or particularly the physical appearance of the parts alleged to be defective. *Alford v. Zeigler*, 65 Ga. App. 294, 16 S.E.2d 69 (1941).

Motion to dismiss. — Where in a suit for personal injuries it is manifest from the allegations of the plaintiff's petition that plaintiff had at least equal opportunities with the master (the defendant) of discovering the defective condition of an appliance from which the injuries complained of resulted, a general demurrer (now motion to dismiss) to the petition was properly sustained. *Lee v. Atlantic C.L.R.R.*, 125 Ga. 655, 54 S.E. 678 (1906).

Jury question as to master's liability. — It was for the jury to determine whether, under the alleged misrepresentations and commands of the alter ego of the master, given to the servant with reference to the manner and instrumentality by which the master's work was to be done, and under the master's assurance of safety given to the servant, the injury sustained by the servant resulted from the alleged negligent misrepresentations and commands by the master; and, if so, whether the servant, in acting upon the misrepresentations and obeying the commands, was exercising ordinary care for the servant's own protection. *Padgett v. Southern Ry.*, 48 Ga. App. 214, 172 S.E. 597 (1934).

Safety of Materials and Danger of Disease

Employee's knowledge. — An employee is not presumed to have knowledge of the hidden dangers requiring scientific knowledge to fully appreciate, or to assume risk thereof; unless the employee is warned or undertakes the work with such knowledge, the employee is not as a matter of law chargeable therewith. *Middlebrooks v. Atlanta Metallic Casket Co.*, 63 Ga. App. 620, 11 S.E.2d 682 (1940).

Master's duty to warn. — A master is conclusively presumed to have knowledge of the nature of the constituents and general characteristics of the substances and things used in the master's business, which frequently makes the knowledge implied against the master superior to that implied against the servant as to things used in connection with the master's business. Having such knowledge, the master is under a duty to warn the servant of the dangers involved. *Genesco, Inc. v. Greeson*, 105 Ga. App. 798, 125 S.E.2d 786 (1962).

Where there are dangers incident to the employment, unknown to the servant, of which the master knows or ought to know, the master is under a duty to give warning thereof. *Rogers v. Bragg*, 117 Ga. App. 295, 160 S.E.2d 217 (1968).

Duty to warn of disease. — A master must warn a servant of the conditions under which the servant is employed which are liable to engender disease, and must furnish suitable protection from such danger, provided that the master is in a position to have greater knowledge of the danger than the servant. *Middlebrooks v. Atlanta Metallic Casket Co.*, 63 Ga. App. 620, 11 S.E.2d 682 (1940).

Employer's liability for disease. — Although the defendant hospital was not an insurer of the safety of its employees, it had the duty to use reasonable care to protect them against the dangers of employment which might reasonably be expected to produce disease, and would be liable to the plaintiff employee for a disease contracted in the course of employment, where the disease was brought about by the negligence of the employer. *Thigpen v. Executive Comm. of Baptist Convention*, 114 Ga. App. 839, 152 S.E.2d 920 (1966); *Miss Ga. Dairies, Inc. v. McLarty*, 114 Ga. App. 259, 150 S.E.2d 725 (1966).

Assumption of skill. — Under the "assumption of skill" doctrine, whereunder the master's technical or scientific knowledge of the master's business makes the knowledge implied to the master superior to that implied against the servant as to matters in connection with the business, the master is under a duty to warn the servant of the dangers involved. *Thigpen v. Executive Comm. of Baptist Convention*, 114 Ga. App. 839, 152 S.E.2d 920 (1966).

Servant's Torts

Employer's liability for servant's tort. — In determining the liability of a master for the negligent or willful acts of a servant, the test of liability is not whether the act was done during the existence of the employment, but whether it was done within the scope of the actual transaction of the master's business for accomplishing the ends of the servant's employment. *Gomez v. Great Atl. & Pac. Tea Co.*, 48 Ga. App. 398, 172 S.E. 750 (1934).

Where a servant departs from the prosecution of the servant's business and commits a tort while acting without the scope of the servant's authority, the person employing the servant may still be liable if the person failed to exercise due care in the selection of the servant. *Pope v. Seaboard Air Line R.R.*, 88 Ga. App. 557, 77 S.E.2d 55 (1953).

Servant's independent voluntary act. — If a servant steps aside from the master's business, for however short a time, to do an act outside the scope of and not in furtherance of the work of the servant's employment, and injury results to another from such independent voluntary act, the servant may be liable, but the master is not. *Gomez v. Great Atl. & Pac. Tea Co.*, 48 Ga. App. 398, 172 S.E. 750 (1934).

Where a servant, while engaged in the line of the servant's duties for the servant's master, commits an assault and battery upon another because of a personal quarrel or some provocation previously existing or suddenly arising, and disconnected with and not pertaining to the business of the master then in the process of transaction, the master is not liable. *Gomez v. Great Atl. & Pac. Tea Co.*, 48 Ga. App. 398, 172 S.E. 750 (1934).

Jury question as to scope of employment. — Except in plain and palpable cases, it is for the jury to decide the question whether

the servant was acting within the scope of and in furtherance of the servant's employment when the servant committed the

tortious act in question. *Gomez v. Great Atl. & Pac. Tea Co.*, 48 Ga. App. 398, 172 S.E. 750 (1934).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Relationship, §§ 203 et seq., 232 et seq., 256 et seq., 350 et seq.

C.J.S. — 30 C.J.S. Employers' Liability for Injuries to Employees, §§ 39 et seq., 71 et seq.

ALR. — Duty to warn servant of danger of cleaning, adjusting or repairing machinery while in motion, 3 ALR 1035.

Duty of master to warn servant against occupational disease, 6 ALR 355; 105 ALR 80.

Negligence of master toward fellow servant in employing a servant who is physically deficient, 11 ALR 783.

What is embraced by words "works," "ways," "equipment," "machinery," etc., in employers' liability acts, 23 ALR 716.

Duty and liability of master to servant injured by horse belonging to master, 26 ALR 871; 42 ALR 226; 60 ALR 468.

Liability of master to common-law employee for injury inflicted by instrumentality of master used by another employee in sport, 30 ALR 693.

Duty of master providing machine of standard make and in common use to equip same with safety device or guard, 36 ALR 1477.

Master's duty to servant to prevent continuance of dangerous sports, 40 ALR 1333.

Liability of independent contractors for injuries to third persons by defects in completed work, 41 ALR 8; 123 ALR 1197.

Recovery by commission salesman given exclusive territory where employer breaches contract of employment, 41 ALR 1175.

Liability of contractee and contractor inter se with respect to injuries sustained while the stipulated work is in course of performance, 44 ALR 891.

Liability of the contractee for injuries sustained by the contractor's servants in the course of the stipulated work, 44 ALR 932.

Liability of master for injuries to servant from exposure to weather conditions, 52 ALR 904.

Employer's promise to remedy defect in instrumentality as affecting defense of as-

sumption of risk or contributory negligence, 61 ALR 901.

Liability of employer for consequences of vaccination or other bodily operation to which employee is subjected, 62 ALR 195.

Liability of master for injuries inflicted on one servant by another by use, maliciously or in sport, of compressed-air device, 62 ALR 1433.

Right, as against vehicle owner, of one not in his general employment injured while assisting in remedying conditions due to accident to automobile or truck on highway, 72 ALR 1283.

Statute denying to employer defense of assumption of risk as affecting simple tool rule, 91 ALR 786.

Inadequacy of appliance for purpose contemplated by Safety Appliance Act as proximate cause of and ground of liability for injury to employee who was using it for another purpose, 96 ALR 1138.

Inference of master and servant relationship and scope of authority in action for negligent injury from fact that person whose acts or statements are relied upon was apparently performing services for defendant upon latter's premises, 112 ALR 337.

Responsibility for injury or damage by or to W.P.A. worker or other workman employed as a means of reducing unemployment, 120 ALR 1148.

Employer's compliance with specific legal standard prescribed by or pursuant to statute for equipment, structure, or material, as defense to charge of negligence, 159 ALR 870.

Liability of railroad for injury to alighting trainman as a result of condition of track or right of way, 172 ALR 594.

Liability of employer for injury to employee due to his physical unfitness for the work to which he was assigned, 175 ALR 982.

Liability in damages for injury to or death of window washer, 17 ALR2d 637.

Duty of owner of premises to furnish independent contractor or his employee a safe place of work, where contract is for repairs, 31 ALR2d 1375.

Liability of employer, other than carrier, for a personal assault upon customer, patron, or other invitee, 34 ALR2d 372.

Failure to furnish assistance to employee as affecting employer's liability for injury or death of employee, 36 ALR2d 8.

Duty of railroad company to prevent injury of employee due to surface condition of yard, 57 ALR2d 493.

Master's liability for servant's injury or death caused in whole or in part by act of God, 62 ALR2d 796.

Master's liability to servant injured by farm machinery, 67 ALR2d 1120.

Master's liability for servant's condition or injury resulting in dermatitis, 74 ALR2d 1029.

Hammer as simple tool within simple tool doctrine, 81 ALR2d 965.

Shipowner's liability for injury caused to seaman or longshoreman by cargo or its stowage, 90 ALR2d 710.

Master's liability to agricultural worker injured other than by farm machinery, 9 ALR3d 1061.

Private person's duty and liability for failure to protect another against criminal attack by third person, 10 ALR3d 619.

Physician's duties and liabilities to person examined pursuant to physician's contract with such person's prospective or actual employer or insurer, 10 ALR3d 1071.

Liability of travel agents for injuries on tour, 53 ALR3d 1310.

Liability for injury or death of participant in theatrical performance or spectacle, 67 ALR3d 451.

Tort liability for window washer's injury or death, 69 ALR4th 207.

Liability of travel publication, travel agent, or similar party for personal injury or death of traveler, 2 ALR5th 396.

What constitutes "agricultural" or "farm" labor within social-security or unemployment-compensation acts, 60 ALR5th 459.

Who is "employer" for purposes of Occupational Safety and Health Act (29 U.S.C.A. § 651 et seq.), 153 ALR Fed. 303.

34-7-21. Liability of employer for coemployees' negligence.

With the exception of railroad companies, the employer shall not be liable to one employee for injuries arising from the negligence or misconduct of other employees about the same business. (Code 1863, § 2180; Code 1868, § 2176; Code 1873, § 2202; Code 1882, § 2202; Civil Code 1895, § 2610; Civil Code 1910, § 3129; Code 1933, § 66-304.)

History of Code section. — This Code section is derived from the decisions in *Seudder v. Woodbridge*, 1 Ga. 195 (1846) and *Henderson v. Walker*, 55 Ga. 481 (1875).

Cross references. — Liability of principal for injuries to agent by other agents generally, § 10-6-39. Liability of employer for torts

of employee engaged in independent business and not subject to immediate direction and control of employer, § 51-2-4.

Law reviews. — For article, "Sexual Harassment Claims Under Georgia Law," see 6 Ga. St. B.J. 16 (2000).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

MASTER'S LIABILITY

FELLOW SERVANTS

VICE PRINCIPAL

General Consideration

In general. — The cornerstone of the fellow servant rule is that a fellow employee's negligence must be the sole cause of an injury. *Alterman v. Jinks*, 122 Ga. App. 859, 179 S.E.2d 92 (1970).

The fellow servant rule is a species of the assumption of risk. *Alterman v. Jinks*, 122 Ga. App. 859, 179 S.E.2d 92 (1970).

The fellow servant rule is an exception or departure from the respondeat superior rule. *Alterman v. Jinks*, 122 Ga. App. 859, 179 S.E.2d 92 (1970).

A master must be free from negligence before the application of the fellow servant doctrine comes into play. *Alterman v. Jinks*, 122 Ga. App. 859, 179 S.E.2d 92 (1970).

Railroad's liability. — Both under the laws of this state, and of the United States, the railroad company is liable for an injury caused to one of its servants as the result of the negligence of a fellow servant, while engaged in the performance of the duties of employment. *Southern Ry. v. Heaton*, 61 Ga. App. 386, 6 S.E.2d 339 (1939).

Availability of rule as defense. — The general rule in this state is that the fellow servant rule is available as a defense whenever the negligent servant did the act complained of in the servant's capacity of a servant or employee and was not representing the master in the discharge of nondelegable duties. *Roberts v. Ethridge*, 73 Ga. App. 400, 36 S.E.2d 883 (1946).

Cited in *Brush Elec. Light & Power Co. v. Wells*, 110 Ga. 192, 35 S.E. 365 (1900); *Baxley v. Satilla Mfg. Co.*, 114 Ga. 720, 40 S.E. 730 (1902); *Cedartown Cotton Co. v. Hanson*, 118 Ga. 176, 44 S.E. 992 (1903); *Colley v. Southern Cotton Oil Co.*, 120 Ga. 258, 47 S.E. 932 (1904); *Babcock Bros. Lumber Co. v. Johnson*, 120 Ga. 1030, 48 S.E. 438 (1904); *Lay v. Nashville, Chattanooga & St. Louis Ry.*, 131 Ga. 345, 62 S.E. 189 (1908); *Georgia Coal & Iron Co. v. Bradford*, 131 Ga. 289, 62 S.E. 193, 127 Am. St. R. 228 (1908); *Roland v. Tift*, 131 Ga. 683, 63 S.E. 133, 20 L.R.A. (n.s.) 354 (1908); *Stevens v. Bunn*, 6 Ga. App. 315, 64 S.E. 1002 (1909); *Whitfield v. Louisville & Nashville R.R.*, 7 Ga. App. 268, 66 S.E. 973 (1910); *Fraser v. Smith & Kelly Co.*, 136 Ga. 18, 70 S.E. 792 (1911); *Donaldson v. Marsh Cypress Co.*, 9 Ga. App. 267, 70 S.E. 1121 (1911); *Winn v. Fulton Bag & Cotton Mills*, 15 Ga. App. 33, 82 S.E. 586

(1914); *Lamb v. Floyd*, 148 Ga. 357, 96 S.E. 877, 1 A.L.R. 1172 (1918); *Falla v. Pine Granite Co.*, 22 Ga. App. 651, 97 S.E. 114 (1918); *Odum v. Edgar Bros. Co.*, 25 Ga. App. 144, 103 S.E. 183 (1920); *Walters v. Berry Schools*, 40 Ga. App. 751, 151 S.E. 544 (1930); *Southern Ry. v. Perdue*, 171 Ga. 134, 154 S.E. 793 (1930); *Salter v. Nugent*, 50 Ga. App. 187, 177 S.E. 513 (1934); *Gartrell v. Russell*, 51 Ga. App. 519, 180 S.E. 860 (1935); *Morrison v. Lewis*, 58 Ga. App. 677, 199 S.E. 782 (1938); *Hopkins v. Barron*, 61 Ga. App. 168, 6 S.E.2d 96 (1939); *Jackson v. Thompson*, 77 Ga. App. 367, 48 S.E.2d 903 (1948); *Hamilton Turpentine Co. v. Johnson*, 93 Ga. App. 544, 92 S.E.2d 235 (1956); *Martin v. Henson*, 95 Ga. App. 715, 99 S.E.2d 251 (1957); *Lacy v. Ferrence*, 117 Ga. App. 139, 159 S.E.2d 479 (1968); *Wiley v. Georgia Power Co.*, 134 Ga. App. 187, 213 S.E.2d 550 (1975).

Master's Liability

Elements of proof. — It is incumbent upon the injured servant to show the following facts: (1) that the fellow servant was incompetent; (2) that the injury complained of resulted directly or proximately from such incompetency; (3) either (a) that the master knew of such incompetency, or (b) that by the exercise of ordinary care the master could have known of it; (4) that the injured servant did not know of such incompetency; (5) that by the exercise of ordinary care the injured servant could not have known of it; and (6) the servant did not have equal means with the master of acquiring knowledge of such fact. *Strickland v. Foughner*, 68 Ga. App. 805, 12 S.E.2d 371 (1940).

A master is liable if the master selects an incompetent servant where there is a master-servant relationship. *Alterman v. Jinks*, 122 Ga. App. 859, 179 S.E.2d 92 (1970).

Master's representative. — A master is not bound to indemnify one servant for injuries caused by the negligence of another servant in the same common employment as the injured servant, unless the negligent servant was the master's representative. *Atkinson v. Empire Printing & Box Co.*, 76 Ga. App. 206, 45 S.E.2d 280 (1947).

Acts authorized by master. — Acts of a person authorized by the master to perform a duty the master owes to a servant are the

Master's Liability (Cont'd)

acts of the master personally insofar as they pertain to that duty; and when the servant is injured by reason of a failure to perform it, the master cannot escape liability by setting up that the duty devolved upon a fellow servant of the person injured. *Corcoran v. Merchants & Miners Transp. Co.*, 1 Ga. App. 741, 57 S.E. 962 (1907), later appeal, 4 Ga. App. 654, 62 S.E. 130 (1908).

Liability for own or vice principal's negligence. — While the master is not ordinarily liable for the negligence of a fellow servant, the master is liable for the master's own negligence or that of the master's vice principal acting for the master. *Maxwell v. Harrell*, 115 Ga. App. 97, 153 S.E.2d 653 (1967).

The fellow servant doctrine does not protect an employer from being charged with direct liability for its own negligence in hiring or retaining an employee with knowledge that the employee's presence or the manner in which the employee performs the duties poses a danger to co-employees. *Lindsey v. Winn Dixie Stores, Inc.*, 186 Ga. App. 867, 368 S.E.2d 813 (1988); *Hardee's Food Sys. v. Evans*, 197 Ga. App. 5, 397 S.E.2d 474 (1990).

Negligence in use of furnished appliances. — When safe appliances are furnished, and an injury to a servant is plainly attributable solely to the negligence of fellow servants in the manner of using them or the servant failing to use them, the master is not chargeable therewith. *Henderson v. Ocean S.S. Co.*, 15 Ga. App. 790, 84 S.E. 230 (1915).

Liability for superintendent and foreman's negligence. — A master is not liable for the negligence of the master's superintendent and foreman, where the alleged negligence of the superintendent and foreman did not consist in a violation or omission of any nonassignable duty of the master, or the issuance of any command given as such a vice principal, but lay solely in the master's removal of the master's hands, without warning to the servant, from a ladder which the master was holding in place and on which the servant had mounted, and in thus causing the ladder to fall. *Haynie v. Foremost Dairies, Inc.*, 54 Ga. App. 369, 187 S.E. 907 (1936).

Liability for volunteer. — Legal liability results only from a breach of legal duty

which implies the existence of some legal relation. One who, without any employment whatever, but at the request of a servant who has no authority to employ other servants, voluntarily undertakes to perform service for a master is a mere volunteer, and the master does not owe the servant any duty, except not to injure the servant willfully and wantonly after the servant's peril is discovered. *Barber v. Rich's, Inc.*, 92 Ga. App. 880, 90 S.E.2d 666 (1955).

Where defendant's servant had no authority to employ plaintiff-customer to assist servant in the manner alleged, the plaintiff became the servant of the defendant's servant when plaintiff assisted the servant of the master and since in this capacity the plaintiff was not the servant or invitee of the defendant, plaintiff could not recover for injuries received. *Barber v. Rich's, Inc.*, 92 Ga. App. 880, 90 S.E.2d 666 (1955).

Knowledge of fellow servant's incompetence. — If a plaintiff knew that plaintiff's fellow servants, about whose conduct plaintiff is complaining, were retained after plaintiff had notified the employer of their incompetence, plaintiff should not have engaged in the same service with them any more than plaintiff should work with a defective tool given plaintiff by an employer. *Atkinson v. Empire Printing & Box Co.*, 76 Ga. App. 206, 45 S.E.2d 280 (1947).

Pleadings. — Where a petition shows that the sole proximate cause of the alleged injuries to the plaintiff's husband was the negligence of a fellow servant, it is not error to sustain the general demurrer (now motion to dismiss) of the defendant corporation-master to dismiss the action as to it. *Bray v. Westinghouse Elec. Corp.*, 102 Ga. App. 803, 117 S.E.2d 919 (1960).

Fellow Servants

Definition of fellow servants. — Two persons subject to control and direction by the same general master in the same common object are fellow servants, and if one is injured by the negligence of the other, the master, save when by statute otherwise provided, is not liable, although the negligent servant has the right to direct the work of the other. *Hamby v. Union Paper-Mills Co.*, 110 Ga. 1, 35 S.E. 297 (1900).

Employees of a common master, engaged in labor for the furtherance of the general

purpose of the business in which they contract to serve, are fellow servants within the purview of this section. *Georgia Coal & Iron Co. v. Bradford*, 131 Ga. 289, 62 S.E. 193, 127 Am. St. R. 228 (1908); *Foundation Co. v. Gobay*, 24 Ga. App. 494, 101 S.E. 392 (1919).

In determining whether certain servants are fellow servants it is necessary to decide whether the servants were "about the same business," or were "engaged in the common pursuit." *Holliday v. Merchants & Miners Transp. Co.*, 161 Ga. 949, 132 S.E. 210 (1926).

Convicts. — Convicts, whose service was compulsory, were not fellow servants within the meaning of this section. *Hall County v. Loggins*, 110 Ga. App. 432, 138 S.E.2d 699 (1964) (see O.C.G.A. § 34-7-21).

Vice Principal

Determination of vice principal by duties.

— It is not the grade, title, or position in the service that determines whether a person is the vice principal of the master or a fellow servant, but it is the duty which the person performs toward the other servants. *Moore v. Dublin Cotton Mills*, 127 Ga. 609, 56 S.E. 839, 10 L.R.A. (n.s.) 772 (1907); *Haynie v. Foremost Dairies, Inc.*, 54 Ga. App. 369, 187 S.E. 907 (1936).

The term "vice principal," as used in the fellow servant law, has been defined as including any servant who represents the master in the discharge of those personal or absolute duties which every master owes to the master's servants, such duties being often referred to as the nonassignable duties of a master. *Moore v. Dublin Cotton Mills*, 127 Ga. 609, 56 S.E. 839, 10 L.R.A. (n.s.) 772 (1907).

A workman engaged on the same job with others, although the workman may have the direction of it, is not a vice principal of the master, but is a mere fellow servant, unless the workman is performing nondelegable, or nonassignable, duties of the master and therefore a servant injured by the workman could recover against their employer. *Miller v. Fulton*, 111 Ga. App. 849, 143 S.E.2d 578 (1965).

Workman directing labor. — A workman, although the workman may direct labor performed, "is not a vice principal of the master, but stands on the footing of a mere fellow servant." *Moore v. Ross*, 41 Ga. App.

509, 153 S.E. 575 (1930).

General superintendent. — A workman engaged in the same job with two or three others, and having the direction of it, is not a general superintendent of a corporation so as to bind it as such, but stands on the footing of a mere fellow servant. *McDonald v. Eagle & Phenix Mfg. Co.*, 67 Ga. 761 (1881); *Shepherd v. Southern Pine Co.*, 118 Ga. 292, 45 S.E. 220 (1903).

Authority to employ other servants. — In *Moseley v. Schofield's Sons Co.*, 123 Ga. 197, 51 S.E. 309 (1905), it was held that one who had authority to employ laborers, and was in charge of the work is a vice principal. *Ingram v. Hilton & Dodge Lumber Co.*, 125 Ga. 658, 54 S.E. 648 (1906).

Provider of unsafe instrumentalities. — Under the allegations as made in the petition in *International Cotton Mills v. Webb*, 22 Ga. App. 309, 96 S.E. 16 (1918), the one who furnishes the alleged defective and unsafe instrumentality to the employee, and who assured the employee that it might be safely used, occupied the position of vice principal to the master. *Stevens v. Bibb Mfg. Co.*, 16 Ga. App. 793, 86 S.E. 445 (1915).

Vice principal assuming status of servant. — Whenever the vice principal of a master in fact enters upon the discharge of duties which relate solely to the ordinary work and functions of a servant, the vice principal will, independently of the title or position, be presumed to have assumed the status of a mere servant, with the result that when the vice principal thus acts the master is not liable for the vice principal's acts of negligence whereby another servant is injured. *Haynie v. Foremost Dairies, Inc.*, 54 Ga. App. 369, 187 S.E. 907 (1936).

Foreman assuming status of servant. — While doing a servant's work engaged solely in executing the ordinary details of labor in connection with another servant, a foreman who in other respects stands in the place of the master is a fellow servant, and the foreman's negligence therein will not render the master liable to the other servant, except where the master is a railroad company. *McGovern v. Columbus Mfg. Co.*, 80 Ga. 227, 5 S.E. 492 (1887); *Wallace v. Kimball Co.*, 20 Ga. App. 617, 93 S.E. 260 (1917).

Assumption of authority. — A fellow servant without the master's knowledge cannot, by an assumption of authority, convert one-

Vice Principal (Cont'd)

self into a vice principal or alter ego of the master. *Hilton & Dodge Lumber Co. v.*

Ingram, 119 Ga. 652, 46 S.E. 895, 100 Am. St. R. 204 (1904); *Chenall v. Palmer Brick Co.*, 125 Ga. 671, 54 S.E. 663 (1906).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Relationship, § 339 et seq.

C.J.S. — 30 C.J.S., Employers' Liability for Injuries to employees, § 214 et seq.

ALR. — Liability of master to common-law employee for injury inflicted by instrumentality of master used by another employee in sport, 30 ALR 693.

Master's duty to servant to prevent continuance of dangerous sports, 40 ALR 1333.

Liability of employer for consequences of vaccination or other bodily operation to which employee is subjected, 62 ALR 195.

Liability of master for injuries inflicted on one servant by another by use, maliciously or in sport, of compressed-air device, 62 ALR 1433.

Workmen's compensation: rights and remedies where employee was injured by a third person's negligence, 67 ALR 249; 88 ALR 665; 106 ALR 1040.

Assumption of risk of overstrain consequent upon failure of other employee to lift his share, 74 ALR 157.

Servant's liability to master for negligent or other wrongful injury to person or property of master or of third person for which master is responsible, 110 ALR 831.

Right of employer sued for tort of employee to implead the latter, 5 ALR3d 871.

Subrogation of employer's liability insurer to employer's right of indemnity against negligent employee, 53 ALR3d 631.

34-7-22. Contracts exempting employer from liability are null and void.

All contracts between employer and employee made in consideration of employment, whereby the employer is exempted from liability to the employee arising from the negligence of the employer or his employees, as such liability is fixed by law, shall be null and void, as against public policy. (Ga. L. 1895, p. 97, § 1; Civil Code 1895, § 2613; Civil Code 1910, § 3132; Code 1933, § 66-302.)

Cross references. — Contracts which contravene public policy generally, § 13-8-2.

JUDICIAL DECISIONS

Contracts for benefits in case of injury. — A contract between an employee and a master, or another acting in the latter's interest, by the terms of which the employee when physically injured, whether as a result of the employee's own negligence or not, or when sick, is to receive pecuniary and other valuable benefits, and which stipulates that the employee's voluntary acceptance of any of such benefits in case of injury is to operate as

a release of the master from all liability on account thereof, is not contrary to public policy. *Petty v. Brunswick & W. Ry.*, 109 Ga. 666, 35 S.E. 82 (1900); *Houser v. Savannah Elec. Co.*, 9 Ga. App. 766, 72 S.E. 276 (1911).

Cited in *New v. Southern Ry.*, 116 Ga. 147, 42 S.E. 391, 59 L.R.A. 115 (1902); *Brown v. Five Points Parking Ctr.*, 121 Ga. App. 819, 175 S.E.2d 901 (1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Relationship, §§ 214, 215.

ALR. — Validity of contract providing that acceptance of benefits from relief association shall bar action against employer, 12 ALR 477.

Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 ALR 97; 99 ALR 408; 96 ALR2d 208.

Constitutionality of statute relating to release of, or contract of employment for the enforcement of, claims for personal injuries or death, or invalidating contracts exonerat-

ing an employer from liability in respect of injury to employee, 84 ALR 1297

Personal liability of auctioneer to owner or mortgagee for conversion, 96 ALR2d 208.

Provision in employment contract requiring written notice before instituting action, 4 ALR3d 439.

Validity, enforceability, and effect of provision in seamen's employment contract stipulating the maximum recovery for scheduled personal injuries, 9 ALR3d 417.

What constitutes duress by employer or former employer vitiating employee's release of employer from claims arising out of employment, 30 ALR4th 294.

34-7-23. Assumption of risk by employees; requirements for recovery of damages.

An employee assumes the ordinary risks of his employment and is bound to exercise his own skill and diligence to protect himself. In actions for injuries arising from the negligence of the employer in failing to comply with the duties imposed by Code Section 34-7-20, in order that the employee may recover, it must appear that the employer knew or ought to have known of the incompetency of the other employee or of the defects or danger in the machinery supplied; and it must also appear that the employee injured did not know and had not equal means of knowing such fact and by the exercise of ordinary care could not have known thereof. (Civil Code 1895, § 2612; Civil Code 1910, § 3131; Code 1933, § 66-303; Ga. L. 1998, p. 128, § 34.)

History of Code section. — This Code section is derived from the decisions in *McDonald v. Eagle & Phenix Mfg. Co.*, 68 Ga. 839 (1882); *Georgia R.R. & Banking Co. v. Nelms*, 83 Ga. 70, 9 S.E. 1049 (1889); *Davis v. Augusta Factory*, 92 Ga. 712, 18 S.E. 974 (1893).

Law reviews. — For article discussing origin and construction of Georgia provisions concerning master-servant relationship, see 14 Ga. L. Rev. 239 (1980).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
COMPETENCY OF EMPLOYEES
SAFETY OF PLACE OF WORK
SAFETY OF TOOLS AND MACHINERY

General Consideration

Definition of assumption of risk. — Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servants' duty shall be at the servants' risk. *Prather v. Richmond & D.R.R.*, 80 Ga. 427, 9 S.E. 530, 12 Am. St. R. 263 (1888); *East Tennessee, V. & Ga. Ry. v. Reynolds*, 93 Ga. 570, 20 S.E. 70 (1894); *Worlds v. Georgia R.R.*, 99 Ga. 283, 25 S.E. 646 (1896); *Plunkett v. Central of Ga. Ry.*, 105 Ga. 203, 30 S.E. 728 (1898).

As a general proposition, risk not caused by the master's negligent act or omission is assumed by the servant. *Neary v. Georgia Pub. Serv. Co.*, 27 Ga. App. 238, 107 S.E. 893, cert. denied, 27 Ga. App. 836 (1921).

An employee does not ordinarily assume the risks of negligence of the employer. *Louisville & N.R.R. v. Crapps*, 62 Ga. App. 437, 8 S.E.2d 413 (1940).

Knowledge of risk. — Assumption of risk is predicated on knowledge, actual or constructive. A servant does not assume a risk about which the servant did not know or was not bound to know. *Western & A.R.R. v. Morgan*, 40 Ga. App. 611, 150 S.E. 850 (1929).

An employee is not presumed to have knowledge of hidden dangers requiring scientific knowledge to fully appreciate or to assume the risk thereof; unless the employee is warned or undertakes the work with such knowledge, the employee is not as a matter of law chargeable therewith. *Middlebrooks v. Atlanta Metallic Casket Co.*, 63 Ga. App. 620, 11 S.E.2d 682 (1940).

Equal means of knowing of danger. — In a suit by a servant for an injury arising from the negligence of the master in failing to furnish proper machinery or appliances or a safe place of work, the servant, to be entitled to recover, must show, among other things, that the servant did not have equal means with the master of knowing of the danger. *Abercrombie v. Ivey*, 59 Ga. App. 296, 200 S.E. 551 (1938).

Master's knowledge of employee's appreciation of danger. — Whether or not the master is negligent in ordering a servant to work under dangerous and hazardous conditions may depend upon the capacity of the

servant, due to the servant's age or otherwise, known to the master, to appreciate the danger of the conditions of the employment. *Jordan v. Batayias*, 53 Ga. App. 538, 186 S.E. 451 (1936).

Nature of risks assumed. — When a peril is obvious or so patent as to be readily understood by the employee by the reasonable use of the employee's senses, having in view the employee's age, intelligence, and experience, the employee will not be heard to say that the employee did not realize or appreciate it. *Atlanta, Birmingham & Coast R.R. v. King*, 55 Ga. App. 1, 189 S.E. 580 (1936).

When one enters the service of another, one impliedly assumes the usual and ordinary risks incident to the employment about which one is engaged; and in discharging the duties which one has undertaken to perform, one is bound to take notice of the ordinary and familiar laws of nature applicable to the subject to which one's employment relates. *Hollingsworth v. Thomas*, 148 Ga. App. 38, 250 S.E.2d 791 (1978).

Obvious risks. — Obvious risks incident to employment are assumed by the servant in the servant's contract of employment. *Howard v. Central of Ga. Ry.*, 138 Ga. 537, 75 S.E. 624 (1912); *International Cotton Mills v. Carroll*, 22 Ga. App. 26, 95 S.E. 472 (1918).

Standing in front of tractor operated by inexperienced driver. — Employee who sued employer for personal injuries should have been aware that standing in front of a large farming tractor, parked on an incline, while a person wholly inexperienced in operating the machinery started the tractor and "eased" the clutch out, was dangerous and was not entitled to recover against an employer as a matter of law. *Clayton v. Larisey*, 190 Ga. App. 512, 379 S.E.2d 789 (1989).

Ordinary and extraordinary risks. — Ordinary risks are usually described as being those incident to the business, and do not imply the result of the master's negligence. The expression "extraordinary risks" is generally used to describe the risk arising from the negligence of the master, and they are generally held not to be assumed unless known or obvious. *Emanuel v. Georgia & F. Ry.*, 142 Ga. 543, 83 S.E. 230 (1914); *Simowitz v. Register*, 60 Ga. App. 180, 3 S.E.2d 231 (1939); *Roberts v. Ethridge*, 73 Ga. App. 400, 36 S.E.2d 883 (1946).

Waiver of assumption of risk. — Assumption of risk is a contractual incident of employment; being a contractual implication, it may be vitiated by express agreement or by a repugnant implication arising from particular transactions or communications between the parties. *Seagraves v. Abco Mfg. Co.*, 118 Ga. App. 414, 164 S.E.2d 242 (1968), later appeal, 121 Ga. App. 224, 173 S.E.2d 416 (1970).

Minor's assumption of risk. — Children under the age of 14 are not to be considered as having assumed the risks of ordinarily patent, obvious and known dangers not within the scope of their capacity to appreciate and avoid. *Eagle & Phenix Mills v. Moncrief*, 17 Ga. App. 10, 86 S.E. 260 (1915). See also *King v. Seaboard Air-Line Ry.*, 1 Ga. App. 88, 58 S.E. 252 (1907).

A child under the age of 14 assumes only such ordinary risks of employment as the child is capable of appreciating and understanding, and a master who, personally or through an authorized agent, directs such a child to do an act which, if performed according to the means and method provided by the master, would be attended with danger, owes the duty of warning the child of the dangers incident to its performance, and in doing so must take into consideration the child's incapacity to appreciate and understand danger. The duty incumbent upon the child is to exercise due care according to the child's age and the child's own actual capacity, rather than the ordinary care exacted by the general rule of every prudent man. *Moore v. Ross*, 41 Ga. App. 509, 153 S.E. 575 (1930).

Since a minor 12 years of age does not as a matter of law possess the capacity to appreciate and apprehend dangers which are ordinarily patent and obvious to adults, an adult, in ordering a minor of that age as a servant to work at a place and under circumstances where the minor is exposed to a danger which is patent and obvious to the employer, may in so employing the minor, be guilty of negligence. *Jordan v. Batayias*, 53 Ga. App. 538, 186 S.E. 451 (1936).

Fellow servant rule. — The fellow servant rule is a species of the assumption of risk rule. *Alterman v. Jinks*, 122 Ga. App. 859, 179 S.E.2d 92 (1970).

The fellow servant rule is an exception or departure from the respondeat superior

rule. *Alterman v. Jinks*, 122 Ga. App. 859, 179 S.E.2d 92 (1970).

The cornerstone of the fellow servant rule is that a fellow employee's negligence must be the sole cause of an injury. *Alterman v. Jinks*, 122 Ga. App. 859, 179 S.E.2d 92 (1970).

A master must be free from negligence before application of the fellow servant doctrine comes into play. *Alterman v. Jinks*, 122 Ga. App. 859, 179 S.E.2d 92 (1970).

Duties of master. — A master must warn a servant of the conditions under which the servant is employed which are liable to engender disease, and must furnish suitable protection from such danger, provided that the master is in a position to have greater knowledge of the danger than the servant. *Middlebrooks v. Atlanta Metallic Casket Co.*, 63 Ga. App. 620, 11 S.E.2d 682 (1940).

Duties of master. — As to place, appliances, instrumentalities, and fellow servants, the law places upon the master a personal or positive, sometimes called nondelegable, duty to provide for the master's servant. *Atkinson v. Empire Printing & Box Co.*, 76 Ga. App. 206, 45 S.E.2d 280 (1947).

Reasonable care by master. — Prima facie, a servant does not assume risks which may be obviated by the master's exercise of reasonable care. *King v. Seaboard Air-Line Ry.*, 1 Ga. App. 88, 58 S.E. 252 (1907).

Liability of master. — The liability of the master to a servant for negligence is strictly limited. *Bray v. Westinghouse Elec. Corp.*, 102 Ga. App. 803, 117 S.E.2d 919 (1960).

Assumption of skill. — The master is charged with the knowledge of the usual and ordinary dangers to which the master is exposing the employees, and is bound to know the normal condition of the master's premises, and to know of the nature of the constituents and general characteristics of the substances used in the master's business, so that the master can give directions for the conduct thereof with ordinary safety to the master's servants performing the work with ordinary care, and particularly is the master chargeable with knowledge of risks ascertainable only through a knowledge of scientific facts which an uneducated man is not presumed to know; the doctrine that imputes this knowledge to the master is called the "assumption of skill" and for the purpose of determining this knowledge the

General Consideration (Cont'd)

law has a standard which does not vary with the actual capacity of the particular master, and consequently the master's ignorance is no excuse for a failure to warn. *Middlebrooks v. Atlanta Metallic Casket Co.*, 63 Ga. App. 620, 11 S.E.2d 682 (1940).

Employee's injury. — An injury to a servant must be the natural and probable consequence of the employer's negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from the wrongdoer's act. *Alford v. Zeigler*, 65 Ga. App. 294, 16 S.E.2d 69 (1941).

Action for master's negligence. — An action brought under former Code 1933, § 66-301 (see O.C.G.A. § 34-7-20) was one for negligence on the part of the master, and where it appeared from the evidence that the servant had equal means with the master of knowing of the defects in machinery and the dangers of employment, and the danger was as obvious to the servant as it was to the master, the servant was not entitled to recovery, notwithstanding any assurances of safety by the master. *Swails v. Carpenter*, 112 Ga. App. 117, 144 S.E.2d 182 (1965).

In suits for injuries arising from the negligence of the employer in failing to comply with the duties imposed by this section, the employee's petition in order to set forth a cause of action must set out issuable facts constituting not only negligence on the part of the employer, causing the injuries, but also due care on the part of the employee; and it must appear from the allegations that the injured employee did not know, and had no equal means of knowing, all that which is charged as negligence to the employer, and by the exercise of ordinary care could not have known. *Bowers v. Louisville & N.R.R.*, 33 Ga. App. 692, 127 S.E. 667 (1925); *Flippin v. Central of Ga. Ry.*, 35 Ga. App. 243, 132 S.E. 918 (1926); *Clark v. Western & A.R.R.*, 41 Ga. App. 317, 152 S.E. 847 (1930); *Holman v. American Auto. Ins. Co.*, 201 Ga. 454, 39 S.E.2d 850 (1946); *Elrod v. Ogles*, 78 Ga. App. 376, 50 S.E.2d 791 (1948); *A.F. King & Son v. Simmons*, 107 Ga. App. 628, 131 S.E.2d 214 (1963); *Owensby v. Jones*, 109 Ga. App. 398, 136 S.E.2d 451 (1964) (see O.C.G.A. § 34-7-23).

Questions for jury resolution. — Ordinarily, what constitutes ordinary care, or the lack of it, whether a servant assumed a risk which caused the injury, and similar questions, are mixed issues of law and fact peculiarly for jury resolution, and to some extent must be based on inferences to be drawn from the evidence. *Jones v. Aaron*, 124 Ga. App. 738, 186 S.E.2d 132 (1971).

Cited in *Nobel v. Jones*, 103 Ga. 584, 30 S.E. 535 (1898); *Western & A.R.R. v. Bradford*, 113 Ga. 276, 38 S.E. 823 (1901); *Evans v. Mills*, 119 Ga. 448, 46 S.E. 674 (1904); *Seaboard Air-Line Ry. v. Pierce*, 120 Ga. 230, 47 S.E. 581 (1904); *Babcock Bros. Lumber Co. v. Johnson*, 120 Ga. 1030, 48 S.E. 438 (1904); *Crown Cotton Mills v. McNally*, 127 Ga. 404, 56 S.E. 452 (1907); *Turner v. Seville Gin & Whse. Co.*, 127 Ga. 555, 56 S.E. 739 (1907); *Atlanta & B. Air-Line Ry. v. McManus*, 1 Ga. App. 302, 58 S.E. 258 (1907); *Cedartown Cotton & Export Co. v. Miles*, 2 Ga. App. 79, 58 S.E. 289 (1907); *Southern States Portland Cement Co. v. Helms*, 2 Ga. App. 308, 58 S.E. 524 (1907); *Short v. Cherokee Mfg. Co.*, 3 Ga. App. 377, 59 S.E. 1115 (1908); *Freeman v. Savannah Elec. Co.*, 130 Ga. 449, 60 S.E. 1042 (1908); *Hobbs v. Small*, 4 Ga. App. 627, 62 S.E. 91 (1908); *Taylor v. Virginia-Carolina Chem. Co.*, 4 Ga. App. 705, 62 S.E. 470 (1908); *Brown v. Rome Mach. & Foundry Co.*, 5 Ga. App. 142, 62 S.E. 720 (1908); *Roland v. Tift*, 131 Ga. 683, 63 S.E. 133, 20 L.R.A. (n.s.) 354 (1908); *Holland v. Durham Coal & Coke Co.*, 131 Ga. 715, 63 S.E. 290 (1908); *Williams v. Garbutt Lumber Co.*, 132 Ga. 221, 64 S.E. 65 (1909); *Redding v. Central Ga. Tel. Co.*, 6 Ga. App. 831, 65 S.E. 1068 (1909); *Smith v. Southern Ry.*, 8 Ga. App. 822, 70 S.E. 192 (1911); *Mills v. Bartow Lumber Co.*, 9 Ga. App. 171, 70 S.E. 983 (1911); *Elliott v. Tifton Mill & Gin Co.*, 12 Ga. App. 498, 77 S.E. 667 (1913); *Spencer v. Lauer & Harper Co.*, 14 Ga. App. 35, 81 S.E. 387 (1913); *Lawrenceville Oil Mill v. Walton*, 143 Ga. 259, 84 S.E. 584 (1915); *Green v. Brinson Ry.*, 16 Ga. App. 639, 85 S.E. 931 (1915); *Young v. Stuart Lumber Co.*, 17 Ga. App. 410, 87 S.E. 149 (1915); *Williams v. Southern Ry.*, 144 Ga. 565, 87 S.E. 771 (1916); *Niblett v. LaGrange Mills*, 18 Ga. App. 173, 88 S.E. 1009 (1916); *Kirbo v. Southern Ry.*, 18 Ga. App. 187, 89 S.E. 179 (1916); *Rush v. Southern Ry.*, 19 Ga. App.

521, 91 S.E. 898 (1917); *City of Atlanta v. Hagan*, 20 Ga. App. 822, 93 S.E. 541 (1917); *Charleston & W.C. Ry. v. Patton*, 22 Ga. App. 554, 96 S.E. 504 (1918); *Decatur Lumber Co. v. Fulton*, 26 Ga. App. 499, 106 S.E. 609 (1921); *Central of Ga. Ry. v. Lindsey*, 28 Ga. App. 198, 110 S.E. 636 (1922); *Wood v. Pynetree Paper Co.*, 29 Ga. App. 81, 114 S.E. 83 (1923); *Newman v. Griffin Foundry & Mach. Co.*, 38 Ga. App. 518, 144 S.E. 386 (1928); *Atlanta, Birmingham & Coast R.R. v. Mullis*, 43 Ga. App. 692, 159 S.E. 893 (1931); *Tanner v. Louisville & N.R.R.*, 45 Ga. App. 734, 165 S.E. 761 (1932); *Gartrell v. Russell*, 51 Ga. App. 519, 180 S.E. 860 (1935); *Story v. Crouch Lumber Co.*, 61 Ga. App. 210, 6 S.E.2d 86 (1939); *Kidd v. Williamson*, 61 Ga. App. 890, 8 S.E.2d 590 (1940); *Ray v. Western & A.R.R.*, 62 Ga. App. 609, 9 S.E.2d 92 (1940); *Daugherty v. Summerall*, 64 Ga. App. 638, 13 S.E.2d 705 (1941); *Jackson v. Thompson*, 77 Ga. App. 367, 48 S.E.2d 903 (1948); *Evans v. Carroll*, 85 Ga. App. 227, 68 S.E.2d 608 (1952); *Howerdd v. Whitaker*, 87 Ga. App. 850, 75 S.E.2d 572 (1953); *Hanson v. Atlanta Lodge No. 78 B.P.O. Elks, Inc.*, 88 Ga. App. 116, 76 S.E.2d 77 (1953); *Harris v. Price*, 95 Ga. App. 521, 98 S.E.2d 118 (1957); *Bray v. Westinghouse Elec. Corp.*, 102 Ga. App. 803, 117 S.E.2d 919 (1960); *Henry v. Adams*, 111 Ga. App. 297, 141 S.E.2d 603 (1965); *Thigpen v. Executive Comm. of Baptist Convention*, 114 Ga. App. 839, 152 S.E.2d 920 (1966); *Taff v. Harris*, 118 Ga. App. 611, 164 S.E.2d 881 (1968); *Webb v. Standard Oil Co.*, 414 F.2d 320 (5th Cir. 1969); *Taylor v. Bolton*, 121 Ga. App. 141, 173 S.E.2d 96 (1970); *Mathis-Akins Concrete Block Co. v. Tucker*, 127 Ga. App. 699, 194 S.E.2d 604 (1972); *Murray Chevrolet Co. v. Godwin*, 129 Ga. App. 153, 199 S.E.2d 117 (1973); *Dodd v. Clary*, 135 Ga. App. 296, 217 S.E.2d 397 (1975); *Butler v. Shirah*, 154 Ga. App. 111, 267 S.E.2d 647 (1980).

Competency of Employees

Selection and retention of competent servants. — The duty of the master to select and retain only competent servants is not absolute, but is to be measured by knowledge, actual or constructive, of the probable results of the master's conduct. Likewise, where a servant has knowledge, or has an equal opportunity with the master to acquire knowledge, of the incompetency of a fellow

servant there can be no recovery; in such a case the servant will be said to have "waived" the negligence of the master. *Southern Ry. v. Roberts*, 206 F.2d 508 (5th Cir. 1953).

Knowledge of fellow servants' incompetence. — If the plaintiff knew that plaintiff's fellow servants, about whose conduct plaintiff is complaining, were retained after plaintiff notified the employer of their incompetence, plaintiff should not have engaged in the same service with them any more than plaintiff should work with a defective tool given plaintiff by an employer. *Atkinson v. Empire Printing & Box Co.*, 76 Ga. App. 206, 45 S.E.2d 280 (1947).

Safety of Place of Work

Master's duty. — A master is under an absolute duty to a servant to furnish the servant a safe working place and to warn of unusual or newly developed dangers which arise in the course of the employment and which are likely to escape an ordinarily prudent servant's knowledge under the circumstances. The servant may, without creating an imputation of negligence against oneself, rely upon the master's performance of these duties until such time as the servant shall discover, or in the exercise of ordinary diligence should discover, that there has been a failure in this respect upon the master's part. *Simowitz v. Register*, 60 Ga. App. 180, 3 S.E.2d 231 (1939).

The specific duty to furnish a safe place to work relates to the equipment of houses, plants and other similar structures, though, of course, it is a general duty of the master, as to all times and all places, not to expose the master's servant to an extraordinary hazard, of which the master has knowledge, actual or constructive, and of which the servant is ignorant, and could not by ordinary diligence acquire knowledge. *Atkinson v. Empire Printing & Box Co.*, 76 Ga. App. 206, 45 S.E.2d 280 (1947).

Knowledge that fumes or dust poisonous. — A master must take into account the properties of such substances as the master employs for the purposes of the master's business and the operation of familiar physical laws upon these substances, and the master is chargeable with knowledge of the fact that fumes or dust given off by various substances used in industrial processes are poisonous to persons who inhale them.

Safety of Place of Work (Cont'd)

Middlebrooks v. Atlanta Metallic Casket Co., 63 Ga. App. 620, 11 S.E.2d 682 (1940).

Employer's duty not abated because of construction, renovation. — It is the duty of the employer to provide its employees with a safe workplace and to warn them of any unusual conditions that may exist, or of any conditions of which employees may have no knowledge, and this duty is not abated when construction or renovation is being done at the workplace; indeed, it might be argued that the employer's duty is enhanced in such situations, inasmuch as it would have knowledge which the ordinary employee might not possess. *Church v. SMS Enters.*, 186 Ga. App. 791, 368 S.E.2d 554 (1988).

Assumption of risk. — Dangers arising from an unsafe place are not included within the risks assumed by the servant. *Nashville, C. & St. L. Ry. v. Hilderbrand*, 48 Ga. App. 140, 172 S.E. 87 (1933); *Middlebrooks v. Atlanta Metallic Casket Co.*, 63 Ga. App. 620, 11 S.E.2d 682 (1940); *Owensby v. Jones*, 109 Ga. App. 398, 136 S.E.2d 451 (1964).

Inspections by servant. — A servant or employee is not required to make a special inspection to see the condition of the place furnished to the servant, but if, by exercising ordinary care, the servant can discover the condition of it, it is the servant's duty to do so. *Spivey v. Lovett & Brinson*, 48 Ga. App. 335, 172 S.E. 658 (1934); *Hopkins v. Barron*, 61 Ga. App. 168, 6 S.E.2d 96 (1939).

Safety of Tools and Machinery

Employee's duty of care. — An adult employee is to exercise ordinary care to protect oneself from being injured by defective or dangerous machinery; the employee is to exercise that degree of care which might reasonably be expected of an ordinarily prudent person under like circumstances. *Georgia Cotton Oil Co. v. Jackson*, 112 Ga. 620, 37 S.E. 873 (1901).

Inspection by employee. — A servant is under no obligation to inspect appliances to discover concealed dangers which would not be disclosed by superficial observation. *Alford v. Zeigler*, 65 Ga. App. 294, 16 S.E.2d 69 (1941).

An employee is under no duty to inspect a ladder supplied by an employer to discover defects which would not be discernible by

mere observation. *A.F. King & Son v. Simmons*, 107 Ga. App. 628, 131 S.E.2d 214 (1963).

Employee's knowledge of defect. — In a farm employee's action for negligence against an employer, there was no basis for a recovery for furnishing defective machinery under O.C.G.A. § 34-7-20, where the evidence was uncontroverted that the employee had equal knowledge with the employer of a defect in the "power takeoff" of the tractor, the employee's claim was barred by the plain language of O.C.G.A. § 34-7-23 and the trial court erred in giving a separate instruction on the liability for furnishing defective machinery which was not adjusted to the evidence. *Strickland v. Howard*, 214 Ga. App. 307, 447 S.E.2d 637 (1994).

Latent defects. — Though a servant is bound to observe open and obvious dangers such as would be disclosed by the exercise of ordinary care, the servant has the right to assume that the master has performed the duty of furnishing the servant with a safe place to work and is under no obligation to inspect the work place in order to discover latent defects not open to ordinary observation. *Owensby v. Jones*, 109 Ga. App. 398, 136 S.E.2d 451 (1964).

In a case of latent defects — those which are discoverable by proper inspection — the master is necessarily held to a higher standard of conduct than the servant, since the master owes to the servant the duty of inspection. *Nashville, C. & St. L. Ry. v. Hilderbrand*, 48 Ga. App. 140, 172 S.E. 87 (1933); *Owensby v. Jones*, 109 Ga. App. 398, 136 S.E.2d 451 (1964).

Nature of risks assumed. — An adult servant of ordinary intelligence will be held to be affected with knowledge of a manifest risk or danger incident to the doing of a particular thing in the operation of a machine, during the servant's employment, although the servant may be inexperienced as to such operation and though the master may have failed to instruct the servant in respect thereto. *Self v. West*, 82 Ga. App. 708, 62 S.E.2d 424 (1950).

If the danger from the continued use of a defective tool or instrument is so obvious or apparent that an ordinarily prudent person would not continue to use the instrument, a servant, although the servant may have received assurances of safety from the master,

may not continue its use and hold the master liable for ensuing injury, as the use by the servant of an obviously dangerous instrument amounts to the failure to use ordinary care to avoid the consequences of the master's negligence. *Atlanta, Birmingham & Coast R.R. v. King*, 55 Ga. App. 1, 189 S.E. 580 (1936).

Compliance with master's order. — It is actionable negligence for a master to order a servant to work with an unsafe instrumentality, and an assurance of safety, coupled with the order, not only aggravates the master's negligence, but also relieves the servant from the assumption of the risk; the assurance of safety likewise makes the question of the servant's contributory negligence one for solution by the jury, unless the danger be so obvious that to undertake to encounter it amounts to plain rashness. *Atlanta, Birmingham & Coast R.R. v. King*, 55 Ga. App. 1, 189 S.E. 580 (1936).

In an action for injuries to a servant resulting from the servant's compliance with a direct and specific command of the master given with reference to an instrumentality by which the master's work is to be performed, the danger or risk incurred by the servant is not assumed by virtue of the employment, unless it involves a violation of law or the act required is so obviously dangerous that no person of ordinary prudence would undertake to perform it. *Louisville & N.R.R. v. Crapps*, 62 Ga. App. 437, 8 S.E.2d 413 (1940).

If a servant points out a danger and the master orders the servant to pursue the dangerous activity anyway, the master is liable for any injury which results. *Webb v. Standard Oil Co.*, 451 F.2d 284 (5th Cir. 1971).

Abrogation of servant's assumption of risk. — While ordinarily the law reads into contracts of employment an agreement on the servant's part to assume the known risks of the employment so far as the servant has the capacity to realize and comprehend them, yet this implication may be abrogated by an express or implied agreement to the contrary; if the servant complains to the master that the instrumentality appears to be dangerous, and thereupon the master commands the servant to proceed with the work and assures the servant there is no danger the law implies a quasi new agreement

whereby the master relieves the servant of the servant's former assumption of the risk and places responsibility for the ensuing injury upon the master. *Bush v. West Yellow Pine Co.*, 2 Ga. App. 295, 58 S.E. 529 (1907); *Massee & Felton Lumber Co. v. Ivey*, 12 Ga. App. 583, 77 S.E. 1130 (1913); *Atlanta, Birmingham & Coast R.R. v. King*, 55 Ga. App. 1, 189 S.E. 580 (1936); *Alford v. Zeigler*, 65 Ga. App. 294, 16 S.E.2d 69 (1941); *Borochoff v. Fowler*, 98 Ga. App. 411, 105 S.E.2d 764 (1958), later appeal, 104 Ga. App. 401, 122 S.E.2d 157 (1961), rev'd on other grounds sub nom. *Southern Wire & Iron, Inc. v. Fowler*, 217 Ga. 727, 124 S.E.2d 738 (1962).

If one engaged to perform a service doubts the safety of performing the service but thereafter proceeds with the work in reliance on the employer's assurance that there is no danger, then unless the danger is so obvious that no prudent man would expose oneself to it, the law implies a new quasi-agreement superseding the assumption of risk and placing responsibility for the resulting injuries on the employer. *Seagraves v. Abco Mfg. Co.*, 118 Ga. App. 414, 164 S.E.2d 242 (1968), later appeal, 121 Ga. App. 224, 173 S.E.2d 416 (1970).

Where the master commanded the servant to proceed with work which the master knows is dangerous with the assurance to the servant that it was not dangerous, such an act on the part of the master relieved the servant of the implied agreement of assumption of risk as to the particular activity warranted as safe, and the master cannot set up as a defense the assumption of risk set forth in this section. *Swails v. Carpenter*, 112 Ga. App. 117, 144 S.E.2d 182 (1965) (see O.C.G.A. § 34-7-23).

Reliance on promises to rectify danger. — The fault or "assumption of risk" implied from a servant's knowledge that a tool, instrument, appliance, piece of machinery, or place of work is defective or dangerous is suspended by the master's promise to repair, made in response to the servant's complaint, so that if the servant is induced by such promise to continue at work the servant may recover for any injury which the servant sustains by reason of such defect within a reasonable time after the making of the promise. *Atlanta, Birmingham & Coast R.R. v. King*, 55 Ga. App. 1, 189 S.E. 580 (1936).

Safety of Tools and Machinery (Cont'd)

If a servant having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until the master makes the assurances good, and moreover, the assurances remove all ground for the argument that the servant by continuing the employment, engages to assume its risks. *Atlanta, Birmingham & Coast R.R. v. King*, 55 Ga. App. 1, 189 S.E. 580 (1936).

Employee's appreciation of danger. — Although an employee may have had knowledge, as of a physical fact, of the defective condition of a tool, appliance or place, by reason of which an employee has sustained an injury, it by no means follows that the employee must have appreciated the danger to which the employee was exposed thereby; if this is shown to have been the case, the employee's right of recovery is not defeated, for it is an appreciation of the danger, not mere knowledge of the defect by which the danger is threatened, that bars the employee's action. *Atlanta, Birmingham & Coast R.R. v. King*, 55 Ga. App. 1, 189 S.E. 580 (1936); *Simowitz v. Register*, 60 Ga. App. 180, 3 S.E.2d 231 (1939).

Where a servant with knowledge of a dangerous condition proceeds with the performance of the servant's duties for a reasonable time, relying upon a promise by the master to rectify such condition, the servant will not be held to have assumed the risk of injury from such dangerous situation or instrumentality, unless it should appear that the danger was so patent that no person of ordinary prudence would carry on work under such conditions and circumstances. *Baker v. Augusta Veneer Co.*, 44 Ga. App. 383, 161 S.E. 676 (1931).

It is the employee's appreciation of the danger, not mere knowledge of the defect by which the danger is threatened, that bars the employee's action. When, however, a peril is obvious or so patent as to be readily understood by the employee by the reasonable use of the employee's senses, having in view the employee's age, intelligence, and experience, the employee will not be heard to say

that the employee did not realize or appreciate it. *Simowitz v. Register*, 60 Ga. App. 180, 3 S.E.2d 231 (1939).

If a servant cannot reasonably rely on a master's "assurances" that a hazardous condition will be corrected, the servant must bear the loss from any injury resulting from obvious dangers, despite the fact that the servant's actions were sanctioned by the master. *Webb v. Standard Oil Co.*, 451 F.2d 284 (5th Cir. 1971).

Where a servant voluntarily undertook climbing a ladder for 20 years, which the servant described as a very dangerous activity and which the servant knew to be risky, the employer is not liable, despite the assurances to the servant that the ladder's dangerous condition would be repaired, since the servant assumed the risk. *Webb v. Standard Oil Co.*, 451 F.2d 284 (5th Cir. 1971).

Pleadings. — In an action for damages resulting from bodily injury by an employee against an employer it must be shown either that the danger was not equally apparent to both parties but rested within the superior knowledge of the master, or that, if the servant was following a direct order which appeared to be dangerous but was yet not so obviously dangerous that no reasonably prudent man would undertake to perform it, the servant remonstrated and the master, by thereafter assuring the servant that there was no danger, in effect relieved the servant from the servant's former assumption of risk and the responsibility for resulting personal injuries. *Palmer v. Webb*, 109 Ga. App. 44, 135 S.E.2d 73 (1964).

A deficiency may be sufficiently alleged by stating that the particular contrivance was so constructed or maintained that it gave forth a result which it was designed to prevent, and which such contrivances, as they are usually constructed and maintained, do prevent. *Alford v. Zeigler*, 65 Ga. App. 294, 16 S.E.2d 69 (1941).

A defect may be described by showing that the machine was in a condition that produced certain definitely described results, which a machine not defective would not and should not produce. It is not necessary to describe minutely or particularly the physical appearance of the parts alleged to be defective. *Alford v. Zeigler*, 65 Ga. App. 294, 16 S.E.2d 69 (1941).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Relationship, § 310 et seq.

C.J.S. — 30 C.J.S. Employers' Liability for Injuries to Employees, § 274 et seq.

ALR. — Duty of master to warn servant against occupational disease, 6 ALR 355; 105 ALR 80.

Contributory negligence or assumption of risk in disobeying rules or directions of master under counter directions by superior, 23 ALR 315.

Duty of master providing machine of standard make and in common use to equip same with safety device or guard, 36 ALR 1477.

Master's duty to servant to prevent continuance of dangerous sports, 40 ALR 1333.

Duty and liability of master to servant injured by draft animal belonging to master, 42 ALR 226; 60 ALR 468.

Liability of contractee and contractor inter se with respect to injuries sustained while the stipulated work is in course of performance, 44 ALR 891.

Liability of master for injuries to servant from exposure to weather conditions, 52 ALR 904.

Employer's promise to remedy defect in instrumentality as affecting defense of assumption of risk or contributory negligence, 61 ALR 901.

Liability of employer for consequences of vaccination or other bodily operation to which employee is subjected, 62 ALR 195.

Liability of master for injuries inflicted on one servant by another by use, maliciously or in sport, of compressed-air device, 62 ALR 1433.

Assumption of risk, under Federal Employers' Liability Act, of excessive speed or failure to give engine signals, 71 ALR 459.

Assumption of risk of overstrain consequent upon failure of other employee to lift his share, 74 ALR 157.

Statute denying to employer defense of assumption of risk as affecting simple tool rule, 91 ALR 786.

Inadequacy of appliance for purpose contemplated by Safety Appliance Act as promi-

mate cause of and ground of liability for injury to employee who was using it for another purpose, 96 ALR 1138.

Construction and application of 1939 amendment of Federal Employers' Liability Act regarding assumption of risk, 143 ALR 978.

Liability of railroad for injury to alighting trainman as a result of condition of track or right of way, 172 ALR 594.

Liability of employer for injury to employee due to his physical unfitness for the work to which he was assigned, 175 ALR 982.

Defenses of fellow servant and assumption of risk in actions involving injury or death of member of airplane crew, ground crew, or mechanic, 13 ALR2d 1137.

Liability in damages for injury to or death of window washer, 17 ALR2d 637.

Contributory negligence, assumption of risk, or related defenses as available in action based on automobile guest statute or similar common law rule, 44 ALR2d 1342.

Liability of proprietor of store, office, or similar business premises for injury from fall on floor made slippery by tracked-in or spilled water, oil, mud, snow, and the like, 62 ALR2d 6.

Master's liability to servant injured by farm machinery, 67 ALR2d 1120.

Master's liability for servant's condition or injury resulting in dermatitis, 74 ALR2d 1029.

Hammer as simple tool within simple tool doctrine, 81 ALR2d 965.

Shipowner's liability for injury caused to seaman or longshoreman by cargo or its stowage, 90 ALR2d 710.

Master's liability to agricultural worker injured other than by farm machinery, 9 ALR3d 1061.

Premises liability: proceeding in the dark on inside steps or stairs as contributory negligence, 25 ALR3d 446.

Tort liability for window washer's injury or death, 69 ALR4th 207.

Employer's liability to employee or agent for injury or death resulting from assault or criminal attack by third person, 40 ALR5th 1.

ARTICLE 3

EMPLOYER'S LIABILITY FOR INJURIES TO RAILROAD EMPLOYEES

Cross references. — Applicability of general workers' compensation law to railroad common carriers, § 34-9-2. Liability of railroad companies for damages generally, § 46-8-290 et seq.

Law reviews. — For article, "Actions for Wrongful Death in Georgia: Part One," see

19 Ga. B.J. 277 (1957). For article, "Actions for Wrongful Death in Georgia: Part Two," see 19 Ga. B.J. 439 (1957). For article, "Actions for Wrongful Death in Georgia: Part Two," section two, see 20 Ga. B.J. 152 (1957).

JUDICIAL DECISIONS

When this article governs. — In a suit brought by an employee of a railway company for damages for personal injury, where the evidence fails to show that the employee was engaged in interstate commerce at the

time the employee was injured, O.C.G.A. Art. 3, Ch. 7, T. 34, the Georgia Employers' Liability Act, governs and not federal law. *Gay v. Osteen*, 56 Ga. App. 224, 192 S.E. 539 (1937).

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Employers' Liability for Injuries to Employees, § 102 et seq.

ALR. — Constitutionality of statutes imposing absolute liability on private persons or corporations, irrespective of negligence or breach of a specific statutory duty, for injury to person or property, 53 ALR 875.

What employees are engaged in interstate commerce within the Federal Employers' Liability Act, 65 ALR 613; 77 ALR 1374; 90 ALR 846.

Duty of railroad toward employees in re-

spect of telltales or other warning of low bridge or other structure over track, 79 ALR 236.

Loaned servant doctrine under Federal Employer's Liability or Safety Appliance Act, 1 ALR2d 302.

Excessiveness or adequacy of awards of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USC § 51 et seq.)—modern cases, 97 ALR Fed. 189.

34-7-40. "Common carrier" defined.

As used in this article, the term "common carrier" shall include the receiver or receivers or other person or corporation charged with the duty of the management and operation of the business of a common carrier. (Ga. L. 1909, p. 160, § 6; Civil Code 1910, § 2787; Code 1933, § 66-406.)

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 21 Am. Jur. Pleading and Practice Forms, Railroads, § 96.

ALR. — Persons or corporations engaged in local transportation of goods as common carriers, 18 ALR 1316.

Company engaged exclusively or mainly in furnishing switching service as carrier engaged in interstate commerce, 38 ALR 1147.

One operating bus or stage as common carrier, 42 ALR 853.

34-7-41. Liability of common carrier by railroad for personal injury or death of employee generally.

Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving spouse or child or children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defects or insufficiency, due to the carrier's negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment; provided, however, that there shall be no recovery under this Code section if the person killed or injured brought about his death or injury by his own carelessness amounting to a failure to exercise ordinary care or if he, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence. The measure of damages in case the injury results in death of the employee shall be that prescribed in Code Sections 51-4-1, 51-4-2, and 51-4-4; provided, however, that parties who may recover under this Code section, Code Sections 34-7-42 through 34-7-44, and Code Section 34-7-46 may sue and recover in their own names in the manner prescribed by Code Sections 51-4-2 and 51-4-4 in case no administrator or executor has been appointed at the time the action is filed. In case death shall result from injury to the employee, the employer shall be liable unless it, its agents, and its employees have exercised all ordinary and reasonable care and diligence, the presumption being in all cases against the employer. If death shall not result from the injury, the presumption of negligence shall be and remain as provided by law in case of injury received by an employee in the service of a railroad company. (Ga. L. 1909, p. 160, § 1; Civil Code 1910, § 2782; Code 1933, § 66-401; Ga. L. 1986, p. 10, § 34.)

Cross references. — Liability of principal for injuries to agent by other agents generally, § 10-6-39. Liability of employer for torts of independent employee, § 51-2-4.

Law reviews. — For article, "Actions for Wrongful Death in Georgia," see 9 Ga. B.J.

368 (1947). For article, "Actions for Wrongful Death in Georgia Part Three and Four," see 21 Ga. B.J. 339 (1959).

For table covering actions for wrongful death in Georgia, see 10 Ga. B.J. 28 (1947).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
DAMAGES
PLEADING AND PRACTICE

General Consideration

Constitutionality of section. — That portion of this section which provided that common carriers by railroad shall be liable to the “next of kin dependent upon” an employee of the common carrier where there was no widow or husband or child or children of such employee was not unconstitutional on the ground that it conflicted with the equal protection clause of the federal Constitution. *Georgia S. & Fla. Ry. v. Adkins*, 156 Ga. 826, 120 S.E. 610 (1923) (see O.C.G.A. § 34-7-41).

Intended beneficiaries. — The right of action to recover for a homicide is not for the benefit of the decedent’s estate, or for all of the heirs at law, but is for the benefit solely of certain designated beneficiaries named in the statutes. *Cooper v. Cooper*, 30 Ga. App. 710, 119 S.E. 335 (1923).

Presumption of employer’s negligence. — The presumption of negligence against the employer “in case death results from injury to the employee,” created by this section, was a part of the integral right to recover, and was not alone a rule of evidence. *Wallace v. Southern Ry.*, 10 Ga. App. 90, 72 S.E. 606 (1911) (see O.C.G.A. § 34-7-41).

Action against federal receiver. — Ga. L. 1909, p. 160 (see O.C.G.A. Art. 3, Ch. 7, T. 34) was applicable to an action brought, under authority of former Civil Code 1910, § 2788 (see O.C.G.A. § 34-7-45), by an employee against a federal receiver of a railroad operated partially within the state. *Atkinson v. Swords*, 11 Ga. App. 167, 74 S.E. 1093 (1912).

Cited in *Wrightsville & T.R.R. v. Tompkins*, 9 Ga. App. 154, 70 S.E. 955 (1911); *Georgia C. & P.R.R. v. Hines*, 138 Ga. 713, 76 S.E. 60 (1912); *Massee & Felton Lumber Co. v. Georgia & F. Ry.*, 12 Ga. App. 436, 77 S.E. 366 (1913); *Tidwell v. Central of Ga. Ry.*, 140 Ga. 250, 78 S.E. 898 (1913); *Central of Ga. Ry. v. Allen*, 140 Ga. 333, 78 S.E. 1052 (1913); *Southern Ry. v. Diseker*, 13 Ga. App. 799, 81 S.E. 269 (1913); *Williams v. Western & A.R.R.*, 142 Ga. 696, 83 S.E. 525 (1914); *Central of Georgia Ry. Co. v. Bessinger*, 17 Ga. App. 617, 87 S.E. 920 (1916); *Western & A.R.R. v. Smith*, 144 Ga. 737, 87 S.E. 1082 (1916); *Central of Ga. Ry. v. DeLoach*, 18 Ga. App. 362, 89 S.E. 433 (1916); *Western & A.R.R. v. State*, 23 Ga. App. 225, 97 S.E. 878 (1919); *Sherrod v. Atlanta B. & A. Ry.*, 27 Ga.

App. 510, 108 S.E. 908 (1921); *Dunbar v. Hines*, 152 Ga. 865, 111 S.E. 396 (1922); *Davis v. Menefee*, 34 Ga. App. 813, 131 S.E. 527 (1926); *Atlantic C.L.R.R. v. Solomon*, 37 Ga. App. 737, 141 S.E. 917 (1928); *Threatt v. American Mut. Liab. Ins. Co.*, 173 Ga. 350, 160 S.E. 379 (1931); *Brooks v. Sessoms*, 53 Ga. App. 453, 186 S.E. 456 (1936); *Thompson v. Watson*, 186 Ga. 396, 197 S.E. 774 (1938); *Louisville & N.R.R. v. Crapps*, 62 Ga. App. 437, 8 S.E.2d 413 (1940); *Southern Ry. v. Roberts*, 206 F.2d 508 (5th Cir. 1953).

Damages

Recovery of diminished damages. — An injured employee is no longer required to show that the employee is free from all blame. In cases where the negligence of the employee in some degree, less than the lack of ordinary care, contributed to the injury, the employee may recover diminished damages. *Southern Ry. v. Perdue*, 171 Ga. 134, 154 S.E. 793 (1930).

Pecuniary damages. — Employee’s right of action to recover damages to compensate the employee for expenses, loss of time, suffering, etc., did not survive the employee’s death, but the existence of such right in the employee’s lifetime did not destroy the dependent’s right under the statute to recover for pecuniary damages consequent upon the death; and this section declared two distinct and independent liabilities, resting upon the common foundation of a wrongful injury, but based upon altogether different principles. *Dameron v. Southern Ry.*, 44 Ga. App. 444, 161 S.E. 641 (1931) (see O.C.G.A. § 34-7-41).

Measure of damages. — The measure of damages for a negligent homicide falling within the purview of former Civil Code 1910, § 2782 (see O.C.G.A. § 34-7-41) was the “full value of the life of the deceased,” which, by reference to former Civil Code 1910, § 4425 (see O.C.G.A. § 51-4-1), was amplified to mean “the full value of the life of the deceased without deduction for necessary or other personal expenses of the deceased had he lived.” *Atkinson v. Hardaway*, 10 Ga. App. 389, 73 S.E. 556 (1912).

Pleading and Practice

Pleading under section. — Since this section gave a prior right of action to beneficia-

ries other than the plaintiff, the petition must negative the existence of any person who had such primary right to sue. *Lamb v. Tucker*, 146 Ga. 216, 91 S.E. 66 (1916) (see O.C.G.A. § 34-7-41).

When right of action arises. — The right of action afforded to parents of a railroad employee for homicide of such employee does not arise until the death of the employee; consequently, the cause of action is not barred before expiration of two years from the death of the employee, even though more than two years may elapse between the time of injury which results in death. *Dameron v. Southern Ry.*, 44 Ga. App. 444, 161 S.E. 641 (1931).

Settlement prior to death. — Settlement by person injured, prior to the person's death, of right of action arising by reason of injury will bar recovery for subsequently resulting death. *Dameron v. Southern Ry.*, 44 Ga. App. 444, 161 S.E. 641 (1931).

Venue of action. — The venue of a cause of action, under this section, against a railway company for a negligent homicide was in the county in which the fatal injury was inflicted, and not in the county where the injured person may have died. The cause of action inheres in the wrong as consummated by the injury, and not in the death itself. *Atkinson v. Hardaway*, 10 Ga. App. 389, 73 S.E. 556 (1912) (see O.C.G.A. § 34-7-41).

Prima facie case. — The plaintiff makes a prima facie case in one action, under this section, by merely showing that the decedent met death while discharging the duties of decedent's employment. *Atkinson v. Hardaway*, 10 Ga. App. 389, 73 S.E. 556 (1912); *Walton v. Georgia, F. & A. Ry.*, 12 Ga. App. 106, 76 S.E. 1060 (1913), later appeal, 15 Ga. App. 191, 82 S.E. 815 (1914) (see O.C.G.A. § 34-7-41).

In a case where the employee is injured by a coemployee in a transaction in which the injured employee participated, the employee must, in order to make a prima facie case and change the onus, prove the fact and extent of the employee's injury and must show either that the employee was not negligent, that is, that the employee was not lacking in ordinary care for the employee's own safety and that the employee could not by the exercise of ordinary care have prevented the consequences to oneself of the negligence of a coemployee; or that the

coemployee was lacking in ordinary care in doing the act by which the employee was injured. *Southern Ry. v. Perdue*, 171 Ga. 134, 154 S.E. 793 (1930).

Presumption of employer's negligence. — Where action was brought by the administratrix of a deceased employee, who was engaged as a car inspector of receivers operating a railroad as a common carrier, whose death was caused by being run over by an engine of the carrier, alleged to have been negligently run at an improper speed, without proper signals, and without any lookout, though it was running backward through a railroad yard where many employees were constantly at work, a presumption of negligence arose, under this section. *Atkinson v. Alexander*, 142 Ga. 124, 82 S.E. 561 (1914) (see O.C.G.A. § 34-7-41).

In an action for the homicide of an employee of a railroad company, under this section, a presumption of negligence against the company did not arise upon a prima facie showing that the deceased met death while discharging the duties of employment. The presumption arises only upon proof that the deceased was killed by the running of the locomotives, or cars, or other machinery of the company, or from an act done by some person in its employment and service. *Smith v. Southern Ry.*, 20 Ga. App. 609, 93 S.E. 166 (1917) (see O.C.G.A. § 34-7-41).

Presumption is rebuttable. — The presumption of negligence against the employer, arising under this section, from death of a railroad employee, is not conclusive, and, if rebutted by uncontradicted and unimpeached evidence, the court should direct the verdict for the defendant. *Walker v. Charleston & W.C. Ry.*, 8 F.2d 725 (5th Cir. 1925) (see O.C.G.A. § 34-7-41).

Jury charge. — A charge of the trial court to the effect that proof of injury by the operation of railroad cars makes out a prima facie case for the injured party which can only be rebutted by the employer by proof of one of three things: 1) that its officers, agents, or employees were in the exercise of ordinary care on that occasion and were not negligent; or 2) that the person killed brought about their own death or injury by carelessness amounting to a failure to exercise ordinary care; or 3) that the deceased, by the exercise of ordinary care, could have avoided the consequences of the defen-

Pleading and Practice (Cont'd)

dant's negligence, was erroneous because the charge had the effect of telling the jury

that it can weigh the presumption stated in this section against the evidence. *Gainesville M.R.R. v. Floyd*, 73 Ga. App. 661, 37 S.E.2d 725 (1946) (see O.C.G.A. § 34-7-41).

RESEARCH REFERENCES

Am. Jur. 2d. — 32B Am. Jur. 2d, Federal Employers' Liability and Compensation Acts, § 14 et seq.

ALR. — Intoxication as affecting contributory negligence of one killed or injured at a railroad crossing, 36 ALR 336.

Employer's promise to remedy defect in instrumentality as affecting defense of assumption of risk or contributory negligence, 61 ALR 901.

Constitutionality of statute which imposes liability enforceable in an action at law upon an employer not within workmen's compensation act, for injury to or death of employee, without fault on employer's part, 129 ALR 1124.

Railroad employee injured while engaged in removing weeds, brush, etc., from road-bed or right of way, as within Federal Employers' Liability Act, 143 ALR 481.

Employer's compliance with specific legal standard prescribed by or pursuant to statute for equipment, structure, or material, as defense to charge of negligence, 159 ALR 870.

Liability of railroad for injury to alighting trainman as a result of condition of track or right of way, 172 ALR 594.

Failure of equipment required by Federal Safety Appliance Acts as constituting actionable wrong, 16 ALR2d 654.

Defect in appliance or equipment as proximate cause of injury to railroad employee in

repair or investigation thereof, 30 ALR2d 1192.

Finding of decedent's body on or near tracks as creating presumption or inference of railroad's negligence, or as affecting burden of proof relating thereto, 40 ALR2d 881.

Duty of railroad company toward employee with respect to close clearance of objects alongside tracks, 50 ALR2d 674.

Duty of railroad company to prevent injury of employee due to surface condition of yard, 57 ALR2d 493.

Contributory negligence of railroad employee in jumping from moving train or car to avoid collision or other injury, 58 ALR2d 1232.

Master's liability for servant's injury or death caused in whole or in part by act of God, 62 ALR2d 796.

Liability, because of improper loading, of railroad consignee or his employee injured while unloading car, 29 ALR3d 1039.

Right of spouse to maintain action for wrongful death as affected by fact that injury resulting in death occurred before marriage, 69 ALR3d 1046.

Modern development of comparative negligence doctrine having applicability to negligence actions generally, 78 ALR3d 339.

Employer's liability to employee or agent for injury or death resulting from assault or criminal attack by third person, 40 ALR5th 1.

34-7-42. Contributory negligence of employee.

In all actions brought against any common carrier by railroad under or by virtue of any of the provisions of this Code section, Code Section 34-7-41, 34-7-43, 34-7-44, or 34-7-46 to recover damages for personal injuries to an employee or for death of an employee where such injuries have resulted in death, the fact that the employee may have been guilty of contributory negligence, not amounting to a failure to exercise ordinary care, shall not bar a recovery; but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, however, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case

where the violation by the common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. (Ga. L. 1909, p. 160, § 2; Civil Code 1910, § 2783; Code 1933, § 66-402.)

Cross references. — Effect of failure of plaintiff to avoid consequences of defendant's negligence generally, § 51-11-7.

JUDICIAL DECISIONS

Constitutionality of section. — This section was constitutional. *Georgia C. & P.R.R. v. Hines*, 138 Ga. 713, 76 S.E. 60 (1912) (see O.C.G.A. § 34-7-42).

Applicability of section. — This section referred only to cases involving the injury to or death of an employee of a common carrier by a railroad. *Willis v. Jones*, 89 Ga. App. 824, 81 S.E.2d 517 (1954) (see O.C.G.A. § 34-7-42).

Effect of employee's contributory negligence. — Under this section, contributory negligence amounting to a failure to exercise ordinary care will absolutely bar recovery, while contributory negligence of a less degree will diminish the recovery. *Seaboard Air-Line Ry. v. Hunt*, 10 Ga. App. 273, 73 S.E. 588 (1912) (see O.C.G.A. § 34-7-42).

Comparative negligence. — The comparative negligence doctrine denies any recovery if the plaintiff's negligence equals or exceeds the defendant's. Thus, if each party is 50 percent at fault, there can be no recovery. But should the plaintiff's negligence be 49 percent, plaintiff is entitled to recover 51 percent of plaintiff's damages. *Southern Ry. v. Brunswick Pulp & Paper Co.*, 376 F. Supp. 96 (S.D. Ga. 1974).

Last clear chance doctrine. — If both the plaintiff and the defendant are negligent,

the latter can be found solely liable for all the damage if the defendant had a last clear chance to avoid the injury and did not exercise ordinary care. *Southern Ry. v. Brunswick Pulp & Paper Co.*, 376 F. Supp. 96 (S.D. Ga. 1974).

Servant's right of recovery barred. — The selection of an unsafe or a dangerous method of performing work when a reasonably safe method is apparent will bar a servant's right of recovery in the event the servant is injured. *Gay v. Osteen*, 56 Ga. App. 224, 192 S.E. 539 (1937).

Erroneous charge of section. — The use of the word "may" for "shall" by the court charging this section to the jury was error. *Central of Ga. Ry. v. Brown*, 138 Ga. 107, 74 S.E. 839 (1912) (see O.C.G.A. § 34-7-42).

Cited in *Georgia R.R. v. Hunter*, 12 Ga. App. 294, 77 S.E. 176 (1913); *Massee & Felton Lumber Co. v. Georgia & F. Ry.*, 12 Ga. App. 436, 77 S.E. 366 (1913); *Atkinson v. Boggs*, 16 Ga. App. 738, 86 S.E. 62 (1915); *Louisville & N.R.R. v. Layton*, 243 U.S. 617, 37 S. Ct. 456, 61 L. Ed. 931 (1917); *Central of Ga. Ry. v. Hartley*, 25 Ga. App. 110, 103 S.E. 259 (1920); *Central of Ga. Ry. v. Lindsey*, 28 Ga. App. 198, 110 S.E. 636 (1922); *Robinson v. State*, 158 Ga. 47, 122 S.E. 886 (1924).

RESEARCH REFERENCES

Am. Jur. 2d. — 32B Am. Jur. 2d, *Federal Employers' Liability and Compensation Acts*, §§ 7, 28 et seq., 69.

ALR. — Right of servant to rely upon performance by another of the duty, equally incumbent upon himself, of complying with the "blue flag rule," 8 ALR 870.

Liability for injury to window washer, 28 ALR 622.

Intoxication as affecting contributory negligence of one killed or injured at a railroad crossing, 36 ALR 336.

Employer's promise to remedy defect in instrumentality as affecting defense of assumption of risk or contributory negligence, 61 ALR 901.

Construction and effect of comparative negligence rule where there are more than

one defendant, or where negligence of nonparties contributes to the injury, 92 ALR 691.

Statute abolishing or modifying contributory negligence rule in certain class of cases or situations, as denial of equal protection of the laws, 142 ALR 631.

Liability of railroad for injury to alighting trainman as a result of condition of track or right of way, 172 ALR 594.

Contributory negligence of railroad employee in jumping from moving train or car to avoid collision or other injury, 58 ALR2d 1232.

Contributory negligence of adult struck

by train while walking or standing beside railroad track, 63 ALR2d 1226.

Comparative negligence rule where misconduct of three or more persons is involved, 8 ALR3d 722.

Premises liability: proceeding in the dark across interior premises as contributory negligence, 28 ALR3d 605.

Liability, because of improper loading, of railroad consignee or his employee injured while unloading car, 29 ALR3d 1039.

Retrospective application of state statute substituting rule of comparative negligence for that of contributory negligence, 37 ALR3d 1438.

34-7-43. Assumption of risk where employer is contributorily negligent.

In any action brought against any common carrier by railroad, under and by virtue of any of the provisions of Code Sections 34-7-41 and 34-7-42, to recover damages for injuries to or the death of any of its employees, the employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the injury or death of such employee. (Ga. L. 1909, p. 160, § 3; Civil Code 1910, § 2784; Code 1933, § 66-403.)

JUDICIAL DECISIONS

Statutory construction. — The provision of former Code 1933, § 66-403 (see O.C.G.A. § 34-7-43) which abolished the defense of the assumption of risk where there had been a violation by the common carrier of any statute enacted for the safety of the employee has reference to statutes specifically applicable to the operations and equipment of such carriers and was not intended to, and cannot properly, apply to the provisions of former Code 1933, § 66-301 (see O.C.G.A. § 34-7-20). *Southern Ry. v. Roberts*, 206 F.2d 508 (5th Cir. 1953).

Assumption of risk and contributory negligence. — Assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while lack of ordinary care for one's own safety, or contributory

negligence, is a matter of some fault or departure from the standard of reasonable conduct. *Wright v. Concrete Co.*, 107 Ga. App. 190, 129 S.E.2d 351 (1962).

Assumption of risk and contributory negligence may coexist, or either may exist without the other. The difference is frequently one between risks which were in fact known to the plaintiff, or so obvious that plaintiff must be taken to have known of them, and risks which plaintiff merely might have discovered by the exercise of ordinary care. *Wright v. Concrete Co.*, 107 Ga. App. 190, 129 S.E.2d 351 (1962).

Cited in *Massee & Felton Lumber Co. v. Georgia & F. Ry.*, 12 Ga. App. 436, 77 S.E. 366 (1913); *Atkinson v. Boggs*, 16 Ga. App. 738, 86 S.E. 62 (1915).

RESEARCH REFERENCES

Am. Jur. 2d. — 32B Am. Jur. 2d, Federal Employers' Liability and Compensation Acts, § 6.

ALR. — Employer's promise to remedy defect in instrumentality as affecting defense of assumption of risk or contribu-

tory negligence, 61 ALR 901.

Assumption of risk of overstrain consequent upon failure of other employee to lift his share, 74 ALR 157.

Construction and application of 1939 amendment of Federal Employers' Liability Act regarding assumption of risk, 143 ALR 978.

Liability of railroad for injury to alighting

trainman as a result of condition of track or right of way, 172 ALR 594.

Liability of employer for injury to employee due to his physical unfitness for the work to which he was assigned, 175 ALR 982.

Liability, because of improper loading, of railroad consignee or his employee injured while unloading car, 29 ALR3d 1039.

34-7-44. Employer exemptions from liability void; allowable setoffs.

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier by railroad to exempt itself from any liability created by Code Sections 34-7-41 through 34-7-43, shall, to that extent, be void; provided, however, that in any action brought against any such common carrier by railroad under or by virtue of any of such Code sections such common carrier may set off therein any sum it has contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employee or, in the event of death, to the person or persons entitled thereto on account of the injury or death for which said action is brought. (Ga. L. 1909, p. 160, § 4; Civil Code 1910, § 2785; Code 1933, § 66-404.)

JUDICIAL DECISIONS

Constitutionality of section. — This section did not violate U.S. Const., amend. 14. *Washington v. Atlantic Coast Line R.R.*, 136 Ga. 638, 71 S.E. 1066, 38 L.R.A. (n.s.) 867 (1911) (see O.C.G.A. § 34-7-44).

Cited in *Louisville & N.R.R. v. Bradford*,

135 Ga. 522, 69 S.E. 870 (1910); *Houser v. Savannah Elec. Co.*, 9 Ga. App. 766, 72 S.E. 276 (1911); *Massee & Felton Lumber Co. v. Georgia & F. Ry.*, 12 Ga. App. 436, 77 S.E. 366 (1913).

RESEARCH REFERENCES

Am. Jur. 2d. — 32B Am. Jur. 2d, Federal Employers' Liability and Compensation Acts, §§ 8, 9.

ALR. — Independent contractor: remedial rights in respect of injuries caused by breaches of positive duties correlative to corporate franchises, 28 ALR 122.

Right of setoff as between proceeds of life insurance and indebtedness of insured to insurer, 101 ALR 1517.

Release or contract after injury as affected by provision of Federal Employers' Liability Act invalidating contract, rule, or device to exempt carrier from liability, 166 ALR 648.

Validity, construction, and effect of agreement, in connection with real-estate lease or license by railroad, for exemption from liability or for indemnification by lessee or licensee, for consequences of railroad's own negligence, 14 ALR3d 446.

34-7-45. Liability of receivers, trustees, and assignees of railroad companies for coemployees' negligence; lien on railroad company income.

(a) The liability of receivers, trustees, assignees, and other like officers operating railroads in, or partially in, this state for injuries and damages to

employees or their property which are caused by the negligence of coemployees shall be the same as that fixed in Code Section 34-7-41.

(b) A lien is created on the gross income of a railroad liable under Code Section 34-7-41 while in the control of any person or corporation described in subsection (a) of this Code section in favor of the injured employee superior to all other liens against the defendant under the laws of this state. (Ga. L. 1895, p. 103, § 1; Civil Code 1895, § 2324; Ga. L. 1896, p. 63, § 1; Civil Code 1910, § 2788; Code 1933, § 66-407.)

Cross references. — Duties of receivers of railroads as to payment of liens generally, § 46-8-254.

JUDICIAL DECISIONS

Applicability. — Georgia law (see O.C.G.A. Art. 3, Ch. 7, T. 34) was applicable to a suit brought under authority of this section by an employee against a federal receiver of a railroad operated partially within the state. *Atkinson v. Swords*, 11 Ga. App. 167, 74 S.E. 1093 (1912) (see O.C.G.A. § 34-7-45).

Consent of appointing court not necessary. — This section was an exception to the general rule that before an action can be maintained against a receiver appointed by the courts of Georgia, the consent of the appointing court was necessary. *Bugg v. Lang*, 35 Ga. App. 704, 134 S.E. 623 (1926) (see O.C.G.A. § 34-7-45).

When consent of appointing court necessary. — A receiver of a corporation, without the permission of the court which appointed the receiver, cannot be sued for any acts of negligence of the corporation prior to appointment as receiver. *Harrell v. Atkinson*, 9 Ga. App. 150, 70 S.E. 954 (1911).

Effect upon federal receivers. — The authority extended under federal statute for

actions in state courts against federal receivers is paramount, and was in no way affected by this section. *Bugg v. Lang*, 35 Ga. App. 704, 134 S.E. 623 (1926) (see O.C.G.A. § 34-7-45).

Lien subject to debt due United States. — A debt of the railroad to the United States has priority over a lien created by former Civil Code 1910, § 2788 (see O.C.G.A. § 34-7-45). *Piedmont Corp. v. Gainesville & N.W.R.R.*, 30 F.2d 525 (N.D. Ga. 1929).

Effect of appointment on limitations. — The running of the statute of limitations is not affected by the mere appointment of a receiver. *Cain v. Seaboard Air-Line Ry.*, 138 Ga. 96, 74 S.E. 764 (1912).

Cited in *Youngblood v. Comer*, 97 Ga. 152, 23 S.E. 509 (1895); *Barry v. McGhee*, 100 Ga. 759, 28 S.E. 455 (1897); *Charleston & W.C. Ry. v. Robinson*, 11 Ga. App. 492, 75 S.E. 820 (1912); *Lamb v. Floyd*, 148 Ga. 357, 96 S.E. 877 (1918); *Hancock v. Miller*, 28 Ga. App. 387, 111 S.E. 80 (1922); *Birmingham Trust & Sav. Co. v. Atlanta, B. & Atl. Ry.*, 287 F. 561 (N.D. Ga. 1923).

RESEARCH REFERENCES

ALR. — *Forum non conveniens*: circumstances justifying state court's refusal to take

jurisdiction of Federal Employers' Liability Act proceeding, 60 ALR3d 964.

34-7-46. Limitation period for institution of action.

No action shall be maintained under Code Sections 34-7-41 through 34-7-44 unless commenced within two years from the day the cause of action

accrued. (Ga. L. 1909, p. 160, § 5; Civil Code 1910, § 2786; Code 1933, § 66-405.)

Cross references. — Time limitation on actions against railroad companies for recovery of damages generally, § 46-1-2.

Law reviews. — For article, "Statutes of Limitation: Counterproductive Complexities," see 37 Mercer L. Rev. 1 (1985).

JUDICIAL DECISIONS

Right of action arises upon employee's death. — The right of action afforded by this article (see O.C.G.A. Art. 3, Ch. 7, T. 34) to parents of a railroad employee for homicide of such employee does not arise until the death of the employee; consequently, the cause of action is not barred before expiration of two years from the death of the employee, even though more than two years may elapse between the time of injury which

results in death and death itself. *Dameron v. Southern Ry.*, 44 Ga. App. 444, 161 S.E. 641 (1931).

Settlement. — Settlement by a person injured, prior to the person's death, of a right of action arising by reason of an injury will bar recovery for a subsequent death. *Dameron v. Southern Ry.*, 44 Ga. App. 444, 161 S.E. 641 (1931).

RESEARCH REFERENCES

ALR. — Independent contractor: remedial rights in respect of injuries caused by

breaches of positive duties correlative to corporate franchises, 28 ALR 122.

34-7-47. Liability of railroad company to its employees for negligence of employees of another railroad company using same track.

Where two or more chartered railroad companies whose lines terminate in the same city contract to use the same track within the corporate limits, the company owning the track shall not be responsible to its employees for injuries sustained solely by reason of the negligent use of the track by the employees of the other company. (Civil Code 1895, § 1865; Civil Code 1910, § 2229; Code 1933, § 66-408.)

History of Code section. — This Code section is derived from the decision in *Georgia R.R. & Banking Co. v. Friddell*, 79 Ga. 489, 7 S.E. 214 (1888).

JUDICIAL DECISIONS

Cited in *Lovett v. Calloway*, 69 F. Supp. 532 (N.D. Ga. 1946).

34-7-48. Recovery by employee working beyond limited hours of service.

No employee of any railroad company shall be deprived of his right to recover damages for personal injury by reason of the fact that at the time of such injury he was making a run of more than 13 hours, or making a run aggregating more than 13 hours in 24 hours, or had gone on duty after a 13 hour run, or runs aggregating 13 hours, before ten hours' rest, as

prohibited by Code Section 46-8-152. (Ga. L. 1890-91, p. 186, § 1; Civil Code 1895, § 2240; Civil Code 1910, § 2693; Code 1933, § 66-410.)

RESEARCH REFERENCES

ALR. — Liability for injury to an employee as affected by expiration of statutory hours of labor before injury, 71 ALR 861.

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34-8-275. Amnesty granted to employers meeting requirements; exceptions.
34-8-276. Interest on installment agreements.
34-8-277. Administrative regulations, forms, and instructions; publicizing program.
34-8-278. Accounting procedures; disposition of collections.
34-8-279. Collection fees.
34-8-280. Debt collection services.

Editor's notes. — Ga. L. 1991, p. 139, effective January 1, 1992, repealed the Code sections formerly codified at this chapter, and enacted the current chapter. The former chapter consisted of Code Sections 34-8-1 through 34-8-7.1, 34-8-8 through 34-8-19 (Article 1); 34-8-30 through 34-8-41.1, 34-8-42 through 34-8-49.1, and 34-8-50 through 34-8-53 (Article 2); 34-8-70 through 34-8-83 (Article 3); 34-8-100 through 34-8-104 (Article 4); 34-8-110 through 34-8-115 (Article 4A); 34-8-120 through 34-8-132 (Article 5); 34-8-150 through 34-8-160 (Article 6); and 34-8-170 through 34-8-177 (Article 7), and was based on Ga. L. 1937, p. 806, §§ 1-20; Ga. L. 1937-38, Ex. Sess., p. 356; Ga. L. 1941, p. 532, §§ 1-6, 8-14, 16-33, 37; Ga. L. 1943, p. 610, §§ 1-3; Ga. L. 1943, p. 612, § 1; Ga. L. 1943, p. 613, § 1; Ga. L. 1945, p. 259, § 1; Ga. L. 1945, p. 331, § 1; Ga. L. 1946, p. 532, § 7; Ga. L. 1947, p. 651, §§ 2-9; Ga. L. 1950, p. 38, §§ 2-7, 9-19; Ga. L. 1951, p. 512, §§ 2-11; Ga. L. 1953, Jan.-Feb. Sess., p. 327, §§ 2-5; Ga. L. 1955, p. 420, § 2; Ga. L. 1955, p. 553,

§§ 2-9; Ga. L. 1956, p. 481, §§ 1, 3, 4, 6-10; Ga. L. 1957, p. 325, §§ 2-4; Ga. L. 1960, p. 861, §§ 2-15, 17-26; Ga. L. 1964, p. 217, § 2; Ga. L. 1964, p. 143, §§ 2, 3; Ga. L. 1966, p. 141, § 1; Ga. L. 1966, p. 526, §§ 1-11; Ga. L. 1969, p. 249, §§ 2-8; Ga. L. 1969, p. 379, § 2; Ga. L. 1971, p. 475, §§ 1-27; Ga. L. 1972, p. 1015, § 408B; Ga. L. 1972, p. 1069, § 3; Ga. L. 1972, p. 1201, §§ 1-18; Ga. L. 1972, p. 1224, §§ 2-17; Ga. L. 1973, p. 341, § 1; Ga. L. 1973, p. 729, §§ 1-24; Ga. L. 1974, p. 101, p. 9, §§ 1-4; Ga. L. 1975, p. 11, §§ 1-5; Ga. L. 1976, p. 1029, §§ 1-10, 12-18; Ga. L. 1977, p. 781, § 1; Ga. L. 1977, p. 850, §§ 1-5, 8-20; Ga. L. 1978, p. 941, § 1; Ga. L. 1978, p. 1386, §§ 1-41; Ga. L. 1980, p. 1553, § 1; Ga. L. 1980, p. 1563, § 1; Ga. L. 1980, p. 1565, §§ 1, 2-8; Ga. L. 1981, p. 390, §§ 1-18, 20; Ga. L. 1981, p. 413, §§ 1-3; Ga. L. 1982, p. 3, § 34; Ga. L. 1982, p. 1023, §§ 1-4, 6-8, 10, 11, 13, 16-34; Ga. L. 1983, p. 3, § 25; Ga. L. 1983, p. 1153, §§ 1-3, 3A, 4-6; Ga. L. 1983, p. 1592, § 1; Ga. L. 1984, p. 22, § 34; Ga. L. 1984, p. 861, §§ 1-6; Ga. L. 1985, p. 149, § 34; Ga. L. 1985, p. 536, § 1; Ga. L. 1985, p.

696, §§ 1, 2; Ga. L. 1985, p. 901, § 1; Ga. L. 1986, p. 10, § 34; Ga. L. 1986, p. 299, § 1; Ga. L. 1986, p. 415, § 1; Ga. L. 1986, p. 925, § 1; Ga. L. 1987, p. 3, § 34; Ga. L. 1987, p. 139, § 1-5; Ga. L. 1987, p. 191, § 9; Ga. L. 1987, p. 435, §§ 1, 2; Ga. L. 1988, p. 13, § 34; Ga. L. 1988, p. 939, §§ 1-7; Ga. L. 1989, p. 302, §§ 1, 2; Ga. L. 1989, p. 305, §§ 1-5; Ga. L. 1989, p. 594, § 1; Ga. L. 1990, p. 870, § 1.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 and former Chapter 8 of Title 34, which were repealed by Ga. L. 1991, p. 139, § 1, effective January 1, 1992, are included in the annotations for this Code section.

Constitutionality of chapter. — Former chapter was not as a whole violative of U.S. Const., amends. 9, 14. *Gernatt v. Huiet*, 192 Ga. 729, 16 S.E.2d 587 (1941) (decided under Ga. L. 1937, p. 806).

Purpose of chapter. — This chapter was enacted to protect the worker in some measure from the loss, through no fault of the worker's own, of employment; that is to say, to ensure the worker against loss of a place to work. *Utica Mut. Ins. Co. v. Pioda*, 90 Ga. App. 593, 83 S.E.2d 627 (1954) (decided under Ga. L. 1937, p. 806).

The Employment Security Law, O.C.G.A. Ch. 8, T. 34, contemplates an employer providing for the payment of limited benefits based on the employee's former wages, subject to specific conditions, for a limited duration; it does not contemplate that the payment of such benefits will result in an individual receiving more than the individual earned when the individual was gainfully employed. *Powell v. Dougherty Christian Academy, Inc.*, 215 Ga. App. 551, 451 S.E.2d 465 (1994).

Construction of chapter. — This chapter was to be liberally construed in favor of the state. *Williams v. Tracy Bldrs., Inc.*, 94 Ga. App. 203, 94 S.E.2d 139 (1956) (decided under Ga. L. 1937, p. 806; see O.C.G.A. Ch. 8, T. 34).

Ineligibility for unemployment compensation. — An employee who was not discharged and did not resign, but who did leave work voluntarily, is disqualified and

Administrative rules and regulations. — Rules and regulations pertaining to Employment Security Law, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Labor, Chapters 300-2-1 et seq.

Law reviews. — For survey article on recent developments in Georgia administrative law, see 34 *Mercer L. Rev.* 393 (1982).

ineligible to receive unemployment compensation under the provisions of this chapter. *Huiet v. Atlanta Gas Light Co.*, 70 Ga. App. 233, 28 S.E.2d 83 (1943) (decided under Ga. L. 1937, p. 806; see O.C.G.A. Ch. 8, T. 34).

Where an employee is a married woman living with her husband and she voluntarily quits her employment without good cause connected with her most recent work, solely for the purpose of joining and living with her husband, a preacher, at a distant point to which he has been transferred that is too far for her to commute to her work, the employee thereby disqualifies herself from receiving compensation under this chapter. *Huiet v. Callaway Mills*, 70 Ga. App. 538, 29 S.E.2d 106 (1944) (decided under Ga. L. 1937, p. 806; see O.C.G.A. Ch. 8, T. 34).

Coverage of chapter. — Where certain fashion show directors had no territorial assignments or geographical restrictions, no prescribed number or time of hours to work, no minimum number of orders to be maintained and no prohibition against selling other companies' products or holding other employment contemporaneously with that of the plaintiff corporation, the fashion directors were not covered under this chapter. *Sarah Coventry, Inc. v. Caldwell*, 243 Ga. 429, 254 S.E.2d 375 (1979) (decided under Ga. L. 1937, p. 806; see O.C.G.A. Ch. 8, T. 34).

Findings by Bureau of Unemployment Compensation. — Findings of fact by the appeals referee of the Bureau of Unemployment Compensation which are supported by evidence are conclusive and binding. *Huiet v. Dayan*, 69 Ga. App. 81, 24 S.E.2d 728 (1943) (decided under Ga. L. 1937, p. 806).

Effect of unreviewed agency decisions on subsequent age discrimination action. — Unreviewed decisions of the Georgia Em-

ployment Security Agency are not granted preclusive effect in subsequent federal Age Discrimination in Employment Act lawsuits because granting such deference could cause potential plaintiffs to forego their chance at unemployment compensation for fear of jeopardizing their ADEA claims or else force employees and employers to litigate unemployment compensation claims as discrimination suits. *Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641 (11th Cir. 1987) (decided under former Chapter 8 of Title 34).

Consideration of workers' compensation.

— The fact that the claimant has applied for and is receiving unemployment compensation under Ga. L. 1937, p. 806 (see O.C.G.A. § 34-7-1 et seq.) alters nothing in finding that claimant's incapacity resulted from injuries which arose out of and in the course of claimant's employment. The claimant's application for and receipt of unemployment

benefits does not estop claimant's claiming compensation under the Workers' Compensation Act or constitute an election between inconsistent remedies. The two chapters are not repugnant. While each seeks the beneficent purpose of insuring the worker from economic insecurity, the two acts seek to remedy economic insecurity stemming from two entirely different sources. *Utica Mut. Ins. Co. v. Pioda*, 90 Ga. App. 593, 83 S.E.2d 627 (1954) (decided under Ga. L. 1937, p. 806; see O.C.G.A. Ch. 7, T. 34).

Cited in *Ocean S.S. Co. v. Allen*, 36 F. Supp. 851 (M.D. Ga. 1941); *Union Dry Goods Co. v. Cook*, 71 Ga. App. 708, 32 S.E.2d 190 (1944); *Phillips v. J.L. Peed Co.*, 78 Ga. App. 471, 51 S.E.2d 468 (1949); *Benton Rapid Express v. Redwine*, 87 Ga. App. 584, 74 S.E.2d 504 (1953); *Huiet v. Rhodes*, 101 Ga. App. 253, 113 S.E.2d 487 (1960).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the provisions, opinions decided under Ga. L. 1937, p. 806 and former Chapter 8 of Title 34, which was repealed by Ga. L. 1991, p. 139, § 1, effective January 1, 1992, are included in the annotations for this Code section.

Contributions are state taxes. — The contributions required by Ga. L. 1937, p. 806 (see O.C.G.A. § 34-7-1 et seq.) are state taxes within the meaning of Ga. L. 1953, Jan.-Feb. Sess., p. 185, § 1 (see O.C.G.A. § 48-2-18) creating the Board of Compromises and Settlements (now Board of Equalization); the board has jurisdiction and authority to settle or compromise such a tax liability according to the authority contained in the Act creating the Board of Compromises and Settlements. 1965-66 Op. Att'y Gen. No. 66-91 (decided under Ga. L. 1937, p. 806).

Administration by Employment Security Agency. — The Employment Security Agency is the proper state agency to administer the state-wide system of public employment offices in cooperation with the United States Employment Service. 1945-47 Op. Att'y Gen. p. 358 (decided under Ga. L. 1937, p. 806).

Department of Labor to be represented by Attorney General. — The Department of Labor may not employ its own general counsel or otherwise provide itself with legal advice or representation other than through the Attorney General. 1984 Op. Att'y Gen. No. 84-48 (decided under former Chapter 8 of Title 34).

Source for unemployment compensation payments. — Ga. L. 1937, p. 806 (see O.C.G.A. § 34-7-1 et seq.) basically provides that unemployment compensation is to be paid from a fund financed by systematic accumulation of money paid by employers. 1982 Op. Att'y Gen. No. 82-35 (decided under Ga. L. 1937, p. 806).

There does not appear to be any basis in the Constitution or the Georgia State Financing and Investment Commission Act which would authorize the Employment Security Agency, Georgia Department of Labor to borrow or obtain advances from the federal unemployment account in the Unemployment Trust Fund for payment of unemployment compensation. 1982 Op. Att'y Gen. No. 82-35 (decided under Ga. L. 1937, p. 806).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Violation of Employee Lie Detector Statute, 18 POF3d 627.

ALR. — Constitutionality of unemployment insurance legislation, 106 ALR 1531.

Judicial questions regarding Federal Social Security Act, and state legislation adopted in anticipation of or after the passage of the act to set up “state plans” contemplated by it, 108 ALR 613; 109 ALR 1346; 118 ALR 1220; 121 ALR 1002.

Construction and application of state social security or Unemployment Compensation Act as affected by terms of the federal act or judicial or administrative rulings thereunder, 139 ALR 892.

Validity, construction, and application of provisions of social security or unemployment compensation acts as to employment units which are affiliated or under a common control, 142 ALR 918; 158 ALR 1237.

Construction and application of provision of social security or unemployment compensation acts relating to exemption of corporations or institutions of a religious, charitable, or educational character, 155 ALR 369.

What amounts to presence of foreign corporation in state, so as to render it liable to action therein to recover unemployment compensation tax, 161 ALR 1068.

State banks, insurance companies, or building and loan associations, which are members of Federal reserve bank or similar Federal agency, or national banks, as within state social security or Unemployment Compensation Act, 165 ALR 1250.

Circumstances of leaving employment, availability for work, or nature of excuse for refusing re-employment as affecting right to social security or unemployment compensation, 165 ALR 1382.

Construction and application of provisions of Unemployment Compensation or

Social Security Acts regarding disqualification for benefits because of labor disputes or strikes, 28 ALR2d 287; 60 ALR3d 1; 60 ALR3d 11; 61 ALR3d 686; 61 ALR3d 693; 61 ALR3d 729; 61 ALR3d 746; 62 ALR3d 304; 62 ALR3d 314; 62 ALR3d 375; 62 ALR3d 380; 62 ALR3d 429; 62 ALR3d 437; 63 ALR3d 88.

Professional personnel such as physicians, surgeons, dentists, lawyers, and the like, as “employees” within Social Security Act, 88 ALR2d 979.

Social Security Acts: requisite of employment as affected by family relationship between alleged employer and employee, 8 ALR3d 696.

Unemployment compensation: eligibility as affected by claimant’s refusal to work at particular times or on particular shifts, 35 ALR3d 1129; 12 ALR4th 611.

Right to unemployment compensation as affected by receipt of pension, 56 ALR3d 520.

Unemployment compensation: eligibility as affected by mental, nervous, or psychological disorder, 1 ALR4th 802.

Employee’s refusal to take lie detector test as banning unemployment compensation, 18 ALR4th 307.

Propriety of telephone testimony or hearings in unemployment compensation proceedings, 90 ALR4th 532.

Unemployment compensation: eligibility as affected by claimant’s refusal to work at particular times or on particular shifts for domestic or family reasons, 2 ALR5th 475.

Right to unemployment compensation or social security benefits of teacher or other school employee, 33 ALR5th 643.

Eligibility for unemployment compensation as affected by claimant’s voluntary separation or refusal to work alleging that the work is illegal or immoral, 41 ALR5th 123.

ARTICLE 1

GENERAL PROVISIONS

34-8-1. Short title.

This chapter shall be known and may be cited as the “Employment Security Law.” (Code 1981, § 34-8-1, enacted by Ga. L. 1991, p. 139, § 1.)

Editor's notes. — Ga. L. 1941, p. 229, §§ 1 through 3 ratified, approved, and confirmed an executive order and proclamation issued by the Governor on April 5, 1940, suspending the collection of unemployment compensation taxes upon certain items and from certain employers exempted by amend-

ments to the Social Security Act approved in August, 1939.

Law reviews. — For survey article on local government law, see 34 Mercer L. Rev. 225 (1982). For annual survey of labor and employment law, see 57 Mercer L. Rev. 251 (2005).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 and former Code Section 34-8-1, which was repealed by Ga. L. 1991, p. 139, § 1, effective January 1, 1992, are included in the annotations for this Code section.

Scope of chapter. — In determining whether an individual comes within the scope of Ga. L. 1937, p. 806 (see O.C.G.A. Ch. 8, T. 34) it is first necessary to establish that the individual in question performs services for wages. *Williamson v. Modern Homes Constr. Co.*, 114 Ga. App. 340, 151 S.E.2d 488 (1966) (decided under Ga. L. 1937, p. 806).

Construction and application. — The courts, as well as the administrator of the unemployment law, in construing and applying the provisions of such law must liberally construe and apply such law in light of the public policy of this state. *Dalton Brick & Tile Co. v. Huiet*, 102 Ga. App. 221, 115 S.E.2d 748 (1960) (decided under Ga. L. 1937, p. 806).

The courts shall be guided by the fact that the unemployment compensation law is intended to provide some income for persons who are, without fault of their own, temporarily out of employment. *Dalton Brick & Tile Co. v. Huiet*, 102 Ga. App. 221, 115 S.E.2d 748 (1960) (decided under Ga. L. 1937, p. 806).

Substitute teacher's employment was intermittent by nature and not the type of employment that Georgia's Employment Security Law was designed to encourage; consequently, the teacher was not unemployed as defined by statute as a matter of law at the time that the teacher filed a claim for unemployment benefits, and the teacher's claim for benefits was properly denied. *Campbell v. Poythress*, 216 Ga. App. 834, 456 S.E.2d 110 (1995).

Rulemaking. — Under the Administrative Procedure Act the adoption of "[r]ules relating to . . . benefits by the state or of an agency" is expressly exempted by O.C.G.A. § 50-13-2(6)(I) from the strict rulemaking procedural requirements of O.C.G.A. § 50-13-4. This includes the promulgation of policies determining eligibility for entitlement and rules for granting unemployment benefits. *Caldwell v. Amoco Fabrics Co.*, 165 Ga. App. 674, 302 S.E.2d 596 (1983) (decided under former § 34-8-1).

Cited in *Huiet v. Dayan*, 194 Ga. 250, 21 S.E.2d 423 (1942); *Johnson v. Huiet*, 67 Ga. App. 638, 21 S.E.2d 437 (1942); *Lee v. State*, 73 Ga. App. 821, 38 S.E.2d 128 (1946); *Banks v. Huiet*, 111 Ga. App. 607, 142 S.E.2d 421 (1965); *Caldwell v. Atlanta Bd. of Educ.*, 152 Ga. App. 291, 262 S.E.2d 573 (1979).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 24 Am. Jur. Pleading and Practice Forms, Unemployment Compensation, § 3.

ALR. — What constitutes appropriate re-

lief for retaliatory discharge under § 11(c) of Occupational Safety and Health Act (OSHA) (29 U.S.C.S. § 660(c)), 134 ALR Fed 629.

34-8-2. Declaration of public policy.

As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker or the worker's family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The General Assembly therefore declares that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own. (Code 1981, § 34-8-2, enacted by Ga. L. 1991, p. 139, § 1.)

Law reviews. — For comment on *Meakins v. Huiet*, 100 Ga. App. 557, 112 S.E.2d 167 (1959), see 11 Mercer L. Rev. 395 (1960).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 and former Code Section 34-8-2, which was repealed by Ga. L. 1991, p. 139, § 1, effective January 1, 1992, are included in the annotations for this Code section.

Constitutionality. — The fact that an employee is entitled to benefits based on employment at a hospital bears a substantial relationship to the purpose of this chapter. Compulsory contributions for employment security are, like many other taxes, payable without regard to fault; an employee's eligibility for benefits and the hospital authority's resulting liability do not offend the due process clause of Georgia's Constitution. *Caldwell v. Hospital Auth.*, 248 Ga. 887, 287 S.E.2d 15 (1982) (decided under Ga. L. 1937, p. 806; see O.C.G.A. Ch. 8, T. 34).

Purpose of chapter. — The purpose of this chapter is to prevent economic insecurity due to unemployment by encouraging

employers to provide more stable employment and to accumulate funds to provide benefits for periods of unemployment, and for this purpose it must be liberally construed and applied. *Redwine v. Wilkes*, 83 Ga. App. 645, 64 S.E.2d 101 (1951) (decided under Ga. L. 1937, p. 806; see O.C.G.A. Ch. 8, T. 34).

The purpose of this chapter is to spread and lighten the burden of unemployment by allowing involuntarily unemployed workers to collect benefits based on their work history, even though that work history may encompass a period of employment which the employee voluntarily terminated. Furthermore, that this bears a substantial relationship to the purpose of the law seems clear beyond peradventure; it does in fact spread and lighten the employee's burden of involuntary unemployment. *Caldwell v. Hospital Auth.*, 248 Ga. 887, 287 S.E.2d 15 (1982) (decided under Ga. L. 1937, p. 806; see O.C.G.A. Ch. 8, T. 34).

Legislative intent. — The unmistakable legislative intent of the Employment Security Law is to pay unemployment compensation during periods of unemployment to those workers whose unemployment is involuntary and is not the result of their own fault. *Caldwell v. Amoco Fabrics Co.*, 165 Ga. App. 674, 302 S.E.2d 596 (1983) (decided under Ga. L. 1937, p. 806).

The legislative intent and purpose, that only the involuntarily unemployed whose unemployment is not the result of their own fault are entitled to compensation, is the foundation upon which the entire act rests; that intent and purpose runs irresistibly through every paragraph and sentence of the whole law and is supreme and controlling in the construction of all paragraphs and sentences. *Ford Motor Co. v. Abercrombie*, 207 Ga. 464, 62 S.E.2d 209 (1950) (decided under Ga. L. 1937, p. 806).

This chapter is to be liberally construed in

favor of the state. *Williams v. Tracy Bldrs., Inc.*, 94 Ga. App. 203, 94 S.E.2d 139 (1956) (decided under Ga. L. 1937, p. 806; see O.C.G.A. Ch. 8, T. 34).

“Through no fault of their own” construed. — The phrase “through no fault of their own” as used in this section evidently refers to causes beyond “their” control. *Huiet v. Schwob Mfg. Co.*, 196 Ga. 855, 27 S.E.2d 743 (1943) (decided under Ga. L. 1937, p. 806; see O.C.G.A. § 34-8-2).

Cited in *Union Dry Goods Co. v. Cook*, 71 Ga. App. 708, 32 S.E.2d 190 (1944); *Brumby v. Brooks*, 234 Ga. 376, 216 S.E.2d 288 (1975); *Phillips v. Caldwell*, 144 Ga. App. 376, 241 S.E.2d 278 (1977); *Caldwell v. Amoco Fabrics Co.*, 163 Ga. App. 74, 293 S.E.2d 57 (1982); *Millen v. Caldwell*, 253 Ga. 112, 317 S.E.2d 818 (1984); *Department of Labor v. Baldwin County Hosp. Auth.*, 241 Ga. App. 119, 526 S.E.2d 153 (1999).

OPINIONS OF THE ATTORNEY GENERAL

Editor’s notes. — In light of the similarity of the provisions, opinions decided under Ga. L. 1937, p. 806, are included in the annotations for this Code section.

Purpose of chapter. — The award of benefits to a “substitute” or part-time teacher during intervals between the teacher’s peri-

odic services solely by virtue of the teacher’s being a substitute teacher would be contrary to the basic purpose of the law, which is to enhance stable employment and lighten the burden of involuntary unemployment. 1977 Op. Att’y Gen. No. 77-45.

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, § 5.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 278 et seq.

ALR. — Constitutionality of unemployment insurance legislation, 106 ALR 1531.

34-8-3. Right of General Assembly to amend or repeal chapter; effect.

The General Assembly reserves the right to amend or repeal all or any part of this chapter at any time; and there shall be no vested private rights of any kind against such amendment or repeal. All the rights, privileges, or immunities conferred by this chapter, or by actions taken pursuant thereto, shall exist subject to the power of the General Assembly to amend or repeal this chapter at any time. (Code 1981, § 34-8-3, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-4. Representation by Attorney General.

In any civil action to enforce this chapter, the Commissioner, the board of review, and the state shall be represented by the Attorney General of this state. (Code 1981, § 34-8-4, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 6, § 34.)

ARTICLE 2**DEFINITIONS****34-8-20. Annual payroll; average annual payroll.**

(a) As used in this chapter, the term “annual payroll” means the total amount of wages for employment paid by an employer during the 12 month period immediately preceding and ending on the computation date.

(b) As used in this chapter, the term “average annual payroll” means the average of the annual payrolls of an employer for the last three 12 month periods immediately preceding the computation date, except that for an employer whose account could have been charged with benefit payments throughout at least 12 but less than 36 consecutive calendar months immediately preceding and ending on the computation date, the term “average annual payroll” means the total amount of wages for employment paid by such employer during the 12 month period immediately preceding and ending on the computation date. (Code 1981, § 34-8-20, enacted by Ga. L. 1991, p. 139, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 14, 18, 19.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 355 et seq.

34-8-21. Base period.

(a) Except as provided in subsection (b) of this Code section, as used in this chapter, the term “base period” means the first four of the last five completed calendar quarters immediately preceding the first day of an individual’s benefit year; provided, however, that, in the case of a combined wage claim under Code Section 34-8-80, the base period shall be that applicable under the unemployment compensation law of the paying state.

(b) If an individual does not have sufficient wages to qualify for benefits under the definition of base period in subsection (a) of this Code section, then his or her base period shall be calculated using the last four completed quarters immediately preceding the first day of the individual’s benefit year. Such base period shall be known as the “alternative base period.” Applicants shall receive written notice of the alternative base period. Implemen-

tation of the alternative base period shall commence on January 1, 2003. Implementation of the alternative base period under this subsection shall be under such terms and conditions as the Commissioner may prescribe by rules and regulations. All benefit payments made under this subsection shall be paid exclusively from amounts credited to the account of this state in the Unemployment Trust Fund by the secretary of the treasury of the United States pursuant to Section 903 of the federal Social Security Act, as amended by the Job Creation and Worker Assistance Act of 2002 (P.L. 107-147). (Code 1981, § 34-8-21, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 2002, p. 1119, § 2; Ga. L. 2004, p. 1074, § 1.)

Editor's notes. — Ga. L. 2002, p. 1119, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Employment Security and Enhancement Act of 2002.'"

Law reviews. — For survey article on labor and employment law for the period from

June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 303 (2003). For annual survey of labor and employment law, see 56 Mercer L. Rev. 291 (2004).

For note on the 2002 enactment of this chapter, see 19 Ga. St. U.L. Rev. 258 (2002).

34-8-22. Benefits.

As used in this chapter, the term "benefits" means the compensation payable to an individual, as provided in this chapter, with respect to the individual's unemployment. (Code 1981, § 34-8-22, enacted by Ga. L. 1991, p. 139, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 13, 29.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 380.

34-8-23. Benefit year.

As used in this chapter, the term "benefit year" with respect to any individual means the one-year period beginning with the day on which a valid claim is filed. In the case of a combined wage claim pursuant to Code Section 34-8-80, the benefit year shall be that of the paying state. Benefits may only be paid during the applicable benefit year, unless there is an extended benefits period in effect as provided in Code Section 34-8-197. (Code 1981, § 34-8-23, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-24. Bona fide in the labor market.

As used in this chapter, the term "bona fide in the labor market" means that any person claiming benefits under this chapter must be available for full-time employment, as that term is generally understood in the trade or work classification involved, without regard to prior work restrictions. (Code 1981, § 34-8-24, enacted by Ga. L. 1991, p. 139, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Code Section 34-8-34, which was repealed by Ga. L. 1991, p. 139, § 1, effective January 1, 1992, are included in the annotations for this Code section.

Full-time students. — A claimant can be a full-time student and still be available for full-time continuous employment. *Curry v. Tanner*, 180 Ga. App. 21, 348 S.E.2d 465 (1986) (decided under former § 34-8-34).

OPINIONS OF THE ATTORNEY GENERAL

Claimant with direct interest in labor dispute is disqualified from receiving unemployment benefits until that claimant completely severs the relationship with the employer involved in the dispute and reen-

ters the labor market through an active, good faith attempt to obtain full-time, continuous employment. 1991 Op. Att'y Gen. No. 91-19.

34-8-25. Calendar quarter.

As used in this chapter, the term "calendar quarter" means the period of three consecutive calendar months ending on the dates of March 31, June 30, September 30, or December 31 of each year or such other dates as the Commissioner may by regulation prescribe. (Code 1981, § 34-8-25, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-26. Commissioner.

As used in this chapter, the term "Commissioner" means the Commissioner of Labor. (Code 1981, § 34-8-26, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-27. Common paymaster.

As used in this chapter, the term "common paymaster" means one of two or more related corporations which concurrently employ the same individual and which is designated to remunerate such individual for services performed for all such related corporations. Upon approval by the Commissioner, the common paymaster shall be considered the employer of such individual and shall be responsible for contributions due on wages paid. Each of the related corporations shall be considered to have paid as remuneration to such individual only the amounts actually disbursed by it to such individual and shall not be considered to have paid as remuneration to such individual amounts actually disbursed to such individual by the common paymaster. (Code 1981, § 34-8-27, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-28. Computation date.

As used in this chapter, the term "computation date" means June 30 of each calendar year with respect to rates applicable to the succeeding

calendar year for each employer whose account could have been chargeable with benefits throughout the 36 consecutive calendar month period immediately preceding and ending on the computation date. (Code 1981, § 34-8-28, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-29. Contributions; payments in lieu of contributions.

(a) As used in this chapter, the term “contributions” means the money payments to the Unemployment Compensation Fund required by Code Sections 34-8-150 through 34-8-156.

(b) As used in this chapter, the term “payments in lieu of contributions” means the money payments to reimburse the Unemployment Compensation Fund for benefit payments charged to employers as required pursuant to Code Sections 34-8-158 through 34-8-161. (Code 1981, § 34-8-29, enacted by Ga. L. 1991, p. 139, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, § 14 et seq.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 194.

34-8-30. Deductible earnings.

As used in this chapter, the term “deductible earnings” means all money in excess of \$30.00 each week earned by a claimant for services performed, whether or not received by such claimant. For claims filed on or after July 1, 2002, the term “deductible earnings” means all money in excess of \$50.00 each week earned by a claimant for services performed, whether or not received by such claimant. Deductible earnings shall be subtracted from the weekly benefit amount of the claim. (Code 1981, § 34-8-30, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 2002, p. 1119, § 3.)

Editor’s notes. — Ga. L. 2002, p. 1119, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Employment Security and Enhancement Act of 2002.’”

Law reviews. — For survey article on labor

and employment law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 303 (2003).

For note on the 2002 enactment of this chapter, see 19 Ga. St. U.L. Rev. 258 (2002).

34-8-31. Department.

As used in this chapter, the term “department” means the Georgia Department of Labor. (Code 1981, § 34-8-31, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-32. Employee leasing company.

(a) As used in this chapter, the term “employee leasing company” means an independently established business entity which engages in the business of providing leased employees to any other employing unit under the following conditions:

- (1) Negotiates with clients or customers for such matters as time, place, type of work, working conditions, quality, and price of service;
- (2) Determines assignments of individuals to its clients or customers, even if the individuals retain the right to refuse specific assignments;
- (3) Sets the rate of pay of the individuals, whether or not through negotiation;
- (4) Pays the individuals from its accounts; and
- (5) Hires and terminates individuals who perform services for the clients or customers.

(b) Individuals performing services for an employee leasing company shall be considered employees of the employee leasing company. The employee leasing company shall file required reports in accordance with regulations prescribed by the Commissioner and pay contributions on wages paid to such employees.

(c) Individuals who perform services for temporary help contracting firms as that term is defined in Code Section 34-8-46 shall not be considered employees of an employee leasing company. (Code 1981, § 34-8-32, enacted by Ga. L. 1991, p. 139, § 1.)

Administrative rules and regulations. — State of Georgia, Georgia Department of Labor, Employment Security Law, § 300-2-7.07.

34-8-33. Employer.

(a) As used in this chapter, the term “employer” means:

(1) Any employing unit which, in either the current or preceding calendar year:

(A) Paid in any calendar quarter wages of \$1,500.00 or more for service in employment; or

(B) Had in employment at least one individual, irrespective of whether the same individual was in employment on each such day, for some portion of a day in each of 20 different calendar weeks, whether or not such weeks were consecutive;

(2) Any employing unit which, within either the current or preceding calendar year, paid for domestic service, as defined in subsection (l) of

Code Section 34-8-35, cash remuneration of \$1,000.00 or more during any calendar quarter;

(3) Any employing unit which within either the current or preceding calendar year:

(A) Paid, during any calendar quarter, remuneration in cash of \$20,000.00 or more to individuals employed in agricultural labor; or

(B) Had ten or more individuals employed in agricultural labor, regardless of whether they were employed at the same moment of time, for some portion of a day in each of 20 different calendar weeks in a calendar year.

For the purposes of subparagraphs (A) and (B) of this paragraph, service in agricultural labor performed before January 1, 1993, by an alien admitted to the United States to perform service in agricultural labor pursuant to Sections 214(c) and 101(a)(15)(H) of the federal Immigration and Nationality Act shall not be taken into account;

(4) Any religious, charitable, educational, or other organization if the following conditions are met:

(A) The organization's employment is excluded from the Federal Unemployment Tax Act by reason of Section 3306(c)(8) of that act; and

(B) The organization had, within either the current or preceding calendar year, four or more individuals in employment for some portion of a day in each of 20 different weeks, whether or not such weeks were consecutive and regardless of whether they were employed at the same time;

(5) Any governmental entity for which service in employment as defined in subsection (h) of Code Section 34-8-35 is performed;

(6) Any employing unit which is or becomes an employer subject to this chapter within any calendar year shall be subject to this chapter during the whole of such calendar year. Any employer subject to this chapter shall remain an employer unless liability has been terminated in accordance with Code Section 34-8-163;

(7) Any employing unit which has elected to become an employer subject to this chapter pursuant to the following:

(A) An employing unit not otherwise subject to this chapter which files with the Commissioner its written election to become an employer subject to this chapter for not less than two calendar years shall, with the written approval of the Commissioner, become an employer subject to the same extent as all other employers as of the date stated in such approval. The employer shall cease to be subject as of January 1 of any

calendar year subsequent to such two calendar years only if prior to April 30 in any calendar year it has filed with the Commissioner a written notice to that effect. However, any employing unit which has elected coverage under this Code section and subsequently becomes liable by operation of law may terminate coverage only as provided in Code Section 34-8-163; or

(B) Any employing unit for which services are performed that do not constitute employment as defined in this chapter may file with the Commissioner a written election that all such services performed by individuals in its employ in one or more distinct establishments or places of business shall be deemed to constitute employment for all purposes of this chapter. The election must be for not less than two calendar years. Upon the written approval of the Commissioner, such services shall be deemed to constitute employment subject to this chapter after the date stated in such approval. Such services shall cease to be deemed employment as of January 1 of any calendar year subsequent to such two calendar years only if prior to April 30 in any calendar year such employing unit has filed with the Commissioner a written notice to that effect;

(8) Any employing unit which acquired the organization, trade or business, or substantially all of the assets of another which at the time of such acquisition was an employer subject to this chapter;

(9) Any employing unit which acquired the organization, trade or business, or substantially all of the assets of another employing unit, if the employment record of such employing unit subsequent to such acquisition together with the employment record of the acquired unit prior to such acquisition, both within the same calendar year, would be sufficient to meet any other definition of employer within this chapter; or

(10) Any employing unit which is not an employer by reason of any other paragraph of this Code section:

(A) For which services are performed within the state with respect to which such employing unit is liable for any federal tax against which credit may be taken for contributions paid into a state unemployment compensation fund; or

(B) Which, as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required to be covered under this chapter.

(b) Nothing in this chapter shall be construed to require identical coverage to that provided by the Federal Unemployment Tax Act, as amended, nor shall interpretations as to liability or nonliability by federal administrative agencies be binding on the department. (Code 1981, § 34-8-33, enacted by Ga. L. 1991, p. 139, § 1.)

U.S. Code. — The Federal Unemployment Tax Act, referred to in subparagraph (a)(10)(B) and subsection (b), is codified as 26 U.S.C. §§ 3301-3311. Section 3306(c)(8) of the Act, referred to in subparagraph (a)(4)(A), is codified as 26 U.S.C. § 3306(c)(8).

Sections 214(c) and 101(a)(15)(H) of the federal Immigration and Nationality Act, referred to in paragraph (a)(3), are codified as 8 U.S.C. §§ 1184(c) and 1101(a)(15)(H), respectively.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 are included in the annotations for this Code section.

Statutory definition mandatory. — In determining the meaning of the word "employment" as used in this chapter, the court is bound by the statutory definition of that word in those provisions, rather than by the common-law meaning of the master and servant relation. *Union Dry Goods Co. v. Cook*, 71 Ga. App. 708, 32 S.E.2d 190 (1944) (decided under former Ga. L. 1937, p. 806; see O.C.G.A. Ch. 8, T. 34).

"Acquire" construed. — To acquire is "to get as one's own." *Williams v. Tracy Bldrs., Inc.*, 94 Ga. App. 203, 94 S.E.2d 139 (1956) (decided under former Ga. L. 1937, p. 806).

Business acquisitions. — The effect of acquiring the business of another is merely to tack on to the number of computable employee-weeks of the employing unit the employee-weeks of its predecessor, which

would result, for the purposes of this chapter, in charging each defendant with a sufficient number of employee-weeks to bring it within the terms of those provisions. *Williams v. Tracy Bldrs., Inc.*, 94 Ga. App. 203, 94 S.E.2d 139 (1956) (decided under former Ga. L. 1937, p. 806; see O.C.G.A. ch. 8, T. 34).

Cited in Independent Gasoline Co. v. Bureau of Unemployment Comp., 190 Ga. 613, 10 S.E.2d 58 (1940); *Lewis v. Huiet*, 67 Ga. App. 337, 20 S.E.2d 201 (1942); *Huiet v. Dayan*, 69 Ga. App. 81, 24 S.E.2d 728 (1943); *Dunn v. Huiet*, 69 Ga. App. 160, 24 S.E.2d 868 (1943); *Royal Cigar Co. v. Huiet*, 195 Ga. 852, 25 S.E.2d 810 (1943); *Huiet v. Brown*, 70 Ga. App. 638, 29 S.E.2d 326 (1944); *Loftis Automatic Sprinkler Co. v. Thompson*, 74 Ga. App. 743, 41 S.E.2d 323 (1947); *Cartersville Candlewick, Inc. v. Huiet*, 204 Ga. 609, 50 S.E.2d 647 (1948); *Williamson v. LaVonda's Hair Stylist, Inc.*, 114 Ga. App. 289, 151 S.E.2d 173 (1966); *Brumby v. Brooks*, 234 Ga. 376, 216 S.E.2d 288 (1975).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the provisions, opinions decided under Ga. L. 1937, p. 806 are included in the annotations for this Code section.

Small claims court judge as employer for bailiff. — A small claims court judge of a county is the "employer," for reporting purposes under this section, for the bailiff of that small claims court. 1978 Op. Att'y Gen. No. U78-17 (decided under former Ga. L. 1937, p. 806; see O.C.G.A. § 34-8-33).

Justice of peace as employer for consta-

bles. — A justice of the peace is the "employer" for reporting purposes under this chapter for the constable or constables within the militia district served by the justice of the peace, except when the services of the constable are rendered outside of the constable's functions in the justice's court, in which case the county in which the constable serves is the "employer" for reporting purposes under those provisions. 1978 Op. Att'y Gen. No. 78-27 (decided under former Ga. L. 1937, p. 806; see O.C.G.A. Ch 8, T. 34).

RESEARCH REFERENCES

C.J.S. — 81 C.J.S., Social Security and Public Welfare, §§ 289, 301, 302, 309 et seq.

ALR. — What amounts to vendor-vendee or lessor-lessee relationship, as distinguished

from employment or service relation, within Social Security or Unemployment Compensation Acts, 152 ALR 520; 164 ALR 1411.

Liability of political party or its subdivision for contributions under employment

compensation acts, 43 ALR3d 1351.

What constitutes "agricultural" or "farm" labor within social-security or unemployment-compensation acts, 60 ALR5th 459.

34-8-34. Employing unit.

As used in this chapter, the term "employing unit" means any individual, the legal representative of a deceased individual, or any type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, employee leasing company, common paymaster, or the receiver, trustee in bankruptcy, trustee, or successor thereof which has or had in its employ one or more individuals performing services for it within this state. Each individual performing services within this state for any employing unit which maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this chapter. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this chapter, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of such work. (Code 1981, § 34-8-34, enacted by Ga. L. 1991, p. 139, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 are included in the annotations for this Code section.

Warehouseman as independent contractor or employee. — Services of a warehouse owner who, for commission based on the hundred weight of freight handled by the owner, picked up, stored and delivered freight for a common carrier, presumptively comes within the statutory definition of employment until the defendant carrier shows conjunctively that the warehouseman has been and will continue to be free from control or direction over the performance of such services, both under the warehouseman's contract of service, and (1) that the warehouseman's service is either outside the usual course of the business for which such service is performed, or that the warehouseman's service is performed outside of all the

places of business of the enterprise for which such service is performed, and (2) that the warehouseman is customarily engaged in an independently established trade, occupation, profession, or business. *Benton Rapid Express v. Redwine*, 87 Ga. App. 584, 74 S.E.2d 504 (1953) (decided under former Ga. L. 1937, p. 806).

Employment of relief personnel. — While relief drivers were hired and paid directly by the owner-drivers, where a lease agreement between the owner-drivers and the defendant in *fi. fa.*, a transport company, contemplated the employment of relief drivers, and the evidence showed without contradiction that the defendant in *fi. fa.* had actual knowledge of their employment, by the terms of Ga. L. 1937, p. 806 (see O.C.G.A. § 34-8-34) the relief drivers were brought within the purview of other provisions of Ga. L. 1937, p. 806 (see O.C.G.A. § 34-8-1 et

seq.). *Redwine v. Refrigerated Transp. Co.*, 90 Ga. App. 784, 84 S.E.2d 478 (1954) (decided under former Ga. L. 1937, p. 806).

Cited in *Huiet v. Dayan*, 69 Ga. App. 81, 24 S.E.2d 728 (1943); *Jeffreys-McElrath Mfg. Co. v. Huiet*, 196 Ga. 710, 27 S.E.2d 385 (1943); *Huiet v. Brown*, 70 Ga. App. 638, 29

S.E.2d 326 (1944); *Huiet v. Brunswick Pulp & Paper Co.*, 74 Ga. App. 355, 39 S.E.2d 545 (1946); *Darby v. Cook*, 201 Ga. 309, 39 S.E.2d 665 (1946); *Cartersville Candlewick, Inc. v. Huiet*, 204 Ga. 609, 50 S.E.2d 647 (1948); *Williams v. Tracy Bldrs., Inc.*, 94 Ga. App. 203, 94 S.E.2d 139 (1956).

RESEARCH REFERENCES

C.J.S. — 81 C.J.S., Social Security and Public Welfare, §§ 289, 298.

ALR. — Validity, construction, and application of provisions of Social Security or

Unemployment Compensation Acts as to employment units which are affiliated or under a common control, 158 ALR 1237.

34-8-35. Employment.

(a) As used in this chapter, the term “employment” means any service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.

(b) The term “employment” shall include an individual’s entire service performed within and outside this state, if:

(1) The service is localized in this state. Service shall be deemed to be localized within a state if:

(A) The service is performed entirely within such state; or

(B) The service is performed both within and outside the state, but the service performed outside the state is incidental to the individual’s service within the state. “Incidental service” shall include service that is temporary or transitory in nature or consists of isolated transactions;

(2) The service is not localized in any state but some of the service is performed in this state and:

(A) The base of operations or, if there is no base of operations, the place from which such service is directed or controlled is in this state; or

(B) The base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual’s residence is in this state;

(3) The service is performed within the United States or Canada, if such service is not covered under the unemployment compensation law of any other state or Canada and the place from which the service is directed and controlled is in this state; or

(4) The service is performed outside the United States, except Canada, by an individual who is a citizen of the United States in the employ of an American employer, other than service which is deemed “employ-

ment” under subsections (d) and (e) of this Code section or the parallel provisions of another state’s law, if:

(A) The employer’s principal place of business is located in this state;

(B) The employer has no place of business in the United States, but:

(i) The employer is an individual who is a resident of this state;

(ii) The employer is a corporation which is organized under the laws of this state; or

(iii) The employer is a partnership or a trust and the number of partners or trustees who are residents of this state is greater than the number who are residents of any other state; or

(C) None of the criteria of subparagraphs (A) and (B) of this paragraph is met but the employer has elected coverage in this state or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits based on such service pursuant to this chapter.

(c) For the purposes of paragraph (4) of subsection (b) of this Code section:

(1) The term “American employer” means:

(A) An individual who is a resident of the United States;

(B) A partnership, if two-thirds or more of the partners are residents of the United States;

(C) A trust, if all the trustees are residents of the United States; or

(D) A corporation organized under the laws of the United States or of any state.

(2) The term “United States” includes the states, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(d) Services performed within this state but not covered under subsection (b) of this Code section shall be deemed to be employment subject to this chapter if contributions are not required and paid with respect to such services under an unemployment compensation law of any other state or of the federal government.

(e) Services not covered under subsection (b) of this Code section and performed entirely outside this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the federal government, shall be deemed to be employment subject to this chapter if the individual performing such services is a resident of this state and the Commissioner approves the

election of the employing unit for whom such services are performed that the entire service of such individual be deemed to be employment subject to this chapter.

(f) Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown that:

(1)(A) Such individual has been and will continue to be free from control or direction over the performance of such services, both under the individual's contract of service and in fact; and

(B) Such individual is customarily engaged in an independently established trade, occupation, profession, or business; or

(2) Such individual and the services performed for wages are the subject of an SS-8 determination by the Internal Revenue Service, which decided against employee status.

(g)(1) The term "employment" shall include all services performed, including service in interstate commerce, by:

(A) Any officer of a corporation; or

(B) Any individual, other than an individual who is an employee under subparagraph (A) of this paragraph, who performs services for remuneration for any person:

(i) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages other than milk, or laundry or dry-cleaning services for his or her principal; or

(ii) As a traveling or city salesman, other than an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of and the transmission to his principal, except for sideline sales activities on behalf of some other person, of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

(2) For purposes of subparagraph (B) of paragraph (1) of this subsection, the term "employment" shall include services described in divisions (1)(B)(i) and (1)(B)(ii) of this subsection performed only if:

(A) The contract of service contemplates that substantially all of the services are to be performed personally by such individual;

(B) The individual does not have a substantial investment in facilities used in connection with the performance of the services other than in facilities for transportation; and

(C) The services are not in the nature of a single transaction that is not part of a continuing relationship with the person for whom the services are performed.

(h) The term “employment” shall include service performed in the employ of this state or any of its instrumentalities or any political subdivision of this state or any of its instrumentalities or any instrumentality of more than one of the foregoing or any instrumentality of any of the foregoing and one or more other states or political subdivisions, provided that such service is excluded from “employment” as defined in the Federal Unemployment Tax Act by Section 3306(c)(7) of that act and is not excluded from “employment” under paragraph (3) of subsection (j) of this Code section. Each of the governmental entities described above shall be individually liable for the payment of contributions or reimbursement for payment of benefits as provided in Code Sections 34-8-158 through 34-8-161; and each shall be individually responsible for the filing of quarterly wage summary reports as promulgated in regulations by the Commissioner and provided in Code Section 34-8-165. For the purposes of the unemployment compensation coverage provided for by this chapter, employees of county and district health agencies established under Chapter 3 of Title 31 and employees of the community service boards established under Chapter 2 of Title 37 are deemed to be employees of this state.

(i) The term “employment” shall include service performed by an individual in the employ of a religious, charitable, educational, or other organization, but only if such organization meets the definition of employer in Code Section 34-8-33.

(j) For the purposes of subsections (h) and (i) of this Code section, the term “employment” does not apply to service performed:

(1) In the employ of:

(A) A church or convention or association of churches; or

(B) An organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(2) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of duties required by such order;

(3) In the employ of a governmental entity referred to in subsection (h) of this Code section if such service is performed by an individual in the exercise of duties:

(A) As an elected official;

(B) As a member of a legislative body or a member of the judiciary of a state or political subdivision;

(C) As a member of the state National Guard or Air National Guard;
or

(D) In a position which, under or pursuant to the laws of this state, is designated as (i) a major nontenured policy-making or advisory position, or (ii) a policy-making or advisory position, the performance of the duties of which ordinarily does not require more than eight hours per week;

(4) By an individual receiving rehabilitation or remunerative work in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who, because of their impaired physical or mental capacity, cannot be readily absorbed in the competitive labor market;

(5) By an individual receiving work relief or work training as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof. This exclusion shall not apply to programs that provide for and require unemployment insurance coverage for the participants; or

(6) By an inmate of a custodial or penal institution.

(k) The term "employment" shall include service performed on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States.

(l) The term "employment" shall include domestic service in a private home, local college club, or local chapter of a college fraternity or sorority, but only if the employing unit meets the definition of employer in Code Section 34-8-33.

(m)(1) The term "employment" shall include service performed by an individual in agricultural labor, as defined in paragraph (2) of this subsection, but only if the employing unit meets the definition of employer in Code Section 34-8-33.

(2) As used in this subsection, the term "agricultural labor" means service on a farm:

(A) In the employ of any employing unit in connection with cultivating the soil or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, fur-bearing animals, and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation,

improvement, or maintenance of such farm and its tools and equipment, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in Section 15(g) of the federal Agricultural Marketing Act of 1946, as amended, or in connection with the ginning of cotton or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways not owned or operated for profit and used exclusively for supplying and storing water for farming purposes; or

(D) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market any agricultural or horticultural commodity, but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. This paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption. This paragraph shall also apply to services performed in the employ of a group of operators of farms, or a cooperative organization of which such operators are members, in the performance of service prescribed in this paragraph, but only if such operators produced more than one-half of the commodity with respect to which such service is performed.

(3) As used in this subsection, the term "farm" includes:

(A) Those farms used for production of stock, dairy products, poultry, fruit, and fur-bearing animals; and

(B) Truck farms, plantations, ranches, nurseries, ranges, greenhouses, orchards, or other similar structures or tracts used primarily for the raising of agricultural or horticultural commodities.

(4) For the purposes of this subsection, any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other person shall be treated as an employee of such crew leader:

(A) If such crew leader holds a valid certificate of registration under the federal Farm Labor Contractor Registration Act of 1963 or if substantially all the members of such crew operate or maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized equipment which is provided by such crew leader; and

(B) If such individual is not an employee of such other person within the meaning of paragraph (1) of this subsection.

(5) For the purposes of paragraph (4) of this subsection, in the case of any worker who is furnished by a crew leader to perform service in agricultural labor for any other person and who is not treated as an employee of such crew leader under this paragraph:

(A) Such other person and not the crew leader shall be treated as the employer of the worker; and

(B) Such other person shall be treated as having paid cash remuneration to the worker in an amount equal to the amount of cash remuneration paid to the worker by the crew leader, either on the worker's own behalf or on behalf of such other person, for the service in agricultural labor performed for such other person.

(6) For purposes of paragraphs (4) and (5) of this subsection, the term "crew leader" means an individual who:

(A) Furnishes workers to perform service in agricultural labor for any other person;

(B) Pays, either on such individual's own behalf or on behalf of another person, the workers so furnished for the service in agricultural labor performed by them; and

(C) Has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person.

(n) The term "employment" shall not include:

(1) Service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is \$50.00 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For the purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if:

(A) On each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business; or

(B) Such individual was regularly employed, as determined under subparagraph (A) of this paragraph, by such employer in the performance of such service during the preceding calendar quarter;

(2) Service performed in the employ of a hospital, if such service is performed by a patient of a hospital;

(3) Service performed by an individual in the employ of the individual's son, daughter, or spouse and service performed by a child under the age of 21 years in the employ of his or her father or mother;

(4) Service performed in the employ of the United States government or of an instrumentality wholly owned by the United States; except that, if the Congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation law or act, then, to the extent permitted by Congress and from and after the date as of which such permission becomes effective, all of the provisions of this chapter shall be applicable to such instrumentalities and to services performed by employees for such instrumentalities in the same manner, to the same extent, and on the same terms as to all other employers and employing units;

(5) Service performed in the employ of an employer, as defined by the federal Railroad Unemployment Insurance Act, or as an "employee representative," as defined by the federal Railroad Unemployment Insurance Act, and service with respect to which unemployment compensation is payable under an unemployment compensation system for maritime employees or under any other unemployment compensation system established by an act of Congress; provided, however, that the Commissioner is authorized and directed to enter into agreements with the proper agencies under such act or acts of Congress, which agreements shall become effective ten days after publication thereof in the manner provided in Code Section 34-8-71 for general rules, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this chapter, acquired rights to unemployment compensation under such act or acts of Congress or who have, after acquiring potential rights to unemployment compensation under such act or acts of Congress, acquired rights to benefits under this chapter;

(6) Service performed in any calendar quarter in the employ of any organization exempt from income tax under 26 U.S.C. Section 501:

(A) The remuneration for which does not exceed \$50.00; or

(B) In the employ of a school, college, or university, if such service is performed by a student who is enrolled and is regularly attending classes at such school, college, or university or by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that (i) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university and (ii) such employment will not be covered by any program of unemployment insurance;

(7) Services performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law; and service performed in the employ of

a hospital in a clinical training program for a period of one year by an individual immediately following the completion of a four-year course in a medical school chartered or approved pursuant to state law;

(8) Service performed by an individual under the age of 18 years in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(9) Service performed by an individual for an employer as an insurance agent or as an insurance solicitor or as a licensed real estate salesperson, if all such service performed by such individual for such employer is performed for remuneration solely by way of commission;

(10) Services performed for an employer who is a common carrier of persons or property by an individual, firm, or corporation, as commission agent, in disseminating information with respect to and selling transportation of persons or property, and in maintaining facilities incidental thereto, including waiting areas, dining rooms, and rest rooms for passengers and storage space for property; provided, however, that:

(A) All such services are performed by such individual, firm, or corporation as an independent contractor for such employer and are remunerated solely by way of commissions on the sale price of such transportation;

(B) The employer exercises no general control over such commission agent but only such control as is necessary to assure compliance with its filed tariffs and with the laws of the United States and the State of Georgia and the rules and regulations of the Public Service Commission, the Interstate Commerce Commission, and all other regulatory bodies having jurisdiction of the premises; and

(C) Such services are not rendered in an establishment devoted primarily to use as a waiting room for the passengers or as a storage room for the property carried or to be carried by such common carrier;

(11) Service performed by an individual who is enrolled as a student at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on, in a full-time program taken for credit at such institution, which program combines academic instruction with work experience, if such service is an integral part of such program and such institution has so certified to the employer, except that this paragraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

(12) Service performed by an individual in or as an officer or member of the crew of a vessel while it is engaged in the catching, taking,

harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweed, or other aquatic forms of animal and vegetable life, including service performed by any such individual as an ordinary incident to any such activity, except:

(A) Service performed in connection with the catching or taking of salmon or halibut for commercial purposes; and

(B) Service performed on or in connection with a vessel of more than ten net tons, which tonnage shall be determined in the manner provided for determining the registered tonnage of merchant vessels under the laws of the United States;

(13) Service, other than service performed by a child under the age of 18 years in the employ of his or her father or mother, performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under an arrangement with the owner or operator of such boat pursuant to which:

(A) Such individual does not receive any cash remuneration other than as provided in subparagraph (B) of this paragraph;

(B) Such individual receives a share of the boat's catch or, in the case of a fishing operation involving more than one boat, the boats' catch of fish or other forms of aquatic animal life or a share of the proceeds from the sale of such catch; and

(C) The amount of such individual's share depends on the amount of the boat's catch or, in the case of a fishing operation involving more than one boat, the boats' catch of fish or other forms of aquatic animal life,

but only if the operating crew of such boat or, in the case of a fishing operation involving more than one boat, the operating crew of each boat from which the individual receives a share is normally made up of fewer than ten individuals;

(14) Service performed in the employ of a foreign government;

(15) If the services performed during one-half or more of any pay period by an employee for the employing unit employing him or her constitute employment, all the services of such employee for such period shall be deemed to be employment; but, if the services performed during more than one-half of any such pay period by an employee for the employing unit employing him or her do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this Code section, the term "pay period" means a period of not more than 31 consecutive days for which payment of remuneration is ordinarily made to the employee by the employing unit employing him or her. This Code section shall not be

applicable with respect to services performed in a pay period by an employee for the employing unit employing him or her where any of such service is excepted by paragraph (5) of this subsection;

(16) Services performed by an independent contract carrier for an employer who is a publisher or distributor of printed materials by an individual, firm, or corporation in transporting, assembling, delivering, or distributing printed materials and in maintaining any facilities or equipment incidental thereto, provided that:

(A) The independent contract carrier has with the employer a written contract as an independent contractor;

(B) Remuneration for the independent contract carrier is on the basis of the number of deliveries accomplished;

(C) With exception to providing the area or route which an independent contract carrier may or may not service, or providing materials or direction for the packaging or assembly of printed materials, the employer exercises no general control regarding the method of transporting, assembling, delivering, or distributing the printed materials; and

(D) The contract entered by the independent contract carrier for such services does not prohibit it from the transportation, delivery, assembly, or distribution of printed materials for more than one employer.

Provided, however, that the exclusion provided in this paragraph shall not apply to any such employment on behalf of an employing unit defined in subsection (h) or (i) of this Code section;

(17) Services performed for a common carrier of property, persons, or property and persons by an individual consisting of the pickup, transportation, and delivery of property, persons, or property and persons; provided that:

(A) The individual is free to accept or reject assignments from the common carrier;

(B) Remuneration for the individual is on the basis of commissions, trips, or deliveries accomplished;

(C) Such individual personally provides the vehicle used in the pickup, transportation, and delivery of the property, persons, or property and persons;

(D) Such individual has a written contract with the common carrier;

(E) The written contract states expressly and prominently that the individual knows:

(i) Of the responsibility to pay estimated social security taxes and state and federal income taxes;

(ii) That the social security tax the individual must pay is higher than the social security tax the individual would pay if he or she were an employee; and

(iii) That the work is not covered by the unemployment compensation laws of Georgia; and

(F) The written contract does not prohibit such individual from the pickup, transportation, or delivery of property, persons, or property and persons for more than one common carrier or any other person or entity; or

(18) Services performed by a direct seller, provided that:

(A) Such individual:

(i) Is engaged in the trade or business of selling or soliciting the sale of consumer products, including services or other intangibles, to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis for resale by the buyer or any other person in the home or otherwise than in a permanent retail establishment; or

(ii) Is engaged in the trade or business of selling or soliciting the sale of consumer products, including services or other intangibles, in the home or otherwise than in a permanent retail establishment;

(B) Substantially all the remuneration, whether or not paid in cash, for the performance of the services described in subparagraph (A) of this paragraph is directly related to sales or other output, including the performance of services, rather than to the number of hours worked; and

(C) The services performed by the individual are performed pursuant to a written contract between such individual and the person for whom the services are performed and such contract provides that the individual will not be treated as an employee for federal and state tax purposes. (Code 1981, § 34-8-35, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1993, p. 323, § 1; Ga. L. 1994, p. 97, § 34; Ga. L. 1994, p. 640, § 1; Ga. L. 1994, p. 1717, § 1; Ga. L. 2005, p. 1200, § 1/HB 520; Ga. L. 2006, p. 822, § 1/SB 486; Ga. L. 2007, p. 394, § 1/HB 443.)

The 2006 amendment, effective July 1, 2006, deleted “or” at the end of paragraph (n)(16); substituted “; or” for a period at the end of paragraph (n)(17); and added paragraph (n)(18).

The 2007 amendment, effective July 1, 2007, in subsection (f), designated paragraph (f)(1) as subparagraph (f)(1)(A) and

added “and” to the end, deleted former paragraph (f)(2) which read: “Such service is outside the usual course of the business for which such service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed; and”, redesignated former paragraph (f)(3) as present subpara-

graph (f)(1)(B), added "or" at the end of subparagraph (f)(1)(B), and added present paragraph (f)(2); and, in paragraph (n)(17), inserted ", persons, or property and persons" four times and inserted ", trips," in subparagraph (n)(17)(B).

Code Commission notes. — Pursuant to § 28-9-5, in 1991, "this subsection" was substituted for "subsection (n) of this Code section" at the end of paragraph (n)(15).

U.S. Code. — Section 3306(c)(7) of the Federal Unemployment Tax Act, referred to in subsection (h), is codified at 26 U.S.C. § 3306(c)(7). Section 15(g) of the federal Agricultural Marketing Act of 1946, referred

to in subparagraph (m)(2)(C), is codified at 12 U.S.C. § 1141j(g). The federal Farm Labor Contractor Registration Act of 1963, referred to in subparagraph (m)(4)(A), was codified at 7 U.S.C. §§ 2041-2055, before it was repealed in 1983. The federal Railroad Unemployment Insurance Act, referred to in paragraph (n)(5), is codified at 45 U.S.C. §§ 351-369.

Law reviews. — For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 152 (1993).

For annual survey of labor and employment law, see 58 Mercer L. Rev. 211 (2006).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SERVICES COVERED

SERVICES NOT COVERED

General Consideration

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 and former Code Section 34-8-40 which was repealed by Ga. L. 1991, p. 139, § 1, effective January 1, 1992, are included in the annotations for this Code section.

Constitutionality. — Subsection (o)(11) of former § 34-8-40 (see O.C.G.A. § 34-8-35) did not deny equal protection in exempting independent salespersons such as real estate agents, and insurance agents and solicitors, while not exempting securities salespersons, in the absence of proof that securities salespersons were in fact similarly situated to the real estate and insurance agents who were exempted. *Stuart-James Co. v. Tanner*, 259 Ga. 289, 380 S.E.2d 257 (1989) (decided under former § 34-8-40).

Determination of coverage. — It does not matter that the federal Employment Security Agency has construed a contract as not bringing the parties under the federal law. This chapter describes its own coverage, and the test of coverage or noncoverage is made under those provisions only. *McNeel, Inc. v. Redwine*, 90 Ga. App. 345, 83 S.E.2d 33 (1954) (decided under Ga. L. 1937, p. 806; see O.C.G.A. Ch. 8, T. 34).

Establishing exemptions. — Since the requirements here are stated conjunctively

and not disjunctively, all three of these elements must be established in order that an employer working an individual for wages may be exempted from this chapter. *Young v. Bureau of Unemployment Comp.*, 63 Ga. App. 130, 10 S.E.2d 412 (1940) (decided under Ga. L. 1937, p. 806; see O.C.G.A. Ch. 8, T. 34).

Use of statutory definition of wages. — Since former § 34-8-51 (see O.C.G.A. § 34-8-49) defines "wages," and did so without reference to the status of the parties (i.e., employer-employee versus independent contractor), the statutory definition of "wages," rather than common-law principles, must be used. *Sarah Coventry, Inc. v. Caldwell*, 243 Ga. 429, 254 S.E.2d 375 (1979) (decided under Ga. L. 1937, p. 806).

Test under chapter. — It makes no difference whether the relationship between the parties is one of employer-employee or the "dealers" are independent contractors. The test, and the question for decision, is whether the status between the parties falls within the meaning of employment as defined by this chapter. *McNeel, Inc. v. Redwine*, 90 Ga. App. 345, 83 S.E.2d 33 (1954) (decided under Ga. L. 1937, p. 806; see O.C.G.A. Ch. 8, T. 34).

Burden of proof. — The burden of proof falls on the defendant to prove that an individual's services come within the excep-

tions of this section. *Moore v. Williams*, 95 Ga. App. 309, 97 S.E.2d 718 (1957) (decided under Ga. L. 1937, p. 806; see O.C.G.A. § 34-8-35).

Cited in *Huiet v. Great Atl. & Pac. Tea Co.*, 66 Ga. App. 602, 18 S.E.2d 693 (1942); *Royal Cigar Co. v. Huiet*, 195 Ga. 852, 25 S.E.2d 810 (1943); *Brewster v. Huiet*, 69 Ga. App. 593, 26 S.E.2d 198 (1943); *Huiet v. Brunswick Pulp & Paper Co.*, 74 Ga. App. 355, 39 S.E.2d 545 (1946); *Blackstock v. Atlanta Newspapers, Inc.*, 95 Ga. App. 369, 98 S.E.2d 48 (1957); *Williams v. Summerour*, 98 Ga. App. 212, 105 S.E.2d 489 (1958); *Williamson v. Southern Regional Council, Inc.*, 223 Ga. 179, 154 S.E.2d 21 (1967).

Services Covered

Warehouse owner's services. — The services of a warehouse owner who, for commission based on the hundred weight of freight handled by the warehouseman, picked up, stored and delivered freight for common carrier, presumptively comes within the statutory definition of employment until the defendant carrier shows conjunctively that the warehouseman has been and will continue to be free from control or direction over the performance of such services, both under the warehouseman's contract of service and in fact; that the warehouseman's service is either outside the usual course of the business for which such service is performed, or that the warehouseman's service is performed outside of all the places of business of the enterprise for which such service is performed; and that the warehouseman is customarily engaged in an independently established trade, occupation, profession or business. *Benton Rapid Express v. Redwine*, 87 Ga. App. 584, 74 S.E.2d 504 (1953) (decided under Ga. L. 1937, p. 806).

Real estate salesmen. — Real estate salesmen working under a broker, as provided by the Act of this state regulating real estate brokers, are employees rendering services for the broker, and fall within the provision of this chapter which provides that, for such employees, the brokers shall make contributions. *Babb v. Huiet*, 67 Ga. App. 861, 21 S.E.2d 663 (1942) (decided under Ga. L. 1937, p. 806; see O.C.G.A. Ch. 8, T. 34).

Book salesmen. — The exclusion for carriers of printed materials did not apply in

the case of a book salesman who was compensated on the basis of the difference between the retail price and the amount the salesman remitted to the company, not on the basis of the number of deliveries accomplished. *American Book Display v. Poythress*, 223 Ga. App. 899, 479 S.E.2d 198 (1996).

Where a book salesman was required to report to the office weekly and turn in sales receipts, the salesman's services were not performed outside the place of business of the company. *American Book Display v. Poythress*, 223 Ga. App. 899, 479 S.E.2d 198 (1996).

Taxi drivers. — Where one obtains a city franchise as a common carrier under the provisions of which one operates under a firm name as a taxicab company, and owns and operates a place of business with a waiting room for patrons and telephone switchboard, including telephone relay system to inform the drivers of calls, pays all license fees, taxes, and insurance, owns all taxicabs and has them uniformly painted with the name and telephone number of the company, and reserves and exercises the right to dismiss drivers for discourtesy, reckless driving, or other causes, an arrangement between such person and the drivers whereby the drivers pay a fixed sum per diem to the company and retain all sums in excess thereof paid to them as fares (the rate of such fares being also fixed by the owner) is not a mere rental agreement, but such drivers are the employees of the company under the terms of this chapter. *Redwine v. Wilkes*, 83 Ga. App. 645, 64 S.E.2d 101 (1951) (decided under Ga. L. 1937, p. 806; see O.C.G.A. Ch. 8, T. 34).

Janitorial services. — The superior court erred in reversing an administrative determination that the employer was not exempt from the payment of unemployment compensation taxes where there was sufficient evidence presented to show that the services performed by the employee were within the usual course of the employer's janitorial business, and that those services were performed at one of the designated places over which the employer could maintain some element of control. *Tanner v. Brooks*, 190 Ga. App. 228, 378 S.E.2d 405 (1989) (decided under former § 34-8-40).

Alligator farm worker. — Definition in Employment Security Law, O.C.G.A.

Services Covered (Cont'd)

§ 34-8-1, of "farm laborer" was applied to that same term under the Workers' Compensation Act in order to reach the determination that when an employee for an alligator farm cleaned out the pens, the employee was caring for wildlife and thus performing "agricultural labor" pursuant to O.C.G.A. § 34-8-35(m)(2)(A), but as the employer was not a "farm" because alligators were "wildlife" and "game animals" under O.C.G.A. § 27-1-2(34) and not "livestock or fur-bearing animals" pursuant to O.C.G.A. § 34-8-35(m)(3)(A), the employer did not fall within the exemption provided by O.C.G.A. § 34-9-2(a) with respect to the employee's claim for workers' compensation benefits; the trial court erred in holding that the employer was exempted from the Workers' Compensation Act's coverage. *Gill v. Prehistoric Ponds, Inc.*, 280 Ga. App. 629, 634 S.E.2d 769 (2006).

Because an employer who was in the business of breeding, rearing, and slaughtering alligators to sell the meat, hides, and head was not a farm, as alligators were "wildlife," not livestock or fur-bearing animals, the employer did not fall within the exemption from coverage under the Workers' Compensation Act provided by O.C.G.A. § 34-9-2(a). *Cook v. Prehistoric Ponds, Inc.*, 282 Ga. App. 904, 640 S.E.2d 383 (2006).

Exemption of services of certain commission agents. — The former provisions of this section, which exempted the services of commission agents of common carriers did not exempt the services of commission agents in general from the definition of employment, but only of those commission agents engaged in disseminating information with respect to transportation of persons or property, those engaged in selling transportation of persons or property, and those engaged in maintaining facilities incidental to the dissemination of information with respect to transportation of persons or property, or those engaged in maintaining facilities incidental to the sale of transportation of persons or property. *Redwine v. Refrigerated Transp. Co.*, 90 Ga. App. 784, 84 S.E.2d 478 (1954) (decided under Ga. L. 1937, p. 806; see O.C.G.A. § 34-8-35).

Services Not Covered

Fashion directors. — Since certain fashion directors had no territorial assignments or geographical restrictions, no prescribed number or time of hours to work, no minimum number of orders to be obtained, and no prohibition against selling other companies' products or holding other employment contemporaneously with that of the plaintiff corporation, and had to furnish their own models and sales gimmicks, if they chose to use them, and their own transportation, the fashion show directors were free from any significant control or direction over the performance of their services so as to establish employment. *Sarah Coventry, Inc. v. Caldwell*, 243 Ga. 429, 254 S.E.2d 375 (1979) (decided under Ga. L. 1937, p. 806).

Employee selling other companies' products. — Where an employee was free to sell the products of other companies, even of competitors of the employer company, the fact that the contract between the employee and the company recognizes this freedom, plus the fact of an intermittent and almost casual relationship between the employee and the company indicated that it was the common practice for such individuals to be "customarily engaged in an independently established trade, occupation, profession, or business." *Sarah Coventry, Inc. v. Caldwell*, 243 Ga. 429, 254 S.E.2d 375 (1979) (decided under Ga. L. 1937, p. 806).

Paint salesmen. — Paint salesmen who were paid the difference between what the paint cost them and what they sold it for to the consumer were in business for themselves. Where they were not required to work any number of hours in any particular day, or to see any number of persons on any one day, week, or month, or to make reports when sales were made, and had no territory designated for them, and had no employment of their time or services, they were not employees. *Zachos v. Huiet*, 195 Ga. 780, 25 S.E.2d 806 (1943) (decided under Ga. L. 1937, p. 806).

Vocational placement service. — A vocational placement service is exempt from contributions to the unemployment trust fund for "field specialist" counselors. *Vocational Placement Servs., Inc. v. Caldwell*, 168 Ga. App. 198, 308 S.E.2d 618 (1983) (decided under Ga. L. 1937, p. 806).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the provisions, opinions decided under Ga. L. 1937, p. 806, are included in the annotations for this Code section.

Teachers. — In extending the coverage of workers' compensation to persons "in the employ of the state or any of its instrumentalities or any political subdivisions thereof," the General Assembly intended to include within its expanded scope all school teachers employed under the normal one-year teaching contract, whether or not a teacher is "tenured." 1977 Op. Att'y Gen. No. 77-45 (decided under Ga. L. 1937, p. 806).

Substitute teachers. — A "substitute

teacher" is an "employee" of the local school board using the substitute teacher's services for purposes of the workers' compensation law. 1977 Op. Att'y Gen. No. 77-45 (decided under Ga. L. 1937, p. 806).

Licensed nurses in private homes. — Licensed nurses (registered professional nurses or licensed practical nurses), performing nursing services within the scope of their statutory authority, in a private home for wages, are not performing "domestic services" nor do the services constitute employment within the meaning of the law. 1980 Op. Att'y Gen. No. 80-34 (decided under Ga. L. 1937, p. 806).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, § 20 et seq.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, §§ 288, 299, 319 et seq.

ALR. — One in general employment of contractee, but who at time of accident was assisting or cooperating with, an independent contractor, as employee of former or latter for the time, 55 ALR 1263.

Who is an independent contractor rather than an employee within social security acts or unemployment compensation acts, 124 ALR 682.

Industrial homeworkers as within social security, unemployment compensation, fair labor standards or workmen's compensation act, 143 ALR 418.

Who is "member of a crew" within meaning of Social Security and Unemployment Compensation Acts, 161 ALR 842.

Taxicab driver as employee of owner of

cab, or independent contractor, within social security and unemployment insurance statutes, 10 ALR2d 369.

Salesman on commission as within Unemployment Compensation or Social Security Acts, 29 ALR2d 751.

Professional personnel such as physicians, surgeons, dentists, lawyers, and the like, as "employees" within Social Security Act, 88 ALR2d 979.

Insurance agents or salesmen as within coverage of Social Security or Unemployment Compensation Acts, 39 ALR3d 872.

Unemployment compensation: trucker as employee or independent contractor, 2 ALR4th 1219.

Who are "agricultural laborers" exempt from coverage of National Labor Relations Act § 2(3) (29 USCS § 152(3)), 130 ALR Fed. 1.

34-8-36. Employment office.

As used in this chapter, the term "employment office" means a free public employment office or branch thereof operated by this state or maintained as a part of a state controlled system of public employment offices. (Code 1981, § 34-8-36, enacted by Ga. L. 1991, p. 139, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Agencies, § 17.

34-8-37. Employment Security Administration Fund.

As used in this chapter, the term “Employment Security Administration Fund” means the Employment Security Administration Fund which is established by this chapter and from which administrative expenses under this chapter shall be paid. (Code 1981, § 34-8-37, enacted by Ga. L. 1991, p. 139, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, § 14.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 353.

34-8-38. Experience rating account.

As used in this chapter, the term “experience rating account” means the individual experience of a covered employer, as determined by factors set forth in Code Sections 34-8-150 through 34-8-157. (Code 1981, § 34-8-38, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-39. Extended benefits.

As used in this chapter, the term “extended benefits” means benefits, including benefits payable to federal civilian employees and to ex-service personnel pursuant to 5 U.S.C. Chapter 85, payable to an individual under Code Section 34-8-197 for the weeks of unemployment in the eligibility period of the individual. (Code 1981, § 34-8-39, enacted by Ga. L. 1991, p. 139, § 1.)

U.S. Code. — Chapter 85 of 5 U.S.C., referred to in this Code section, consists of 5 U.S.C. § 8501-8525.

34-8-40. Fund.

As used in this chapter, the term “fund” means the Unemployment Compensation Fund which is established by Code Section 34-8-83 and from which all benefits provided under this chapter shall be paid. (Code 1981, § 34-8-40, enacted by Ga. L. 1991, p. 139, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, § 14.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 353.

34-8-41. Insured work.

As used in this chapter, the term “insured work” means employment for a liable employer. (Code 1981, § 34-8-41, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-42. Liable employer.

As used in this chapter, the term “liable employer” means an employer who is responsible for the payment of unemployment contributions or payments in lieu of contributions or a governmental entity. (Code 1981, § 34-8-42, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-43. Most recent employer.

(a) As used in this chapter and except as otherwise provided in subsection (b) of this Code section, the term “most recent employer” means the last liable employer for whom an individual worked and:

- (1) The individual was separated from work for a disqualifying reason;
- (2) The individual was released or separated from work under nondisqualifying conditions and earned wages of at least ten times the weekly benefit amount of the claim; or
- (3) The employer files the claim for the individual by submitting such reports as authorized by the Commissioner.

(b) As used in this chapter, the term “most recent employer” means, for claims with benefit years that begin on or before December 31, 1991, the last liable employer for whom an individual worked and:

- (1) From whom the individual was separated from work for a disqualifying reason; or
- (2) From whom the individual was released or separated from work under nondisqualifying conditions and earned wages equal to the lesser of \$500.00 or eight times the weekly benefit amount of the claim.

(c) Where no employer in subsection (a) or (b) of this Code section meets the definition of most recent employer from the beginning of the base period to the date the claim is filed, the last liable employer for whom the individual worked shall be considered as the most recent employer for determining eligibility for benefits.

(d) Where periods of employment with the same liable employer fail, independently, to meet the definition of most recent employer in subsection (a) or (b) of this Code section, such periods of employment may be used cumulatively to determine the most recent employer and eligibility for benefits shall be determined by the reason for separation from the last

employment with such employer. (Code 1981, § 34-8-43, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-44. State.

As used in this chapter, the term “state” includes the states of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands. (Code 1981, § 34-8-44, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-45. Supplemental unemployment benefits.

As used in this chapter, the term “supplemental unemployment benefits” means only:

- (1) Benefits which are paid to an employee because of such employee’s involuntary separation from the employment of the employer, whether or not such separation is temporary, which separation results directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions; and
- (2) Sickness and accident benefits subordinate to the benefits described in paragraph (1) of this Code section. (Code 1981, § 34-8-45, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-46. Temporary help contracting firm.

As used in this chapter, the term “temporary help contracting firm” means any person who is in the business of employing individuals and, for compensation from a third party, providing those individuals to perform work for the third party under the general or direct supervision of the third party. Employment with a temporary help contracting firm is characterized by a series of limited-term assignments of an employee to a third party, based on a contract between the temporary help contracting firm and the third party. A separate employment contract exists between the temporary help contracting firm and each individual it hires as an employee. Completion of an assignment for a third party by an employee employed by a temporary help contracting firm does not, in itself, terminate the employment contract between the temporary help contracting firm and the employee. (Code 1981, § 34-8-46, enacted by Ga. L. 1991, p. 139, § 1.)

JUDICIAL DECISIONS

Workers’ compensation benefits. — Pursuant to Fed. R. Civ. P. 54(b), the court reconsidered its prior denial of summary judgment to a corporation in an employee’s suit to recover for a workplace injury be-

cause the court’s prior holding that tort immunity under Georgia’s workers’ compensation scheme attached only if the corporation exercised the greater amount of control over the employee’s job duties than

did a temporary help contracting firm was clearly erroneous; the corporation was entitled to summary judgment because the temporary help contracting firm paid workers' compensation benefits to the employee and such benefits were the exclusive remedy pursuant to O.C.G.A. § 34-9-11. *Lambert v. Briggs & Stratton Corp.*, F. Supp. 2d , 2006 U.S. Dist. LEXIS 3104 (S.D. Ga. Jan. 18, 2006).

Temporary help contracting firm. — Entity qualified as a temporary help contract-

ing firm under O.C.G.A. § 34-8-46 where the entity provided its employee to a business and the employee then worked for the business under its general supervision; thus, the business was protected by the exclusivity provisions set forth in O.C.G.A. § 34-9-11, and the employee's recovery for workplace injuries was limited to the workers' compensation benefits that the temporary help contracting firm paid. *Lambert v. Briggs & Stratton Corp.*, F. Supp. 2d , 2006 U.S. Dist. LEXIS 3104 (S.D. Ga. Jan. 18, 2006).

34-8-47. Unemployment.

For purposes of this chapter, an individual shall be deemed "unemployed" in any week during which the individual performs no services and with respect to which no wages are payable to him or her or in any week of less than full-time work if his or her deductible earnings do not equal or exceed his or her weekly benefit amount. The Commissioner shall prescribe regulations applicable to unemployed individuals and shall make such distinctions in the procedures as to total unemployment, partial unemployment of individuals attached to their regular jobs, temporary employment, and other forms of short-time work as is deemed necessary. An individual compensated solely on a commission basis shall be deemed to be unemployed only upon the termination of his or her contract of employment. (Code 1981, § 34-8-47, enacted by Ga. L. 1991, p. 139, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 are included in the annotations for this Code section.

Substitute teacher was employed on an as-needed basis and was not guaranteed employment with the school system for a certain period of time. The teacher's employment with the school system was intermittent by nature and not the type of employment that the state Employment Security Law was designed to encourage. Consequently, the teacher was not unemployed as defined by statute as a matter of law at the time that the teacher filed a claim for unemployment benefits, and the teach-

er's claim for benefits was properly denied. *Campbell v. Poythress*, 216 Ga. App. 834, 456 S.E.2d 110 (1995).

An as-needed nurse who voluntarily chose part-time, intermittent employment which allowed the nurse to retain complete control over the amount of hours the nurse worked at the hospital, if the nurse chose to work at all, could not claim that the nurse was entitled to unemployment benefits during times when no work was offered. *Department of Labor v. Baldwin County Hosp. Auth.*, 241 Ga. App. 119, 526 S.E.2d 153 (1999).

Cited in *Meakins v. Huiet*, 100 Ga. App. 557, 112 S.E.2d 167 (1959).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 20, 21.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, §§ 299, 314.

ALR. — Right to unemployment compensation as affected by employee's refusal to work in areas where smoking is permitted, 14 ALR4th 1234.

34-8-48. Valid claim.

As used in this chapter, the term "valid claim" means a claim filed for unemployment compensation benefits in which sufficient base period wages establish a monetary entitlement as provided in Code Section 34-8-193. (Code 1981, § 34-8-48, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-49. Wages.

(a)(1) As used in this chapter, the term "wages" means all remuneration for personal services, including commissions and bonuses and the cash value of all remuneration paid in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with the rules or regulations prescribed by the Commissioner.

(2) The term "wages" also means, for the purpose of determining benefit rights of a claimant, wages payable but unpaid where the employer has been adjudicated bankrupt.

(b) The term "wages" shall not include:

(1) For the purposes of Code Section 34-8-20 and Articles 5 and 6 of this chapter, except Code Sections 34-8-156 and 34-8-157, any remuneration paid in excess of taxable wages. For purposes of this chapter, "taxable wages" means that portion of remuneration paid by an employer to each employee, subject to unemployment insurance contributions for each calendar year which does not exceed the following amounts:

(A) For the period January 1, 1976, through December 31, 1982 — \$6,000.00;

(B) For the period January 1, 1983, through December 31, 1985 — \$7,000.00;

(C) For the period January 1, 1986, through December 31, 1989 — \$7,500.00; and

(D) January 1, 1990, and thereafter — \$8,500.00;

provided, however, that in cases of successorship of an employer, the amount of wages paid by the predecessor shall be considered for purposes of this provision as having been paid by the successor employer;

(2) The amount of any payment to or on behalf of an employee under a plan or system established by an employer which makes provision for its employees generally or for a class or classes of its employees, including

any amount paid by an employer for insurance or annuities or into a fund to provide for any such payment, on account of:

(A) The termination of an employee's employment relationship because of (i) death, or (ii) retirement for disability, other than any such payment or series of payments which would have been paid to the employee or his or her dependents if the employee's employment relationship had not been so terminated;

(B) The supplementation of unemployment benefits to an individual under the terms of a written agreement, contract, trust arrangement, or other instrument. Such payments shall not be construed to be wages or compensation for personal services under this chapter and benefit payments under this chapter shall not be denied or reduced because of the receipt of payments under such arrangements or plans;

(C) Sickness or accident disability, but, in the case of payments made to an employee or any of his or her dependents, this subparagraph shall exclude from the term "wages" only payments which are received under a workers' compensation law;

(D) Medical and hospitalization expenses in connection with sickness or accident disability;

(E) Death; or

(F) Temporary layoff, but, in the case of payments made to an employee who is temporarily laid off or to any of his or her dependents, this subparagraph shall exclude from the term "wages" only payments made out of a 100 percent vested account in the name of such employee under a pension or profit-sharing plan or trust that is qualified under Section 501(a) of the federal Internal Revenue Code of 1986;

(3) Payment by an employer without deduction from the remuneration of an employee of the tax imposed by Section 3101 of the federal Internal Revenue Code of 1986, with respect to remuneration paid to an employee for domestic service in a private home of the employer or for agricultural labor;

(4) Any remuneration paid for services by an alien, unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or otherwise was permanently residing in the United States under color of law;

(5) Any remuneration paid in any medium other than cash to an employee for agricultural labor or for service not in the course of the employer's trade or business;

(6) Any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or

accident disability, made by an employer to, or on behalf of, an employee after the expiration of six calendar months following the last calendar month in which the employee worked for such employer;

(7) Any payment made to, or on behalf of, an employee or his beneficiary from, under, or to a trust, annuity plan, simplified employee pension plan, annuity contract, exempt governmental deferred compensation plan, supplemental pension benefits plan or trust, or cafeteria plan, as such payments are defined under Section 3306(b)(5) of the federal Internal Revenue Code of 1986; or

(8) Any payment made by an employer to a survivor or the estate of a former employee after the calendar year in which such employee died.

(c) Any remuneration not elsewhere included in the definition of wages by this chapter, but for which services are performed within this state and for which an employing unit is liable for any federal tax against which credit may be taken for contributions paid into a state fund, shall, for the purposes of this chapter and notwithstanding any other provisions, constitute wages for employment, but only to the extent that such remuneration constitutes wages on which federal tax is payable. (Code 1981, § 34-8-49, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 776, § 1.)

U.S. Code. — Sections 501(a), 3101 and 3306(b)(5) of the federal Internal Revenue Code of 1986, referred to in subparagraph (b)(2)(F) and paragraphs (b)(3) and (b)(7),

respectively, are codified at 26 U.S.C. §§ 501(a), 3101 and 3306(b)(5), respectively.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 are included in the annotations for this Code section.

Cited in *Young v. Bureau of Unemploy-*

ment Comp., 63 Ga. App. 130, 10 S.E.2d 412 (1940); *Meakins v. Huiet*, 100 Ga. App. 557, 112 S.E.2d 167 (1959); *National Trailer Convoy, Inc. v. Undercofler*, 109 Ga. App. 703, 137 S.E.2d 328 (1964).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 18, 19.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 298.

ALR. — Service charges, made by hotels

or restaurants and later distributed to waiters or similar employees, as "wages" upon which federal or state unemployment taxes or contributions are required to be paid, 83 ALR2d 1024.

34-8-50. Week.

As used in this chapter, the term "week" means such period of seven consecutive calendar days ending at 12:00 Midnight as the Commissioner may by regulation prescribe. (Code 1981, § 34-8-50, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-51. Weekly benefit amount.

As used in this chapter, the term “weekly benefit amount” means the dollar amount, prior to any deductions, which an individual may be entitled to receive for one week of total unemployment. (Code 1981, § 34-8-51, enacted by Ga. L. 1991, p. 139, § 1.)

ARTICLE 3**ADMINISTRATION****34-8-70. Duties and powers of Commissioner.**

- (a) It shall be the duty of the Commissioner to administer this chapter.
- (b) The Commissioner shall have power and authority to adopt, amend, or rescind such rules and regulations and to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as deemed necessary or suitable to that end, and such rules and regulations shall be effective upon publication in the manner, not inconsistent with this chapter, which the Commissioner shall prescribe.
- (c) The Commissioner shall determine methods of organization and procedure in accordance with this chapter and shall have an official seal, which shall be judicially noticed.
- (d) Not later than February 1 of each year, the Commissioner shall submit to the Governor a report covering the administration and operation of this chapter during the preceding fiscal year and shall make such recommendations for amendments to this chapter as deemed proper. Such report shall include a balance sheet of the moneys in the fund in which there shall be provided, if possible, a reserve against the liability in the future years to pay benefits in excess of the then current contributions, which reserve shall be established by the Commissioner in accordance with accepted actuarial principles on the basis of statistics regarding employment, business activity, and other relevant factors for the longest possible period.
- (e) Whenever the Commissioner believes that a change in contribution or benefit rates will become necessary to protect the solvency of the fund, the Commissioner shall promptly so inform the Governor and the General Assembly and make recommendations with respect thereto.
- (f) The Commissioner shall fully cooperate with the agencies of other states and shall make every proper effort to oppose and prevent any further action which would in the Commissioner’s judgment tend to effect complete or substantial federalization of state unemployment compensation funds or state employment security programs. In addition, the Commissioner may make and may cooperate with other appropriate agencies in

making studies as to the practicality and probable cost of possible new state administered social security programs and the relative desirability of state, rather than federal, action in any such field.

(g) The Commissioner is authorized to enter into such cooperative agreements or contracts with appropriate officials in other states or with the United States secretary of labor for the purpose of the reciprocal collection of overpayments or delinquent contributions, penalties, interest, and costs or for such other purposes as reasonably relate to the discharge of the Commissioner's responsibilities under this chapter.

(h) Notwithstanding any other provision of this chapter, the Commissioner may recover an overpayment of benefits paid to any individual under this state or another state's unemployment benefit law or under an unemployment benefit program of the United States. (Code 1981, § 34-8-70, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 6, § 34.)

Cross references. — Additional compensation of Commissioner for administering chapter, § 45-7-4(a)(9).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 are included in the annotations for this Code section.

Rulemaking. — Under the Administrative Procedure Act the adoption of "[r]ules relating to . . . benefits by the state or of an agency" is expressly exempted by O.C.G.A.

§ 50-13-2(6)(I) from the strict rulemaking procedural requirements of O.C.G.A. § 50-13-4. This includes the promulgation of policies determining eligibility for entitlement and rules for granting unemployment benefits. *Caldwell v. Amoco Fabrics Co.*, 165 Ga. App. 674, 302 S.E.2d 596 (1983) (decided under Ga. L. 1937, p. 806).

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, §§ 8, 241 et seq. 76 Am. Jur. 2d, Unemployment Compensation, § 7.

C.J.S. — 73 C.J.S., Public Administrative

Law and Procedure, § 106 et seq. 81 C.J.S., Social Security and Public Welfare, §§ 283, 284, 287 et seq.

81A C.J.S., Social Security and Public Welfare, §§ 471, 472.

34-8-71. Distribution of text of chapter and other materials.

The Commissioner shall make available to the public copies of the text of this chapter, any rules or regulations promulgated pursuant to this chapter, the Commissioner's annual reports to the Governor, and any other material the Commissioner deems relevant. Such copies shall be furnished without cost, provided the request for copies is nominal and reasonable. (Code 1981, § 34-8-71, enacted by Ga. L. 1991, p. 139, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Administrative Law, §§ 279, 280, 287.

C.J.S. — 73 C.J.S., Public Administrative

Law and Procedure, § 200 et seq. 81A C.J.S., Social Security and Public Welfare, § 473.

34-8-72. Appointment of state and local or industry advisory councils.

The Commissioner shall appoint a State Advisory Council and may appoint local or industry advisory councils, composed in each case of an equal number of employer representatives and employee representatives who may fairly be regarded as representative because of their vocation, employment, or affiliations and of such members representing the general public as the Commissioner may designate. Such councils shall aid the Commissioner in formulating policies and discussing problems related to the administration of this chapter and in assuring impartiality and freedom from political influence in the resolution of such problems. Such advisory councils shall serve without compensation but shall be reimbursed for any necessary expenses. (Code 1981, § 34-8-72, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-73. Department to administer chapter and programs; authority to create, and delegate powers and duties to, Employment Security Agency.

(a) The department shall administer the provisions of this chapter and all programs relating to state employment services and unemployment compensation.

(b) The Commissioner may, at his or her discretion, create an Employment Security Agency and a director of such agency within the department and may delegate in writing to such agency and director and to any subordinate official or employee such powers, duties, and responsibilities as the Commissioner deems appropriate to administer this chapter and the programs relating to state employment services and unemployment compensation. (Code 1981, § 34-8-73, enacted by Ga. L. 1991, p. 139, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, § 241 et seq. 70A Am. Jur. 2d, Social Security and Medicare, §§ 22, 44.

C.J.S. — 73 C.J.S., Public Administrative Law and Procedure, § 106 et seq.

34-8-74. Appointment, compensation, powers, and duties of personnel administering chapter.

Subject to other provisions of this chapter, the Commissioner is authorized to appoint, fix the compensation of, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of the Commissioner's duties under this chapter. The Commissioner may delegate to any such person such power and authority as deemed reasonable and proper for the effective administration of this chapter and may, in the discretion of the Commissioner, bond any persons handling moneys or signing checks under this chapter. (Code 1981, § 34-8-74, enacted by Ga. L. 1991, p. 139, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes — In light of the similarity of the provisions, opinions decided under former Code Section 34-8-74, which was repealed by Ga. L. 1991, p. 139, § 1, are included in the annotations for this Code section.

Attorney General to represent Department of Labor. — See 1984 Op. Att'y Gen. No. 84-48 (decided under former § 34-8-74).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Civil Service, § 34 et seq. 63C Am. Jur. 2d, Public Officers and Employees, §§ 241 et seq., 253, 262, 263, 437.

C.J.S. — 67 C.J.S., Officers and Public

Employees, §§ 120, 125 et seq., 270 et seq., 311 et seq. 73 C.J.S., Public Administrative Law and Procedure, § 106 et seq. 81 C.J.S., Social Security and Public Welfare, § 468. 81A C.J.S., States, § 250.

34-8-75. Experience rating committee.

The Commissioner shall designate an experience rating committee. The committee shall be composed of one representative of employers, one representative of employees, and one representative of the department. The committee shall be constituted as a continuing committee for the purpose of conducting studies of experience rating and from time to time making recommendations to the Commissioner and the advisory council as to desirable modifications and improvements of the law, procedures, and regulations adopted in connection with the experience rating program. (Code 1981, § 34-8-75, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-76. Duties of Commissioner to reduce and prevent unemployment.

The Commissioner, with the advice and aid of the State Advisory Council and the local or industry advisory councils, shall take all appropriate steps to reduce and prevent unemployment; to encourage and assist in the adoption of practical methods of vocational training, retraining, and vocational guidance; to investigate, recommend, advise, and assist in the

establishment and operation, by municipalities, counties, school districts, and the state, of reserves for public works to be used in times of business depressions and unemployment; to promote the reemployment of unemployed workers throughout the state in every other way that may be feasible; and to these ends to carry on and publish the results of investigations and research studies. (Code 1981, § 34-8-76, enacted by Ga. L. 1991, p. 139, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 5, 6.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 278 et seq.

34-8-77. Creation and financing of State Employment Service; cooperation with federal agencies; authority to establish and maintain free public employment offices.

(a) The State Employment Service is established as a program administered by the department. The Commissioner shall establish and maintain free public employment offices in such number and in such places as may be necessary for the proper administration of this chapter and for the purposes of performing such duties as are within the purview of the federal Wagner-Peyser Act, 29 U.S.C. Section 49, as amended. The Commissioner is authorized to cooperate with or enter into agreements with any official or agency of the United States having powers or duties under the federal Wagner-Peyser Act and to do and perform all things necessary to secure to this state the benefits of that act in the promotion and maintenance of a system of public employment offices. The provisions of the federal Wagner-Peyser Act are accepted by this state, in conformity with Section 4 of that act, and this state will observe and comply with the requirements thereof. The Department of Labor is designated and constituted the agency of this state for the purposes of that act.

(b) For the purpose of establishing and maintaining free public employment offices, the Commissioner is authorized to enter into agreements with the Railroad Retirement Board or any other agency of the United States charged with the administration of any unemployment compensation law, with any political subdivision of this state, or with any private, nonprofit organization; and, as a part of any such agreement, the Commissioner may accept moneys, services, or quarters as a contribution. (Code 1981, § 34-8-77, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1995, p. 373, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Agencies, §§ 16, 17. 63C Am. Jur. 2d, Public Officers and Employees, § 241 et seq.

C.J.S. — 73 C.J.S., Public Administrative Law and Procedure, § 106 et seq. 81A C.J.S., States, § 249.

34-8-78. Board of review; appointment, term of office, compensation, and removal of members.

(a) There shall be a Board of Review of the Department of Labor, which board shall consist of three members. Each member shall be appointed by the Governor for a term of six years. Each member shall be compensated for such member's services, which compensation shall be fixed by the Governor and paid from the Employment Security Administration Fund. The Governor may, at any time, after notice and a hearing, remove any member for cause. Vacancies shall be filled by appointment by the Governor for the unexpired term.

(b) The Governor may appoint additional alternative members of the board of review as needed to ensure the prompt and efficient review of cases by the board of review. Those members may participate in any cases in which the other members are unable to participate.

(c) The board of review shall have the powers and authority and shall perform the functions conferred upon it by this chapter. (Code 1981, § 34-8-78, enacted by Ga. L. 1991, p. 139, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 8, 14, 85, 88.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, §§ 291, 292, 366, 373 et seq.

34-8-79. State and federal cooperation in administration of chapter.

(a) In the administration of this chapter, the Commissioner shall cooperate, to the fullest extent consistent with this chapter, with the United States secretary of labor and the federal official responsible for the allocation of funds for the administration of this chapter and for making other administrative determinations within the federal province under the federal Social Security Act, as amended; shall make such reports in such form and containing such information as the United States secretary of labor and such federal official may from time to time require and shall comply with such provisions as the United States secretary of labor and such federal official may from time to time find necessary to assure the correctness and verification of such reports; and shall comply with the regulations prescribed by the United States secretary of labor and such federal official governing the expenditures of such sums as may be allotted and paid to this state under Title III of the federal Social Security Act for the purpose of assisting in the administration of this chapter.

(b) Upon request therefor, the Commissioner shall furnish to any agency of the United States charged with the administration of public works or assistance through public employment the name, address, ordinary occupation, and employment status of each recipient of benefits and such recipient's rights to further benefits under this chapter.

(c) The Commissioner may request the comptroller of the currency of the United States to cause an examination of the correctness of any return or report of any national banking association rendered pursuant to this chapter and may in connection with such request transmit any such report or return to the comptroller of the currency of the United States as provided in 26 U.S.C. Section 3305(c). (Code 1981, § 34-8-79, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 6, § 34.)

U.S. Code. — Title III of the federal Social Security Act, referred to in subsection (a), is codified as 42 U.S.C. § 501 et seq.

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Administrative Law, § 203. 76 Am. Jur. 2d, Unemployment Compensation, §§ 1, 7.

C.J.S. — 73 C.J.S., Public Administrative Law and Procedure, § 112 et seq. 81 C.J.S., Social Security and Public Welfare, § 283 et seq.

ALR. — State banks, insurance companies, or building and loan associations, which are members of Federal Reserve Bank or similar federal agency, or national banks, as within state Social Security or Unemployment Compensation Act, 165 ALR 1250.

34-8-80. Payment of compensation under two or more state unemployment compensation laws.

(a) The Commissioner shall participate in any arrangements for the payment of compensation on the basis of combining an individual's wages and employment covered under this chapter with the individual's wages and employment covered under the unemployment compensation laws of other states, which arrangements are approved by the United States secretary of labor in consultation with the state unemployment compensation agencies as reasonably calculated to assure the prompt and full payment of compensation in such situations and which include provisions for (1) applying the base period of a single state law to a claim involving the combining of an individual's wages and employment covered under two or more state unemployment compensation laws and (2) avoiding the duplicate use of wages and employment by reason of such combining.

(b) Payments to another state's trust fund shall be deemed to be benefits for the purposes of Code Sections 34-8-83 through 34-8-86, 34-8-150 through 34-8-161, 34-8-191, and 34-8-193, provided that appropriate charges may be made to employers' accounts for benefits so payable based on wages in this state. The Commissioner is authorized to make payment to other state or federal agencies and receive payment from such other state or federal agencies, in accordance with arrangements pursuant to this Code section. (Code 1981, § 34-8-80, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 6, § 34.)

OPINIONS OF THE ATTORNEY GENERAL

Editor's note — In light of the similarity of the provisions, opinions decided under Ga. L. 1937, p. 806 are included in the annotations for this Code section.

Interstate arrangements. — The Commissioner of Labor may enter into arrange-

ments with agencies of other states for the determination and payment of interstate benefit claims under the law. 1945-47 Op. Att'y Gen. p. 360 (decided under former Ga. L. 1937, p. 806).

RESEARCH REFERENCES

Am. Jur. 2d. — 72 Am. Jur. 2d, States, Territories and Dependencies, §§ 8, 9. 76 Am. Jur. 2d, Unemployment Compensation, §§ 1, 6, 7.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 278. 81A C.J.S., States, §§ 57, 58.

ALR. — State banks, insurance companies, or building and loan associations, which are members of Federal Reserve Bank or similar federal agency, or national banks, as within state Social Security or Unemployment Compensation Act, 165 ALR 1250.

34-8-81. Creation of Employment Security Administration Fund; sources of money for fund; management and control of moneys.

(a) There is created a trust fund, with the Commissioner as trustee, to be known as the Employment Security Administration Fund. All moneys which are deposited or paid into this fund shall be continuously available to the Commissioner for expenditure in accordance with this chapter and shall not lapse at any time or be transferred to any other fund except as provided in this Code section and shall not be subject to Article 4 of Chapter 12 of Title 45. All moneys in this fund, except money received under Code Section 34-8-85 pursuant to Section 903 of the federal Social Security Act, as amended, which are received from the federal government or any agency thereof or which are appropriated by this state for the purposes described in Code Section 34-8-77 shall be expended solely for the purposes and in the amounts found necessary by the United States secretary of labor for the proper and efficient administration of this chapter.

(b) The fund shall consist of all moneys appropriated by this state for the purposes described in Code Section 34-8-77; all moneys received from the United States or any agency thereof, including the United States secretary of labor; all moneys, except funds appropriated pursuant to Code Section 34-8-92, received from any other source for such purpose; any moneys received from any agency of the United States or any other state as compensation for services or facilities supplied to such agency; any amounts received pursuant to any surety bond or insurance policy or from other sources for losses sustained by the Employment Security Administration Fund or by reason of damage to equipment or supplies purchased from moneys in such fund; and any proceeds realized from the sale or disposition of any such equipment or supplies which may no longer be necessary for the proper administration of this chapter.

(c) All moneys in this fund shall be deposited, administered, and disbursed in the manner and under the conditions and requirements provided under this chapter, except that moneys in this fund shall not be commingled with other state funds but shall be maintained in a separate account on the books of a depository bank. Such moneys shall be secured by the depository in which they are held to the same extent and in the same manner as required by the general depository laws of this state, and collateral pledged shall be maintained in a separate custody account. The Commissioner shall be liable on the Commissioner's official bond for the faithful performance of duties in connection with the Employment Security Administration Fund provided for under this chapter. All sums recovered on any surety bond for losses sustained by the Employment Security Administration Fund shall be deposited in the fund.

(d) Notwithstanding any provision of this Code section, all money requisitioned and deposited in this fund under Code Section 34-8-85 pursuant to Section 903 of the federal Social Security Act, as amended, shall remain part of the Unemployment Trust Fund and shall be used only in accordance with conditions specified in Code Section 34-8-85. (Code 1981, § 34-8-81, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 6, § 34.)

Code Commission notes. — Pursuant to § 28-9-5, in 1991, "a" was inserted in the second sentence of subsection (c).

U.S. Code. — Section 903 of the federal

Social Security Act, referred to in subsections (a) and (d), is codified as 42 U.S.C. § 1103.

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the provisions, opinions decided under former Code 1933, § 54-645 and Ga. L. 1937, p. 806 are included in the annotations for this Code section.

Authority of Commissioner. — Ga. L. 1937, p. 806 (see O.C.G.A. § 34-8-81) authorizes the Commissioner of Labor to determine what are proper expenditures of federal funds for employment security purposes; the Commissioner may, therefore, authorize payment of the moving expenses

from those funds. 1972 Op. Att'y Gen. No. U72-53 (decided under Ga. L. 1937, p. 806).

Waiver of collateral by State Depository Board. — To the extent that former Code 1933, §§ 54-645 and 89-812 (see O.C.G.A. §§ 34-8-81 and 45-8-13), or any other laws, are irreconcilably inconsistent with Ga. L. 1971, p. 553 (see O.C.G.A. §§ 50-17-53 and 50-17-58), they are superseded or repealed by implication. 1971 Op. Att'y Gen. No. 71-112 (decided under former Code 1933, § 54-645).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Agencies, § 16. 76 Am. Jur. 2d, Unemployment Compensation, § 2.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 353.

34-8-82. State reimbursement of Employment Security Administration Fund for moneys lost, wrongfully expended, or overexpended.

This state recognizes its obligation to replace and declares it to be the policy of this state that funds will be provided in the future and applied to the replacement of any moneys received from the United States secretary of labor or the federal official responsible for the allocation of funds for the administration of this chapter and for making other administrative determinations within the federal province under Title III of the federal Social Security Act; any unencumbered balances in the Employment Security Administration Fund as of that date; any moneys thereafter granted to this state pursuant to the provisions of the federal Wagner-Peyser Act; and any moneys made available by the state or its political subdivisions and matched by such moneys granted to this state pursuant to the provisions of the federal Wagner-Peyser Act, which the United States secretary of labor or other responsible federal official finds, because of any action or contingency, have been lost or have been expended for purposes other than or in amounts in excess of those found necessary by the United States secretary of labor or other responsible federal official. Such moneys shall be promptly replaced by moneys appropriated for such purpose from the general funds of this state to the Employment Security Administration Fund for expenditure as provided in Code Section 34-8-81. The Commissioner shall promptly report to the Governor, and the Governor to the General Assembly, the amount required for such replacement. (Code 1981, § 34-8-82, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 6, § 34.)

U.S. Code. — The federal Wagner-Peyser Act is codified as 29 U.S.C. § 49 et seq. Title III of the federal Social Security Act is codified as 42 U.S.C. § 501 et seq.

34-8-83. Establishment, composition, and administration of Unemployment Compensation Fund.

There is established as a trust fund, separate and apart from all other public funds of this state, an Unemployment Compensation Fund, which shall be administered by the Commissioner exclusively for the purposes of this chapter. The fund shall consist of:

- (1) All contributions collected under this chapter;
- (2) All payments in lieu of contributions collected under Code Sections 34-8-158 through 34-8-161;
- (3) Interest earned upon any moneys in the fund;
- (4) Any property or securities acquired through the use of moneys belonging to the fund;
- (5) All earnings of such property or securities;

(6) All moneys credited to this state's account in the Unemployment Trust Fund pursuant to Section 903 and related sections of the federal Social Security Act, as amended;

(7) All moneys received from the federal government as reimbursements pursuant to Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970; and

(8) All moneys received for the fund from any other source. (Code 1981, § 34-8-83, enacted by Ga. L. 1991, p. 139, § 1.)

U.S. Code. — Section 903 of the federal Social Security Act, referred to in paragraph (6), is codified as 42 U.S.C. § 1103.

Section 204 of the Federal-State Extended

Unemployment Compensation Act of 1970, referred to in paragraph (7), is noted following 26 U.S.C. § 3304.

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 2, 14.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 353.

34-8-84. Commissioner as custodian of fund; establishment of accounts within fund; deposits of money in accounts.

The Commissioner shall be custodian of the Unemployment Compensation Fund and shall administer the fund in accordance with such rules and regulations as the Commissioner shall prescribe. The Commissioner shall maintain within the fund three separate accounts: (1) a clearing account, (2) an unemployment trust fund account, and (3) a benefit account. The Commissioner shall immediately deposit all moneys payable to the fund, upon receipt thereof, in the clearing account. Refunds payable pursuant to Code Section 34-8-164 may be paid from the clearing account or the benefit account upon authorization issued by the Commissioner. After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the secretary of the treasury of the United States to the credit of the account of this state in the Unemployment Trust Fund established and maintained pursuant to Section 904 of the Social Security Act, as amended, any provisions of law in this state relating to the deposit, administration, release, or disbursement of moneys in the possession or custody of this state to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned from this state's account in the Unemployment Trust Fund. Except as otherwise provided in this Code section, moneys in the clearing and benefit accounts may be deposited by the Commissioner in any bank or public depository in which general funds of the state may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund; provided, however, that any charges for exchange on local bank checks in payment of contributions may be paid as expense of collection from the Employment Security Administration Fund. Such money shall be secured by the depository bank to the same

extent and in the same manner as required by the general depository laws of this state; and collateral pledged for this purpose or bonds given for this purpose shall be kept separate and distinct from any collateral pledged to secure the other funds of the state. The Commissioner shall be liable on the Commissioner's official bond for the faithful performance of duties in connection with the Unemployment Compensation Fund as provided under this chapter. All sums recovered on any surety bond for losses sustained by the Unemployment Compensation Fund shall be deposited in said fund. (Code 1981, § 34-8-84, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 6, § 34.)

U.S. Code. — Section 904 of the federal Social Security Act, referred to in this Code section, is codified as 42 U.S.C. § 1104.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 are included in the annotations for this Code section.

Cited in *Caldwell v. Atlanta Bd. of Educ.*, 152 Ga. App. 291, 262 S.E.2d 573 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 2, 8.

81A C.J.S., Social Security and Public Welfare, §§ 471, 472.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 353.

34-8-85. Withdrawals from Unemployment Trust Fund for expenditures under chapter.

Moneys shall be requisitioned from this state's account in the Unemployment Trust Fund solely for the payment of regular benefits and extended benefits and for refunds pursuant to Code Section 34-8-164 and in accordance with regulations prescribed by the Commissioner, except that moneys credited to this state's account pursuant to Section 903 of the federal Social Security Act, as amended, may be requisitioned and used exclusively as provided in paragraphs (1) through (5) of this Code section:

(1) **FUNDS FOR PAYMENT OF FUTURE BENEFITS.** The Commissioner shall from time to time requisition from the Unemployment Trust Fund amounts, not exceeding the amount standing in this state's account therein, as deemed necessary by the Commissioner for the payment of benefits for a reasonable future period. Upon receipt thereof, the Commissioner shall deposit the funds in the benefit account. The benefit account shall be used solely for the payment of regular benefits and extended benefits or refunds upon requisition of the Commissioner as authorized in this Code section. Withdrawal of such funds in the benefit

account shall not be subject to any provisions of law requiring specific appropriations or other formal releases of state officers of moneys in their custody. The Commissioner's requisitions for lump sum withdrawals for the payment of individual benefit claims shall not exceed the balance of funds in the Unemployment Trust Fund; and such requisition shall be in an amount estimated to be necessary for benefit payments for such reasonable future period as the Commissioner may by regulation prescribe. Such lump sum amounts, when received by the Commissioner, shall be immediately deposited in the benefit account maintained in the name of the Commissioner in such bank or public depository and under such conditions as the Commissioner determines necessary; provided, however, that such bank or public depository shall be one in which general funds of the state may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund; provided, further, that such moneys shall be secured by the depository bank to the same extent and in the same manner as required by the general laws of this state governing depositories of state funds and that collateral pledged for this purpose or bonds given for this purpose shall be kept separate and distinct from any collateral or bonds pledged or given to secure other funds of the state. The Commissioner or a duly authorized representative of the Commissioner shall be authorized to draw and issue checks on the benefit account for the payment of individual benefit claims. Any balance of moneys requisitioned from the Unemployment Trust Fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for and may be utilized for the payment of benefits during succeeding periods or, in the discretion of the Commissioner, shall be redeposited with the secretary of the treasury of the United States to the credit of this state's account in the Unemployment Trust Fund as provided in Code Section 34-8-84;

(2) **APPROPRIATION OF ADMINISTRATION EXPENSES.** Moneys credited to the account of this state in the Unemployment Trust Fund by the secretary of the treasury of the United States pursuant to Section 903 of the federal Social Security Act, as amended, may be requisitioned and used in the payment of expenses incurred for the administration of this chapter pursuant to a specific appropriation by the General Assembly, provided that the expenses are incurred and the moneys are requisitioned after the enactment of an appropriations Act which:

(A) Specifies the purposes for which such moneys are appropriated and the amount appropriated therefor; and

(B) Limits the period within which such moneys may be expended to a period ending not more than two years after the date of the enactment of the appropriations Act;

(3) **LIMITATION ON WITHDRAWALS AND USE OF FUNDS.** Moneys credited to the account of this state pursuant to Section 903 of the federal

Social Security Act, as amended, may not be withdrawn or used except for the payment of benefits or for the payment of expenses for the administration of this chapter and of public employment offices pursuant to this Code section;

(4) **RECORDS OF APPROPRIATED FUNDS.** Moneys appropriated for the payment of expenses of administration pursuant to this Code section shall be requisitioned as needed for the payment of obligations incurred under such appropriation and, upon requisition, shall be deposited in the Employment Security Administration Fund, but, until expended, shall remain a part of the Unemployment Trust Fund. The Commissioner shall maintain a separate record of the deposit, obligation, expenditure, and return of funds so deposited. If any moneys so deposited are, for any reason, not to be expended for the purposes for which they were appropriated, such moneys shall be returned promptly to the secretary of the treasury of the United States for credit to this state's account in the Unemployment Trust Fund; and

(5) **APPROPRIATIONS TO DEPARTMENT OF LABOR.** There is authorized to be appropriated by the General Assembly to the Department of Labor any part of or all moneys credited to the account of this state in the Unemployment Trust Fund by the secretary of the treasury of the United States pursuant to Section 903 of the federal Social Security Act, as amended, and as provided in this Code section; provided, however, that notwithstanding any other provisions of this Code section to the contrary, moneys credited with respect to federal fiscal years 1999, 2000, and 2001 shall be used solely for the administration of the unemployment insurance program in Georgia and are not subject to appropriations by the General Assembly. (Code 1981, § 34-8-85, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 6, § 34; Ga. L. 1998, p. 1501, § 1.)

U.S. Code. — Section 903 of the federal Social Security Act, referred to throughout this Code section, is codified as 42 U.S.C. § 1103.

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes — In light of the similarity of the provisions, opinions decided under Ga. L. 1937, p. 806 are included in the annotations for this Code section.

Return of deposited funds. — The Employment Security Agency may return funds

deposited in the Unemployment Compensation Fund, to which it claims no entitlement, to the claimant from whom the funds were received. 1980 Op. Att'y Gen. No. 80-24 (decided under Ga. L. 1937, p. 806).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, § 2.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 353.

81A C.J.S., Social Security and Public Welfare, § 508.

34-8-86. Management of funds upon discontinuance of Unemployment Trust Fund.

Code Sections 34-8-83 through 34-8-85, to the extent that they relate to the Unemployment Trust Fund, shall be operative only so long as such trust fund continues to exist and so long as the secretary of the treasury of the United States continues to maintain for this state a separate book account of all funds deposited therein by this state for benefit purposes, together with this state's proportionate share of the earnings of the Unemployment Trust Fund, from which no other state is permitted to make withdrawals. If and when such Unemployment Trust Fund ceases to exist or such separate book account is no longer maintained, all moneys, properties, or securities therein belonging to the Unemployment Compensation Fund of this state shall be transferred to the treasurer of the Unemployment Compensation Fund, who shall hold, invest, transfer, sell, deposit, and release such funds, properties, or securities in a manner approved by the Commissioner in accordance with this chapter; provided, however, that such funds shall be invested in the bonds or other interest-bearing obligations of the United States of America and of the State of Georgia; and provided, further, that such investment shall at all times be so made that all the assets of the fund shall always be readily convertible into cash when needed for the payment of benefits. The Commissioner, as custodian, shall have the discretionary authority to dispose of securities or other properties belonging to the Unemployment Compensation Fund. (Code 1981, § 34-8-86, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 6, § 34.)

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, § 2.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 353.

81A C.J.S., Social Security and Public Welfare, § 508.

34-8-87. Borrowing funds from United States Treasury upon depletion of Unemployment Compensation Fund.

The Commissioner is authorized to borrow funds from the United States Treasury in accordance with standards and regulations promulgated by the United States Department of Labor and pursuant to laws of the United States. Such authority is granted only to be used if and when the Unemployment Compensation Fund should be depleted; and all funds so borrowed shall be used only for the purpose of paying benefits to those persons eligible to receive such benefits. (Code 1981, § 34-8-87, enacted by Ga. L. 1991, p. 139, § 1.)

RESEARCH REFERENCES

C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 353.

34-8-88. Necessary powers in discharge of duties.

In the discharge of the duties imposed by this chapter, the Commissioner, the chief administrative hearing officer, the members of the board of review, and any duly authorized representative of any of them shall have the power to administer oaths and affirmations, take depositions, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with a disputed claim or the administration of this chapter. (Code 1981, § 34-8-88, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-89. Application for order requiring persons to obey subpoena issued by Commissioner.

(a) In case of contumacy or refusal to obey a subpoena by any person, any court of this state within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Commissioner, the board of review, the chief administrative hearing officer, or any duly authorized representative of any of them, shall have jurisdiction to issue to such person an order requiring such person to appear before the Commissioner, the board of review, the chief administrative hearing officer, or any duly authorized representative of any of them to produce evidence, if so ordered, or to give testimony regarding the matter under investigation or in question; and any failure to obey such order may be punished by the superior court as a contempt of court.

(b) Any person who shall without just cause fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if it is in such person's power to do so, in obedience to a subpoena of the Commissioner, the board of review, the chief administrative hearing officer, or any duly authorized representative of any of them shall, upon conviction thereof, be punished by a fine of not less than \$200.00, or by imprisonment for not longer than 60 days, or by both such fine and imprisonment; and each day such violation continues shall be deemed to be a separate offense. (Code 1981, § 34-8-89, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-90. Authority to lease property.

Reserved. Repealed by Ga. L. 2005, p. 100, § 16/SB 158, effective April 12, 2005.

Editor's notes. — This Code section was based on Code 1981, § 34-8-90, enacted by Ga. L. 1991, p. 139, § 1.

34-8-91. Benefits limited to extent funds are available.

Benefits shall be deemed due and payable under this chapter only to the extent provided in this chapter and to the extent that funds are available therefor to the credit of the Unemployment Compensation Fund. Neither the state nor the Commissioner shall be liable for any amount in excess of such sums. (Code 1981, § 34-8-91, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-92. Disposition of fines, penalties, and interest collected.

All fines, penalties, and interest collected under the terms of this chapter shall be paid into the state treasury. The General Assembly shall be authorized to appropriate to the Commissioner all such funds so raised and deposited in the state treasury, which shall be payable upon requisition of the Commissioner. Such funds are to be used for the replacement of funds, as provided in Code Section 34-8-82, and for incidental expenses incurred in the administration of this chapter for which funds are not granted by the federal government through the United States secretary of labor or other agencies. (Code 1981, § 34-8-92, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 6, § 34.)

34-8-93. Construction of chapter; severability.

(a) Any ambiguity in this chapter shall be construed in a manner consistent with federal law applicable to the unemployment compensation program.

(b) In the event any Code section, subsection, paragraph, subparagraph, sentence, clause, phrase, or provision of this chapter shall be ruled unconstitutional by any court or out of conformity with federal law by the United States secretary of labor, such provision shall be null and void and of no force and effect. The General Assembly declares that it would have passed the remaining portions of this chapter if it had known that any such part or provision of this chapter would be declared unconstitutional or out of conformity with federal law by the United States secretary of labor. Further, the Commissioner shall have the authority to make procedurally the necessary adjustments in order to bring about conformity with federal law, pending action of the General Assembly. (Code 1981, § 34-8-93, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 6, § 34.)

ARTICLE 4

DISCLOSURE OF RECORDS

34-8-120. Legislative intent.

(a) This article is intended to reconcile the free access to public records granted by Article 4 of Chapter 18 of Title 50, relating to the inspection of public records, and the discovery rights of judicial and administrative systems with the historical confidentiality of certain records of the department and the individual's right of privacy.

(b) The General Assembly recognizes that records and information held by the Department of Labor could be misused. Therefore, it is the intent of this article to define a right of privacy and confidentiality as regards individual and employing unit records and other records maintained by the Department of Labor. The General Assembly further recognizes that there are situations where this right of privacy and confidentiality is outweighed by other considerations. Therefore, it is the intent of this article to define also certain exceptions to the right of privacy and confidentiality. (Code 1981, § 34-8-120, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-121. Information or records shall be private and confidential; release authorized; maintenance of records; destruction of outdated records.

(a) Any information or records concerning an individual or employing unit obtained by the department pursuant to the administration of this chapter or other federally funded programs for which the department has responsibility shall be private and confidential, except as otherwise provided in this article or by regulation. This article does not create a rule of evidence. Information or records may be released by the department when the release is required by the federal government in connection with, or as a condition of funding for, a program being administered by the department. The provisions of paragraphs (1) through (3) of subsection (a) of Code Section 34-8-125 shall not apply to such release.

(b)(1) Each employing unit shall keep true and accurate records containing such information as the Commissioner may prescribe. Such records shall be open to inspection and be subject to being copied by the Commissioner or an authorized representative of the Commissioner at any time and as often as may be necessary. In addition to information prescribed by the Commissioner, each employer shall keep records of and report to the Commissioner quarterly the street address of each establishment, branch, outlet, or office of such employer, the nature of the operation, the number of persons employed, and the wages paid at each establishment, branch, outlet, or office.

(2) The Commissioner or an authorized representative of the Commissioner may require from any employing unit any sworn or unsworn reports deemed necessary for the effective administration of this chapter. Any member of the board of review, any administrative hearing officer, or any field representative may require from any employing unit any sworn or unsworn reports, with respect to persons employed by it, which are deemed necessary for the effective administration of this chapter.

(3) Information, statements, transcriptions of proceedings, transcriptions of recordings, electronic recordings, letters, memoranda, and other documents and reports thus obtained or obtained from any individual, claimant, employing unit, or employer pursuant to the administration of this chapter, except to the extent necessary for the proper administration and enforcement of this chapter, shall be held confidential and shall not be subject to subpoena in any civil action or proceeding, published, or open to public inspection, other than to public employees in the performance of their public duties, in any manner revealing the individual's or employing unit's identity; but any claimant, employer, or a duly authorized representative, at a hearing before an administrative hearing officer or the board of review, shall be supplied with information from such records to the extent necessary for the proper presentation of his or her claim. Any person who violates any provision of this paragraph shall upon conviction be guilty of a misdemeanor.

(4) On orders of the Commissioner, any records or documents received or maintained by the Commissioner under the provisions of this chapter or the rules and regulations promulgated under this chapter may be destroyed under such safeguards as will protect their confidential nature two years after the date on which such records or documents last serve any useful, legal, or administrative purpose in the administration of this chapter or in the protection of the rights of anyone. (Code 1981, § 34-8-121, enacted by Ga. L. 1991, p. 139, § 1.)

Law reviews. — For note discussing administrative records and reports of public employment agencies with emphasis on the critical role of the employer, and advocating

a qualified, rather than absolute, privilege placed on confidential employer reports, see 11 Mercer L. Rev. 345 (1960).

34-8-122. Communications between employer and employee, or between employer or employee and department, privileged.

(a) All letters, reports, communications, or any other matters, either oral or written, from the employer or employee to each other or to the department or any of its agents, representatives, or employees, which letters, reports, or other communications shall have been written, sent, delivered, or made in connection with the requirements of the administration of this chapter, shall be absolutely privileged and shall not be made the

subject matter or basis for any action for slander or libel in any court of the State of Georgia.

(b) Any finding of fact or law, judgment, determination, conclusion, or final order made by an adjudicator, examiner, hearing officer, board of review, or any other person acting under the authority of the Commissioner with respect to this chapter shall not be admissible, binding, or conclusive in any separate or subsequent action or proceeding between a person and such person's present or previous employer brought before any court of this state or the United States or before any local, state, or federal administrative agency, regardless of whether the prior action was between the same or related parties or involved the same or similar facts; provided, however, any finding of fact or law, judgment, determination, conclusion, or final order made as described in this chapter shall be admissible in proceedings before the Commissioner. (Code 1981, § 34-8-122, enacted by Ga. L. 1991, p. 139, § 1.)

JUDICIAL DECISIONS

Communication of reasons for discharge of employees privileged. — Hospital personnel director's communication of reasons for discharge of employees to the Georgia Department of Labor was absolutely privileged and the trial court erred in denying summary judgment to the director as to this aspect of the employees' defamation claims. *Davis v. Copelan*, 215 Ga. App. 754, 452 S.E.2d 194 (1994).

Because statements by a city as an employer to the Department of Labor with respect to the discharged employee's unemployment compensation benefits were absolutely privileged, pursuant to O.C.G.A. § 34-8-122(a), and, as such, could not be used to support an at-will employee's defamation claim. *Reid v. City of Albany*, 276 Ga. App. 171, 622 S.E.2d 875 (2005).

Collateral estoppel. — Superior court's determination in an action for unemployment benefits that an employee was terminated for cause precludes that employee from relitigating the issue in a subsequent action such as one based on employment discrimination. *Langton v. Department of Cor.*, 220 Ga. App. 445, 469 S.E.2d 509 (1996).

Cited in *Hightower v. Kendall Co.*, 225 Ga. App. 71, 483 S.E.2d 294 (1997); *Desmond v. Troncalli Mitsubishi*, 243 Ga. App. 71, 532 S.E.2d 463 (2000); *ComSouth Teleservices, Inc. v. Liggett*, 243 Ga. App. 446, 531 S.E.2d 190 (2000); *Doss v. City of Savannah*, 290 Ga. App. 670, 660 S.E.2d 457 (2008).

34-8-123. Commissioner's authority to adopt, amend, or rescind rules and regulations.

The Commissioner shall have the authority to adopt, amend, or rescind rules and regulations interpreting and implementing the provisions of this article. In particular, these rules shall specify the procedure to be followed to obtain information or records to which the public has access under this chapter. (Code 1981, § 34-8-123, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-124. Access to records and information by individuals and employing units; fee for copies.

(a) An individual shall have access to all records and information concerning that individual held by the department unless the information is exempt from disclosure. An employing unit shall have access to its own records and to any records and information relating to a benefit claim by an individual if the employing unit is the individual's chargeable employer. An employing unit shall have access to general summaries of benefit claims by individuals whose benefits are chargeable to the employing unit's experience rating or reimbursement account.

(b) Any interested party or authorized representative of such party shall be entitled to examine and, upon the payment of a reasonable fee to the department, to obtain a copy of any materials contained in such records to the extent necessary for proper presentation of the party's position at any hearing on a claim. At the Commissioner's discretion, the fee may be waived for persons for whom such payment would present a hardship. (Code 1981, § 34-8-124, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-125. Access to information or records by governmental agencies; penalty for violation.

(a) Governmental agencies, including law enforcement agencies, prosecuting agencies, and the executive branch, whether state, local, or federal, shall have access to information or records deemed private and confidential under this article if the information or records are needed by the agency for official purposes and:

(1) The agency submits an application in writing to the department for the records or information containing a statement of the official purposes for which the information or records are needed and specific identification of the records or information sought from the department;

(2) The commissioner, chief executive, or other responsible official of the requesting agency has verified the need for the specific information in writing either on the application or on a separate document; and

(3) The agency requesting access has served a copy of the application for records or information on the individual or employing unit whose records or information are sought and has provided the department with proof of service. Service shall be made in the same manner as service of process in a civil action. The requesting agency shall include with the copy of the application a statement to the effect that the individual or employing unit may contact the public records officer of the department to state any objections to the release of the records or information. The department shall not act upon the application of the requesting agency until at least five days after service on the concerned individual or

employing unit. The department shall consider any objections raised by the concerned individual or employing unit in deciding whether the requesting agency needs the information or records for official purposes.

(b) In cases of emergency the governmental agency requesting access shall not be required to comply formally with the provisions of subsection (a) of this Code section at the time of the request if the procedures required by subsection (a) of this Code section are complied with by the requesting agency following the receipt of any records or information deemed private and confidential under this article. An emergency is defined as a situation in which irreparable harm or damage could occur if records or information are not released immediately.

(c) The requirements of paragraph (3) of subsection (a) of this Code section shall not apply to governmental agencies where the procedures would frustrate the investigation of possible violations of criminal laws.

(d) Governmental agencies shall have access to certain records or information, limited to such items as names, addresses, social security numbers, and general information about benefit entitlement or employer information possessed by the department, for comparison purposes with records or information possessed by the requesting agency to detect improper or fraudulent claims, to determine eligibility or entitlement to public programs, or to determine potential tax liability or employer compliance with registration and licensing requirements. In those cases the governmental agency shall not be required to comply with paragraph (3) of subsection (a) of this Code section, but the requirements of the remainder of subsection (a) of this Code section must be satisfied.

(e) Disclosure to governmental agencies of information or records obtained by the department from the federal government shall be governed by any applicable federal law or any agreement between the federal government and the department where so required by federal law. State law shall control when federal law does not apply to the records or information.

(f) The disclosure of any records or information by a governmental agency which has obtained the records or information under this Code section is prohibited unless the disclosure is directly connected to the official purpose for which the records or information was obtained. The willful violation of this subsection shall upon conviction constitute a misdemeanor. (Code 1981, § 34-8-125, enacted by Ga. L. 1991, p. 139, § 1.)

Cross references. — Punishment for misdemeanors generally, § 17-10-3.

34-8-126. Information or records available to parties to judicial or formal administrative proceedings.

Information or records deemed private and confidential under this chapter shall be available to parties to judicial or formal administrative proceedings only upon a finding by the presiding officer that the need for the information or records in the proceeding outweighs any reasons for the privacy and confidentiality of the information or records. Information or records deemed private and confidential under this chapter shall not be available in discovery proceedings unless the court in which the action has been filed has made the finding specified above. A judicial or administrative subpoena or order directed to the department must contain this finding. A subpoena for records or information held by the department may be directed to and served upon any employee of the department, but the department may specify by rule or regulation which employee shall produce the records or information in compliance with the subpoena. (Code 1981, § 34-8-126, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-127. Disclosure of information or records when necessary to permit private parties to assist in operation of department; penalty for violations; enforcement by Attorney General.

The department shall have the right to disclose information or records deemed private and confidential under this chapter to any private person or organization when such disclosure is necessary to permit private contracting parties to assist in the operation and management of the department in instances where certain departmental functions may be delegated to private parties to increase the department's efficiency or quality of service to the public. The private persons or organizations shall use the information or records solely for the purpose for which the information was disclosed and shall be bound by the same rules of privacy and confidentiality as department employees. The misuse or unauthorized release of records or information deemed private and confidential under this article by any private person or organization to which access is permitted by this Code section shall subject the person or organization to a civil penalty of \$500.00 per violation and shall also subject such person or organization to the criminal provisions specified in Code Section 34-8-125. An action to enforce this Code section shall be brought by the Attorney General. The Attorney General may recover reasonable attorneys' fees for any action brought to enforce this Code section. (Code 1981, § 34-8-127, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-128. Disclosure of information to contracting governmental or private organizations.

Where the department contracts to provide services to other governmental or private organizations, the department may disclose to those organi-

zations information or records deemed private and confidential which have been acquired in the performance of the department's obligations under the contracts. (Code 1981, § 34-8-128, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-129. Disclosure of information or records when identifying information deleted.

Nothing in this article shall prevent the disclosure of information or records deemed private and confidential under this article if all details identifying an individual or employing unit are deleted or the individual and employing unit consent to the disclosure. (Code 1981, § 34-8-129, enacted by Ga. L. 1991, p. 139, § 1.)

ARTICLE 5

CONTRIBUTIONS AND PAYMENTS IN LIEU OF CONTRIBUTIONS

Law reviews. — For survey article on local government law, see 34 Mercer L. Rev. 225 (1982).

34-8-150. Payment of contributions by employers.

(a) Contributions shall accrue from each employer for each calendar year in which the employer is subject to this chapter with respect to wages payable for employment, except as provided in Code Sections 34-8-158 through 34-8-162. Such contributions shall become due and be paid before the last day of the month next following the end of the calendar quarter to which they apply, in accordance with such regulations as the Commissioner may prescribe; provided, however, that with respect to employers as defined in paragraph (2) of subsection (a) of Code Section 34-8-33, the Commissioner shall provide by regulation that such contributions shall become due and be paid on an annual basis not later than such date as shall be prescribed by resolution of the Commissioner. Such contributions shall become delinquent if not paid when due and shall not be deducted, in whole or in part, from the wages of individuals in such employer's employ.

(b) In the payment of any contributions, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent. (Code 1981, § 34-8-150, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1995, p. 781, § 1; Ga. L. 2002, p. 1084, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, "commissioner" was capitalized at the end of the second sentence in subsection (a).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 and former Code 1933, § 54-650.2 are included in the annotations for this Code section.

"Person" construed. — It is clear that the "person" referred to in former Code 1933, § 54-650.2 (see O.C.G.A. § 34-8-168) is not the employer because Ga. L. 1937, p. 806 (see O.C.G.A. § 34-8-1 et seq.) contained other provisions which, in effect, made the employer personally liable for the tax by prohibiting the employer from deducting

the taxes, in whole or in part, from the wages of the employees, and by providing for collection of the unpaid taxes from the employer. Thus, if the term "person" in former Code 1933, § 54-650.2 was construed to mean the "employer," the statute would be redundant. *Brumby v. Brooks*, 234 Ga. 376, 216 S.E.2d 288 (1975), later appeal, 140 Ga. App. 210, 230 S.E.2d 359 (1976) (decided under Ga. L. 1937, p. 806 and former Code 1933, § 54-650.2).

Cited in *Tucker v. Caldwell*, 608 F.2d 140 (5th Cir. 1979).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes — In light of the similarity of the provisions, opinions decided under Ga. L. 1937, p. 806 are included in the annotations for this Code section.

Nurses acting within scope of statutory authority. — It does not appear that licensed nurses (registered professional nurses or li-

censed practical nurses), acting within the scope of their statutory authority, are performing "domestic services" within the meaning of this chapter. 1980 Op. Att'y Gen. No. 80-34 (decided under former Ga. L. 1937, p. 806; see O.C.G.A. Ch. 8, T. 34).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 15, 18, 19.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, §§ 284 et seq., 330, 346, 347.

ALR. — Receiver as within social security and unemployment compensation acts, 143 ALR 984.

Constitutionality, construction, and application of provisions of social security or unemployment compensation acts which vary rate of employers' contributions according to period in which business has been conducted, 163 ALR 1148.

34-8-151. Rate of employer contributions.

(a) For periods prior to April 1, 1987, or after December 31, 2011, each new or newly covered employer shall pay contributions at a rate of 2.7 percent of wages paid by such employer with respect to employment during each calendar year until the employer is eligible for a rate calculation based on experience as defined in this chapter, except as provided in Code Sections 34-8-158 through 34-8-162.

(b) For periods on or after April 1, 1987, but on or before December 31, 1999, each new or newly covered employer shall pay contributions at a rate of 2.64 percent of wages paid by such employer with respect to employment during each calendar year until the employer is eligible for a rate calculation based on experience as defined in this chapter, except as provided in Code Sections 34-8-158 through 34-8-162.

(c) For periods on or after January 1, 2000, but on or before December 31, 2011, each new or newly covered employer shall pay contributions at a

rate of 2.62 percent of wages paid by such employer with respect to employment during each calendar year until the employer is eligible for a rate calculation based on experience as defined in this chapter, except as provided in Code Sections 34-8-158, 34-8-159, 34-8-160, 34-8-161, and 34-8-162. (Code 1981, § 34-8-151, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1996, p. 693, § 1; Ga. L. 1998, p. 1501, § 2; Ga. L. 1999, p. 449, § 2; Ga. L. 1999, p. 521, § 2; Ga. L. 2005, p. 1200, § 2/HB 520; Ga. L. 2006, p. 72, § 34/SB 465.)

The 2006 amendment, effective April 14, 2006, part of an Act to revise, modernize, and correct the Code, inserted a comma following "December 31, 2011" in subsection (c).

Editor's notes. — Ga. L. 1999, p. 449, § 1, and Ga. L. 1999, p. 521, § 1, not codified by the General Assembly, provide that: "This

Act shall be known and may be cited as the 'Workforce Reinvestment Act of 1999.'"

Law reviews. — For annual survey of labor and employment law, see 57 Mercer L. Rev. 251 (2005).

For review of 1996 labor and industrial relations legislation, see 13 Ga. St. U. L. Rev. 217 (1996).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 are included in the annotations for this Code section.

Cited in National Trailer Convoy, Inc. v. Undercoffer, 109 Ga. App. 703, 137 S.E.2d 328 (1964); Massey v. Thiokol Chem. Corp., 368 F. Supp. 668 (S.D. Ga. 1973).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 15, 23.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, §§ 284, 350 et seq.

ALR. — Construction and application of provision in Social Security or Unemployment Compensation Acts excluding from the basis of contribution remuneration in excess of a named amount paid to employee, 159 ALR 1197.

Constitutionality, construction, and application of provisions of Social Security or Unemployment Compensation Acts which vary rate of employers' contributions according to period in which business has been conducted, 163 ALR 1148.

Unemployment compensation: right of successor in business to experience or rating of predecessor for purpose of fixing rate of contributions, 22 ALR2d 673.

Service charges, made by hotels or restaurants and later distributed to waiters or similar employees, as "wages" upon which federal or state unemployment taxes or contributions are required to be paid, 83 ALR2d 1024.

Part-time or intermittent workers as covered by or as eligible for benefits under State Unemployment Compensation Act, 95 ALR3d 891.

34-8-152. Standard rate.

(a) The standard rate of contribution shall be 5.4 percent. The standard rate of contribution is the rate from which variations therefrom are computed as provided in Code Section 34-8-155.

(b) No employer's rate shall be reduced below the rate for new employers as specified in Code Section 34-8-151 for any calendar year, except as

provided in Code Section 34-8-155, unless and until such employer's account could have been chargeable with benefit payments throughout the 36 consecutive calendar months ending on the computation date for that calendar year. (Code 1981, § 34-8-152, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-153. Liability of succeeding employer; computation of rate of contributions; transfers between employers with substantially common ownership, management, or control; transfers made for the purpose of obtaining a lower rate of contribution; penalties for violations.

(a) Subject to the provisions of subsections (g) and (h) of this Code section, any corporation, partnership, individual, or other legal entity who acquires by purchase, merger, consolidation, or other means substantially all of the trade, business, or assets of any employer and who thereafter continues the acquired trade or business shall be deemed to be a successor to the employer from whom the trade or business was acquired. The successor shall acquire the experience rating record of the predecessor except as otherwise provided in this Code section or in the rules and regulations of the Department of Labor. If the successor is not already an employer at the time of the acquisition, the rate of contributions applicable to the predecessor shall continue to be applicable to the successor; provided, however, if the existing rate of contributions of the predecessor exceeds the new employer rate as specified in Code Section 34-8-151, the successor shall be assigned a new employer rate of contributions; in such event, the experience of the predecessor shall not be considered for purposes of rate calculations and the successor shall be otherwise treated as a new employer.

(b) Subject to the provisions of subsections (g) and (h) of this Code section, if the successor is already an employer at the time of the acquisition, the rate of contributions applicable to the successor shall continue until the end of the quarter in which the acquisition occurred. The rate of contributions applicable to the successor beginning on the first day of the quarter following the acquisition will be determined by the combined experience of the predecessor and successor as of the applicable computation date; provided, however, the experience of the predecessor shall not be combined with that of the successor for purposes of rate calculation if the predecessor's rate of contributions immediately preceding the acquisition exceeded the rate already in effect for the successor; in such event, the experience of the predecessor shall not be considered for purposes of rate calculations unless this combination of experience results in a reduction of rates.

(c) Subject to the provisions of subsections (g) and (h) of this Code section, any employing unit which acquires by any means any clearly identifiable or separable portion of the trade or business of an employer

and is an employer at the time of the acquisition or becomes an employer within six months from the end of the quarter in which the acquisition is made may be deemed to be a partial successor to the employer from whom the portion of the trade or business was acquired. A portion of the predecessor's experience rating records which are attributable to the portion of trade or the business which was acquired may be transferred to the successor. Mutual consent of both parties must be given to effectuate the partial transfer. The Commissioner shall prescribe by regulation the time frame for notification to the department of partial acquisitions and the method by which the portion of the experience rating record to be transferred will be determined.

(d) Subject to the provisions of subsections (g) and (h) of this Code section, if the conditions of subsection (c) of this Code section are met and the partial successor is not already an employer at the time of the acquisition, the rate of contributions applicable to the predecessor shall be applicable to the successor. Future rates will be determined by combining the transferred portion of the predecessor's experience rating record with the successor's own experience rating record as of the applicable computation date.

(e) Subject to the provisions of subsections (g) and (h) of this Code section, if the conditions of subsection (c) of this Code section are met and the partial successor is already an employer at the time of the acquisition, the rate of contributions applicable to the successor shall continue until the end of the quarter in which the acquisition occurred. The rate of contributions applicable to the successor beginning on the first day of the quarter following the acquisition will be determined by combining the transferred portion of the predecessor's experience rating record with the successor's own experience rating record as of the applicable computation date.

(f) Nothing in this Code section shall be construed to affect liens which are created pursuant to Code Section 34-8-167.

(g) Notwithstanding any other provision in this chapter to the contrary, effective July 1, 2006:

(1) If an employer transfers its trade or business, or any portion thereof, to another employer and, at the time of the transfer, there is substantially common ownership, management, or control of the two employers then the rate of contributions attributable to the predecessor shall be transferred to the successor employer to whom such business is so transferred. The rates of contributions of both employers shall be recalculated and made effective immediately upon the date of the transfer of the trade or business.

(2) Whenever the successor is not already an employer at the time of the acquisition, the unemployment experience of the acquired business

shall not be transferred to the successor if the Commissioner determines that the successor acquired the business solely or primarily for the purpose of obtaining a lower rate of contribution. Instead, the successor shall be assigned the new employer rate under Code Section 34-8-151. In determining whether the trade or business was acquired solely or primarily for the purpose of obtaining a lower rate of contributions, the Commissioner shall use objective factors which may include the following:

(A) The cost of acquiring the trade or business;

(B) Whether the successor actually continued the business enterprise of the acquired trade or business;

(C) How long the acquired trade or business was continued; and

(D) Whether or not a substantial number of new employees were hired for the performance of duties unrelated to the business activity conducted by the predecessor prior to acquisition.

(h)(1) Any person who knowingly violates or attempts to violate subsection (g) of this Code section or any other provision of this chapter related to determining the assignment of a rate of contributions or any person who knowingly advises another person in a manner that results in a violation of such provision shall be subject to the following penalties:

(A) If the person is an employer, then such employer shall be assigned the highest rate assignable under this chapter for the rate year during which such violation or attempted violation occurred and the three rate years immediately following that rate year; provided, however, that if:

(i) The person's business is already at the highest rate; or

(ii) If the amount of increase in the rate of contributions for such person would be less than 2 percent for such year,

then a penalty rate of contributions of 2 percent of taxable wages shall be imposed for such year;

(B) If the person is not an employer, such person shall be subject to a civil monetary penalty of not more than \$5,000.00 per violation. Any such fine collected shall be deposited in the penalty and interest account established under Code Section 34-8-92.

(2) For the purposes of this subsection, the term "knowingly" means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibited act or omission.

(3) For the purposes of this subsection, the term "violates or attempts to violate" includes, but is not limited to, intent to evade, misrepresentation, and willful nondisclosure.

(4) For the purposes of this subsection, the term “person” shall have the meaning given such term by Section 7701(a)(1) of the Internal Revenue Code of 1986, as amended.

(5) In addition to the penalty imposed by paragraph (1) of this subsection, any violation of this Code section may be prosecuted as a felony under Code Section 16-10-20.

(6) The Commissioner shall establish procedures to identify the occurrence of any transfer or acquisition of a business that violates any provision of this Code section.

(i) For the purposes of this Code section and administration of the Employment Security Law, the terms “trade, business, or assets” and “trade or business” shall include:

(1) The employer’s work force or any part of the employer’s work force; and

(2) Any part of the employer’s trade, business, or assets, whether or not clearly identifiable or separable within the meaning of subsection (c) of this Code section.

Tax liability under Chapter 7 of Title 48 shall not be affected by the definitions of “trade, business, or assets” and “trade or business” in this Code section. (Code 1981, § 34-8-153, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1995, p. 373, § 2; Ga. L. 1997, p. 888, § 1; Ga. L. 2005, p. 1200, § 3/HB 520; Ga. L. 2006, p. 72, § 34/SB 465; Ga. L. 2008, p. 324, § 34/SB 455.)

The 2006 amendment, effective April 14, 2006, part of an Act to revise, modernize, and correct the Code, inserted “of this Code section” following “subsection (g)” in paragraph (h)(1).

The 2008 amendment, effective May 12, 2008, part of an Act to revise, modernize, and correct the Code, in subsection (h), substituted “For the purposes of this subsection” for “For the purposes of this Code section” at the beginning of paragraphs (h)(2) through (h)(4); redesignated former paragraph (h)(5) and former subparagraphs (h)(5)(A) and (h)(5)(B) as present subsection (i) and present paragraphs (i)(1) and (i)(2), respectively; and redesignated former paragraphs (h)(6) and (h)(7) as present paragraphs (h)(5) and (h)(6), respectively.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2005, a colon was substituted for a period at the end of paragraph (h)(1) and “monetary” was substituted for “money” in subparagraph (h)(1)(B).

Law reviews. — For annual survey of labor and employment law, see 57 Mercer L. Rev. 251 (2005).

For note discussing administrative records and reports of public employment agencies with emphasis on the critical role of the employer, and advocating a qualified, rather than absolute privilege placed on confidential employer reports, see 11 Mercer L. Rev. 345 (1960).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806, and former Code Section 34-8-122 are included in the annotations for this Code section.

Cited in Schwob Mfg. Co. v. Huiet, 69 Ga.

App. 285, 25 S.E.2d 149 (1943); Cartersville Candlewick, Inc. v. Huiet, 204 Ga. 609, 50 S.E.2d 647 (1948); Phillips v. J.L. Peed Co., 78 Ga. App. 471, 51 S.E.2d 468 (1949); Caldwell v. Hospital Auth., 248 Ga. 887, 287 S.E.2d 15 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 16, 28.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, §§ 284 et seq., 330, 331, 346 et seq., 354.

ALR. — Constitutionality, construction, and application of provisions of social security or unemployment compensation acts which vary rate of employers' contributions according to period in which business has been conducted, 163 ALR 1148.

Constitutionality, construction, and appli-

cation of provision of Unemployment Compensation Act subjecting to its provisions an employer purchasing or succeeding to the business of another employer, 4 ALR2d 721.

Unemployment compensation: right of successor in business to experience or rating of predecessor for purpose of fixing rate of contributions, 22 ALR2d 673.

Unemployment compensation: eligibility of employee laid off according to employer's mandatory retirement plan, 50 ALR3d 880.

34-8-154. Separate accounts.

Except as provided in Code Section 34-8-161, the Commissioner shall maintain a separate account for each employer and shall credit such account with all the contributions paid by that employer. Nothing in this chapter shall be construed to grant any employer or individuals in the service of such employer prior claims or rights to the amounts paid by the employer into the fund. (Code 1981, § 34-8-154, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-155. Benefit experience; variations from standard rate.

(a) Employers shall be classified in accordance with their actual experience in the payment of contributions and with respect to benefits charged against their accounts so that contribution rates will reflect such experience. Employer rates shall be computed based on each employer's own experience rating record as of the computation date, June 30 of each year. The computed rate shall apply to taxable wages paid during the calendar year immediately following the computation date.

(b) Any employer who has failed to file all required tax and wage reports, including all such reports of all predecessor employers, by the end of the month following any computation date shall be notified by the department of such failure. If the required tax and wage reports remain unfiled 30 days following notice, the employer will not be eligible for a rate computation but shall be assigned the maximum rate allowable after application of the State-wide Reserve Ratio, if computed for such year, as provided in Code Section 34-8-156. Employers having positive reserve accounts will be as-

signed the maximum rate allowable for positive reserve accounts. Employers having deficit reserve accounts will be assigned the maximum rate allowable for deficit reserve accounts. Such rates shall remain effective until the end of the calendar year for which the rates have been assigned.

(c) For the periods prior to April 1, 1987, or after December 31, 2011, variations from the standard rate of contributions shall be determined in accordance with the following requirements:

(1) If, on the computation date, the total of an employer's contributions exceeds the total benefits charged to its account, its contribution rate for the following calendar year shall be determined by subtracting benefits charged from contributions and dividing the difference by the employer's average annual payroll. The resulting percentage will then be applied to the following rate table. Contributions paid by the end of the month following the computation date and contributions paid within 30 days of notice of failure to file all required tax and wage reports will be considered as having been paid on the computation date.

RATE TABLE FOR EMPLOYERS
WITH POSITIVE RESERVE ACCOUNTS

If the excess percentage:

| Equals or Exceeds | But Is Less Than | The Contribution Rate Is (Percent) |
|-------------------------|------------------------|--|
| 0.00 | 0.86 | 2.16 |
| 0.86 | 1.17 | 2.08 |
| 1.17 | 1.48 | 2.00 |
| 1.48 | 1.79 | 1.92 |
| 1.79 | 2.10 | 1.84 |
| 2.10 | 2.41 | 1.76 |
| 2.41 | 2.72 | 1.68 |
| 2.72 | 3.04 | 1.60 |
| 3.04 | 3.35 | 1.52 |
| 3.35 | 3.65 | 1.44 |
| 3.65 | 3.97 | 1.36 |
| 3.97 | 4.29 | 1.28 |
| 4.29 | 4.60 | 1.20 |
| 4.60 | 4.91 | 1.12 |
| 4.91 | 5.22 | 1.04 |
| 5.22 | 5.53 | 0.96 |
| 5.53 | 5.84 | 0.88 |

RATE TABLE FOR EMPLOYERS
WITH POSITIVE RESERVE ACCOUNTS

If the excess percentage:

| Equals or Exceeds | But Is Less Than | The Contribution Rate Is (Percent) |
|-------------------------|------------------------|--|
| 5.84 | 6.15 | 0.80 |
| 6.15 | 6.47 | 0.72 |
| 6.47 | 6.77 | 0.64 |
| 6.77 | 7.08 | 0.56 |
| 7.08 | 7.40 | 0.48 |
| 7.40 | 7.71 | 0.40 |
| 7.71 | 8.02 | 0.32 |
| 8.02 | 8.33 | 0.24 |
| 8.33 | 8.64 | 0.16 |
| 8.64 | 8.95 | 0.08 |
| 8.95 and over | | 0.04 |

(2) If, on the computation date, the total of an employer's contributions is less than the total benefits charged to its account, its contribution rate for the following calendar year shall be determined by subtracting contributions from benefits charged and dividing the difference by the employer's average annual payroll. The resulting percentage will then be applied to the following rate table. Contributions paid by the end of the month following the computation date and contributions paid within 30 days of notice of failure to file all required tax and wage reports will be considered as having been paid on the computation date.

RATE TABLE FOR EMPLOYERS
WITH DEFICIT RESERVE ACCOUNTS

If the deficit percentage:

| Equals or Exceeds | But Is Less Than | The Contribution Rate Is (Percent) |
|-------------------------|------------------------|--|
| 0.0 | 0.5 | 2.2 |
| 0.5 | 1.5 | 2.4 |
| 1.5 | 2.5 | 2.6 |
| 2.5 | 3.5 | 2.8 |
| 3.5 | 4.5 | 3.0 |

RATE TABLE FOR EMPLOYERS
WITH DEFICIT RESERVE ACCOUNTS

If the deficit percentage:

| Equals or Exceeds | But Is Less Than | The Contribution Rate Is (Percent) |
|-------------------------|------------------------|--|
| 4.5 | 5.5 | 3.2 |
| 5.5 | 6.5 | 3.4 |
| 6.5 | 7.5 | 3.6 |
| 7.5 | 8.5 | 3.8 |
| 8.5 | 9.5 | 4.0 |
| 9.5 | 10.5 | 4.2 |
| 10.5 | 11.5 | 4.4 |
| 11.5 | 12.5 | 4.6 |
| 12.5 | 13.5 | 4.8 |
| 13.5 | 14.5 | 5.0 |
| 14.5 | 15.5 | 5.2 |
| 15.5 and over | | 5.4 |

(d) For the periods on or after April 1, 1987, but on or before December 31, 1999, variations from the standard rate of contributions shall be determined in accordance with the following requirements:

(1) If, on the computation date, the total of an employer's contributions exceeds the total benefits charged to its account, its contribution rate for the following calendar year shall be determined by subtracting benefits charged from contributions and dividing the difference by the employer's average annual payroll. The resulting percentage will then be applied to the following rate table. Contributions paid by the end of the month following the computation date and contributions paid within 30 days of notice of failure to file all required tax and wage reports will be considered as having been paid on the computation date.

RATE TABLE FOR EMPLOYERS
WITH POSITIVE RESERVE ACCOUNTS

If the excess percentage:

| Equals or Exceeds | But Is Less Than | The Contribution Rate Is (Percent) |
|-------------------------|------------------------|--|
| 0.00 | 0.86 | 2.125 |

RATE TABLE FOR EMPLOYERS
WITH POSITIVE RESERVE ACCOUNTS

If the excess percentage:

| Equals or Exceeds | But Is Less Than | The Contribution Rate Is (Percent) |
|-------------------------|------------------------|--|
| 0.86 | 1.17 | 2.043 |
| 1.17 | 1.48 | 1.962 |
| 1.48 | 1.79 | 1.881 |
| 1.79 | 2.10 | 1.800 |
| 2.10 | 2.41 | 1.725 |
| 2.41 | 2.72 | 1.643 |
| 2.72 | 3.04 | 1.562 |
| 3.04 | 3.35 | 1.481 |
| 3.35 | 3.65 | 1.400 |
| 3.65 | 3.97 | 1.325 |
| 3.97 | 4.29 | 1.243 |
| 4.29 | 4.60 | 1.162 |
| 4.60 | 4.91 | 1.081 |
| 4.91 | 5.22 | 1.000 |
| 5.22 | 5.53 | 0.925 |
| 5.53 | 5.84 | 0.843 |
| 5.84 | 6.15 | 0.762 |
| 6.15 | 6.47 | 0.681 |
| 6.47 | 6.77 | 0.600 |
| 6.77 | 7.08 | 0.525 |
| 7.08 | 7.40 | 0.443 |
| 7.40 | 7.71 | 0.362 |
| 7.71 | 8.02 | 0.281 |
| 8.02 | 8.33 | 0.200 |
| 8.33 | 8.64 | 0.125 |
| 8.64 | 8.95 | 0.043 |
| 8.95 and over | | 0.040 |

(2) If, on the computation date, the total of an employer's contributions is less than the total benefits charged to the account of such employer, the contribution rate for the following calendar year shall be determined by subtracting contributions from benefits charged and dividing the difference by the employer's average annual payroll. The resulting percentage will then be applied to the following rate table. Contributions paid by the end of the month following the computation date and contributions paid within 30 days of notice of failure to file all

required tax and wage reports will be considered as having been paid on the computation date.

RATE TABLE FOR EMPLOYERS
WITH DEFICIT RESERVE ACCOUNTS

If the deficit percentage:

| Equals or Exceeds | But Is Less Than | The Contribution Rate Is (Percent) |
|-------------------------|------------------------|--|
| 0.0 | 0.5 | 2.16 |
| 0.5 | 1.5 | 2.36 |
| 1.5 | 2.5 | 2.56 |
| 2.5 | 3.5 | 2.76 |
| 3.5 | 4.5 | 2.96 |
| 4.5 | 5.5 | 3.16 |
| 5.5 | 6.5 | 3.36 |
| 6.5 | 7.5 | 3.56 |
| 7.5 | 8.5 | 3.76 |
| 8.5 | 9.5 | 3.96 |
| 9.5 | 10.5 | 4.16 |
| 10.5 | 11.5 | 4.36 |
| 11.5 | 12.5 | 4.56 |
| 12.5 | 13.5 | 4.76 |
| 13.5 | 14.5 | 4.96 |
| 14.5 | 15.5 | 5.16 |
| 15.5 and over | | 5.40 |

(e) For the periods on or after January 1, 2000, but on or before December 31, 2011, variations from the standard rate of contributions shall be determined in accordance with the following requirements:

(1) If, on the computation date, the total of an employer's contributions exceeds the total benefits charged to its account, its contribution rate for the following calendar year shall be determined by subtracting benefits charged from contributions and dividing the difference by the employer's average annual payroll. The resulting percentage will then be applied to the following rate table. Contributions paid by the end of the month following the computation date and contributions paid within 30 days of notice of failure to file all required tax and wage reports will be considered as having been paid on the computation date.

RATE TABLE FOR EMPLOYERS
WITH POSITIVE RESERVE ACCOUNTS

If the excess percentage:

| Equals or Exceeds | But Is Less Than | The Contribution Rate Is (Percent) |
|-------------------------|------------------------|--|
| 0.00 | 0.86 | 2.110 |
| 0.86 | 1.17 | 2.028 |
| 1.17 | 1.48 | 1.947 |
| 1.48 | 1.79 | 1.866 |
| 1.79 | 2.10 | 1.785 |
| 2.10 | 2.41 | 1.710 |
| 2.41 | 2.72 | 1.628 |
| 2.72 | 3.04 | 1.547 |
| 3.04 | 3.35 | 1.466 |
| 3.35 | 3.65 | 1.385 |
| 3.65 | 3.97 | 1.310 |
| 3.97 | 4.29 | 1.228 |
| 4.29 | 4.60 | 1.147 |
| 4.60 | 4.91 | 1.066 |
| 4.91 | 5.22 | 0.985 |
| 5.22 | 5.53 | 0.910 |
| 5.53 | 5.84 | 0.828 |
| 5.84 | 6.15 | 0.747 |
| 6.15 | 6.47 | 0.666 |
| 6.47 | 6.77 | 0.585 |
| 6.77 | 7.08 | 0.510 |
| 7.08 | 7.40 | 0.428 |
| 7.40 | 7.71 | 0.347 |
| 7.71 | 8.02 | 0.266 |
| 8.02 | 8.33 | 0.185 |
| 8.33 | 8.64 | 0.110 |
| 8.64 | 8.95 | 0.028 |
| 8.95 and over | | 0.025 |

(2) If, on the computation date, the total of an employer’s contributions is less than the total benefits charged to its account, its contribution rate for the following calendar year shall be determined by subtracting contributions from benefits charged and dividing the difference by the employer’s average annual payroll. The resulting percentage will then be applied to the following rate table. Contributions paid by the end of the month following the computation date and contributions paid within 30

days of notice of failure to file all required tax and wage reports will be considered as having been paid on the computation date.

RATE TABLE FOR EMPLOYERS
WITH DEFICIT RESERVE ACCOUNTS

If the deficit percentage:

| Equals or Exceeds | But Is Less Than | The Contribution Rate Is (Percent) |
|-------------------------|------------------------|--|
| 0.0 | 0.5 | 2.15 |
| 0.5 | 1.5 | 2.35 |
| 1.5 | 2.5 | 2.55 |
| 2.5 | 3.5 | 2.75 |
| 3.5 | 4.5 | 2.95 |
| 4.5 | 5.5 | 3.15 |
| 5.5 | 6.5 | 3.35 |
| 6.5 | 7.5 | 3.55 |
| 7.5 | 8.5 | 3.75 |
| 8.5 | 9.5 | 3.95 |
| 9.5 | 10.5 | 4.15 |
| 10.5 | 11.5 | 4.35 |
| 11.5 | 12.5 | 4.55 |
| 12.5 | 13.5 | 4.75 |
| 13.5 | 14.5 | 4.95 |
| 14.5 | 15.5 | 5.15 |
| 15.5 and over | | 5.40 |

(f)(1) Subject to the provisions of paragraph (2) of this subsection, contribution rates for experience rated employers for the time periods:

- (A) January 1, 2000, to December 31, 2000;
- (B) January 1, 2001, to December 31, 2001;
- (C) January 1, 2002, to December 31, 2002; and
- (D) January 1, 2003, to December 31, 2003

shall not be imposed above the level of 1.0 percent of statutory contribution rates.

(2) The Governor shall have authority to suspend by executive order any future portion of the reduction in calculated rates provided for in paragraph (1) of this subsection in the event the Governor determines, upon the recommendation of the Commissioner, that suspension of said reduction is in the best interests of the State of Georgia.

(Code 1981, § 34-8-155, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1996, p. 670, § 1; Ga. L. 1996, p. 693, § 2; Ga. L. 1999, p. 449, § 3; Ga. L. 1999, p. 521, § 3; Ga. L. 2002, p. 1119, § 4; Ga. L. 2005, p. 1200, § 4/HB 520.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2002, the semicolon at the end of subparagraph (f)(1)(D) was deleted.

Editor’s notes. — Ga. L. 1999, p. 449, § 1, and Ga. L. 1999, p. 521, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Workforce Reinvestment Act of 1999’.”

Ga. L. 2002, p. 1119, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Employment Security and Enhancement Act of 2002’.”

Law reviews. — For note on the 2002 enactment of this chapter, see 19 Ga. St. U.L. Rev. 258 (2002).

34-8-156. State-wide Reserve Ratio; reduction in tax rate.

(a) A State-wide Reserve Ratio shall be computed as of June 30 of each year by dividing the balance in the trust fund, including accrued interest, by the total covered wages paid in the state during the previous calendar year. Any amount credited to the state’s account under Section 903 of the Social Security Act, as amended, which has been appropriated for the expenses of administration, whether or not withdrawn from the trust fund, shall be excluded from the trust fund balance in computing the State-wide Reserve Ratio.

(b) For the period on or after January 1, 1990, but prior to January 1, 1995:

(1) When the State-wide Reserve Ratio, as computed above, is 3.3 percent or more for any calendar year, each employer who does not have a deficit reserve balance shall have its contribution rate at the time of computation credited by applying an overall reduction of the rate in accordance with the following table:

If the State-wide Reserve Ratio:

| <u>Equals or Exceeds</u> | <u>But Is Less Than</u> | <u>Overall Reduction</u> |
|--------------------------|-------------------------|--------------------------|
| 3.3 percent | 3.7 percent | 40 percent |
| 3.7 percent and over | | 60 percent |

(2) When the State-wide Reserve Ratio, as calculated above, is less than 3.0 percent, there shall be an overall increase in the rate, as of the computation date, for each employer whose rate is computed under a rate table in Code Section 34-8-155 in accordance with the following table:

If the State-wide Reserve Ratio:

| <u>Equals or Exceeds</u> | <u>But Is Less Than</u> | <u>Overall Increase</u> |
|--------------------------|-------------------------|-------------------------|
| 2.6 percent | 3.0 percent | 40 percent |
| Under 2.6 percent | | 60 percent |

(c) For the period on or after January 1, 1995, but prior to January 1, 1997:

(1) When the State-wide Reserve Ratio, as computed above, is 3.3 percent or more for any calendar year, each employer who does not have a deficit reserve balance shall have its contribution rate at the time of computation credited by applying an overall reduction of the rate in accordance with the following table:

If the State-wide Reserve Ratio:

| <u>Equals or Exceeds</u> | <u>But Is Less Than</u> | <u>Overall Reduction</u> |
|--------------------------|-------------------------|--------------------------|
| 3.3 percent | 3.7 percent | 40 percent |
| 3.7 percent and over | | 50 percent |

(2) When the State-wide Reserve Ratio, as calculated above, is less than 3.0 percent, there shall be an overall increase in the rate, as of the computation date, for each employer whose rate is computed under a rate table in Code Section 34-8-155 in accordance with the following table:

If the State-wide Reserve Ratio:

| <u>Equals or Exceeds</u> | <u>But Is Less Than</u> | <u>Overall Increase</u> |
|--------------------------|-------------------------|-------------------------|
| 2.6 percent | 3.0 percent | 40 percent |
| Under 2.6 percent | | 50 percent |

(d)(1) For the period on or after January 1, 1997, but prior to January 1, 1998:

(A) When the State-wide Reserve Ratio, as computed above, is 3.0 percent or more for any calendar year, each employer who does not have a deficit reserve balance shall have its contribution rate at the time of computation credited by applying an overall reduction of the rate in accordance with the following table:

If the State-wide Reserve Ratio:

| <u>Equals or Exceeds</u> | <u>But Is Less Than</u> | <u>Overall Reduction</u> |
|--------------------------|-------------------------|--------------------------|
| 3.0 percent | 3.6 percent | 25 percent |
| 3.6 percent and over | | 50 percent |

(B) When the State-wide Reserve Ratio, as calculated above, is less than 2.6 percent, there shall be an overall increase in the rate, as of the computation date, for each employer whose rate is computed under a rate table in Code Section 34-8-155 in accordance with the following table:

If the State-wide Reserve Ratio:

| <u>Equals or Exceeds</u> | <u>But Is Less Than</u> | <u>Overall Increase</u> |
|--------------------------|-------------------------|-------------------------|
| 1.8 percent | 2.6 percent | 25 percent |
| Under 1.8 percent | | 50 percent |

(2) For the period on or after January 1, 1998, but prior to January 1, 1999:

(A) When the State-wide Reserve Ratio, as computed above, is 2.4 percent or more for any calendar year, each employer who does not have a deficit reserve balance shall have its contribution rate at the time of computation credited by applying an overall reduction of the rate in accordance with the following table:

If the State-wide Reserve Ratio:

| <u>Equals or Exceeds</u> | <u>But Is Less Than</u> | <u>Overall Reduction</u> |
|--------------------------|-------------------------|--------------------------|
| 2.4 percent | 2.7 percent | 25 percent |
| 2.7 percent and over | | 50 percent |

(B) When the State-wide Reserve Ratio, as calculated above, is less than 2.1 percent, there shall be an overall increase in the rate, as of the computation date, for each employer whose rate is computed under a rate table in Code Section 34-8-155 in accordance with the following table:

If the State-wide Reserve Ratio:

| <u>Equals or Exceeds</u> | <u>But Is Less Than</u> | <u>Overall Increase</u> |
|--------------------------|-------------------------|-------------------------|
| 1.8 percent | 2.1 percent | 25 percent |
| Under 1.8 percent | | 50 percent |

(3) For the period on or after January 1, 1999, but prior to January 1, 2000:

(A) When the State-wide Reserve Ratio, as computed above, is 2.4 percent or more for any calendar year, each employer who does not have a deficit reserve balance shall have its contribution rate at the time of computation credited by applying an overall reduction of the rate in accordance with the following table:

If the State-wide Reserve Ratio:

| <u>Equals or Exceeds</u> | <u>But Is Less Than</u> | <u>Overall Reduction</u> |
|--------------------------|-------------------------|--------------------------|
| 2.4 percent | 2.7 percent | 25 percent |
| 2.7 percent and over | | 50 percent |

(B) When the State-wide Reserve Ratio, as calculated above, is less than 2.0 percent, there shall be an overall increase in the rate, as of the computation date, for each employer whose rate is computed under a rate table in Code Section 34-8-155 in accordance with the following table:

If the State-wide Reserve Ratio:

| <u>Equals or Exceeds</u> | <u>But Is Less Than</u> | <u>Overall Increase</u> |
|--------------------------|-------------------------|-------------------------|
| 1.8 percent | 2.0 percent | 25 percent |
| Under 1.8 percent | | 50 percent |

(4) For the period on or after January 1, 2000:

(A) When the State-wide Reserve Ratio, as calculated above, is 2.4 percent or more for any calendar year, each employer who does not have a deficit reserve balance shall have its contribution rate at the time of computation credited by applying an overall reduction of the rate in accordance with the following table:

If the State-wide Reserve Ratio:

| <u>Equals or Exceeds</u> | <u>But Is Less Than</u> | <u>Overall Reduction</u> |
|--------------------------|-------------------------|--------------------------|
| 2.4 percent | 2.7 percent | 25 percent |
| 2.7 percent and over | | 50 percent |

(B) Except for any year or portion of a year during which the provisions of paragraph (1) of subsection (f) of Code Section 34-8-155 apply, when the State-wide Reserve Ratio, as calculated above, is less than 1.7 percent, there shall be an overall increase in the rate, as of the computation date, for each employer whose rate is computed under a rate table in Code Section 34-8-155 in accordance with the following table:

If the State-wide Reserve Ratio:

| <u>Equals or Exceeds</u> | <u>But Is Less Than</u> | <u>Overall Increase</u> |
|--------------------------|-------------------------|-------------------------|
| 1.5 percent | 1.7 percent | 25 percent |
| 1.25 percent | 1.5 percent | 50 percent |
| 0.75 percent | 1.25 percent | 75 percent |
| Under 0.75 percent | | 100 percent |

provided, however, that for the periods of January 1 through December 31, 2004; January 1 through December 31, 2005; and January 1 through December 31, 2006, the overall increase in the rate required under this subparagraph shall be suspended and the provisions of this subparagraph shall be null and void, except in the event the State-wide Reserve Ratio, as calculated above, is less than 1.00 percent on the computation date with respect to rates applicable to calendar year 2004, 2005, or 2006, then for each such year the Commissioner of Labor shall have the option of imposing an increase in the overall rate of up to 35 percent, as of the computation date, for each employer whose rate is computed under a rate table in Code Section 34-8-155; and provided, further, that for the periods of January 1 through December 31, 2007, January 1 through December 31, 2008, and January 1 through December 31, 2009, the overall increase in the rate required under this subparagraph shall be suspended and the provisions of this subparagraph shall be null and void, except in the event the State-wide Reserve Ratio, as calculated above, is less than 1.25 percent on the computation date with respect to rates applicable to calendar year 2007, 2008, or 2009, then for each such year the Commissioner of Labor shall have the option of imposing an increase in the overall rate of up to 35 percent, as of the computation date, for each employer whose rate is computed under a rate table in Code Section 34-8-155.

(e)(1) For any calendar year prior to January 1, 1999, with respect to which the State-wide Reserve Ratio shall equal or exceed 2.1 percent, as computed pursuant to the provisions of this Code section, contribution rates shall be further reduced for the succeeding calendar year by a percentage which shall be computed in the following manner:

(A) The dollar amount by which the Unemployment Trust Fund exceeds the dollar amount which equates to a State-wide Reserve Ratio of 2.1 percent shall be divided by the total of contributions collected attributable to wages paid during the preceding calendar year, excluding penalty and interest, as of the computation date as that term is defined in Code Section 34-8-28;

(B) The resulting percentage shall be used to reduce all experience rated contribution rates by that same percentage; provided, however, that the resulting reduction shall not reduce contribution rates below the level which will produce a contribution rate of 5.4 percent for maximum deficit reserve accounts. This reduction in contribution rates shall be valid for the succeeding calendar year only; and

(C) Accounts which are not eligible for a computed contribution rate as provided in Code Section 34-8-152 shall not receive the reduction in rates.

(2) For any calendar year on and after January 1, 1999, with respect to which the State-wide Reserve Ratio shall equal or exceed 2.0 percent, as computed pursuant to the provisions of this Code section, contribution rates shall be further reduced for the succeeding calendar year by a percentage which shall be computed in the following manner:

(A) The dollar amount by which the Unemployment Trust Fund exceeds the dollar amount which equates to a State-wide Reserve Ratio of 2.0 percent shall be divided by the total of contributions collected attributable to wages paid during the preceding calendar year, excluding penalty and interest, as of the computation date as that term is defined in Code Section 34-8-28;

(B) The resulting percentage shall be used to reduce all experience rated contribution rates by that same percentage; provided, however, that the resulting reduction shall not reduce contribution rates below the level which will produce a contribution rate of 5.4 percent for maximum deficit reserve accounts. This reduction in contribution rates shall be valid for the succeeding calendar year only; and

(C) Accounts which are not eligible for a computed contribution rate as provided in Code Section 34-8-152 shall not receive the reduction in rates.

(f) The computed rates after application of percentage reductions or increases will be rounded to the nearest one-hundredth of 1 percent. The

Commissioner will give notice to each employer on any rate change by reason of the above provisions. (Code 1981, § 34-8-156, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1994, p. 640, § 2; Ga. L. 1996, p. 670, § 2; Ga. L. 1997, p. 831, § 1; Ga. L. 1998, p. 1501, §§ 3, 4, 5; Ga. L. 1999, p. 449, § 4; Ga. L. 1999, p. 521, § 4; Ga. L. 2002, p. 1119, § 5; Ga. L. 2003, p. 362, § 1; Ga. L. 2004, p. 1074, § 2; Ga. L. 2005, p. 1200, § 5/HB 520; Ga. L. 2006, p. 877, § 1/HB 1326; Ga. L. 2007, p. 394, § 2/HB 443; Ga. L. 2008, p. 324, § 34/SB 455.)

The 2006 amendment, effective July 1, 2006, in the undesignated language at the end of subparagraph (d)(4)(B), in the first proviso, substituted “periods of January 1 through December 31, 2004; January 1 through December 31, 2005; and January 1 through December 31, 2006” for “period of January 1 through December 31, 2006” near the beginning, and substituted “1.00 percent on the computation date with respect to rates applicable to calendar year 2004, 2005, or 2006, then for each such year” for “1.00 percent then” near the middle, and added the second proviso.

The 2007 amendment, effective July 1, 2007, in the undesignated paragraph of subparagraph (d)(4)(B), inserted “January 1 through December 31, 2008, and January 1 through December 31, 2009,” near the middle and inserted “2008, or 2009, then for each such year” near the end.

The 2008 amendment, effective May 12, 2008, part of an Act to revise, modernize,

and correct the Code, substituted “periods” for “period” in the undesignated text at the end of subparagraph (d)(4)(B).

Editor’s notes. — Ga. L. 1999, p. 449, § 1, and Ga. L. 1999, p. 521, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Workforce Reinvestment Act of 1999’.”

Ga. L. 2002, p. 1119, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Employment Security and Enhancement Act of 2002’.”

U.S. Code. — Section 903 of the federal Social Security Act, referred to in subsection (a), is codified as 42 U.S.C. § 1103.

Law reviews. — For survey article on labor and employment law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 303 (2003). For annual survey of labor and employment law, see 57 Mercer L. Rev. 251 (2005).

For note on the 2002 enactment of this chapter, see 19 Ga. St. U.L. Rev. 258 (2002).

34-8-157. Regular benefits paid to be charged against experience rating account.

(a) Regular benefits paid with respect to all benefit years that begin on or before December 31, 1991, shall be charged against the experience rating account of employers in the following manner:

(1) Benefits paid to an individual with respect to the individual’s current benefit year shall be charged against the accounts of the individual’s base period employers. Charges shall be based upon the pro rata share of wages paid to the individual during the base period. To receive relief of charges to its account, an employer shall furnish, in a timely manner, detailed and specific information as to the reason for separation from employment. If a disqualification is imposed on the claim and the employer has properly submitted its information, the account shall be relieved of charges;

(2) When the most recent employer, as that term is defined in Code Section 34-8-43, is not a base period employer, a determination shall be made with respect to potential future charges in the event a second benefit year claim is filed. If an individual files a valid claim for unemployment compensation for a second benefit year and is paid unemployment compensation, then those benefits will be charged or relieved against the experience rating account of such employer as provided in this Code section;

(3) An employer who provided timely response to the department as specified in the regulations of the department may receive relief of charges for benefits paid to an individual under any of the following circumstances:

(A) An employer subject to benefit charges offers otherwise suitable work to the individual and the job is refused solely because the individual has moved his or her place of residence too far to commute to the job location. The employer must provide timely notice to the Commissioner of the job offer as provided by regulations of the Commissioner; or

(B) The individual earned base period wages for part-time employment from an employer who:

(i) Is an interested party because of the individual's loss of other employment;

(ii) Has provided base period employment and continues to provide employment to the same extent as that part-time employment was provided in the base period of the individual; and

(iii) Has furnished timely information pursuant to the regulations of the Commissioner; and

(4) Notwithstanding paragraphs (1) through (3) of this subsection, any employer who has elected to make payments in lieu of contributions is not subject to relief of charges for benefits paid with respect to all benefit years that begin on or before December 31, 1991.

(b) Regular benefits paid with respect to all benefit years that begin on or after January 1, 1992, shall be charged against the experience rating account or reimbursement account of employers in the following manner:

(1) Benefits paid shall be charged to the account of the most recent employer, as that term is defined in Code Section 34-8-43, including benefits paid based upon insured wages which were earned to requalify following a period of disqualification as provided in Code Section 34-8-194;

(2)(A) Benefits charged to the account of an employer shall not exceed the amount of wages paid by such employer during the period

beginning with the base period of the individual's claim and continuing through the individual's benefit year.

(B) In the event the provisions of subparagraph (A) of this paragraph are determined by the United States secretary of labor or by a court of competent jurisdiction at a subsequent level of appeal, such appeal to be taken at the sole discretion of the Commissioner, to be out of conformity with federal law, the provisions of subparagraph (A) of this paragraph shall be considered null and void and the provisions of this subparagraph shall control. Benefits charged to the account of an employer shall not exceed the amount of wages paid by such employer during the period beginning with the base period of the individual's claim and continuing through the individual's benefit year; provided, however, the portion of such charges for benefits paid which exceed the amount of wages paid by such employer shall be charged against the experience rating account of all base period employers in the manner provided in subsection (a) of this Code section.

(C) Benefits shall not be charged to the account of an employer when an individual's overpayment is waived pursuant to Code Section 34-8-254.

(D) Notwithstanding any other provision of this subsection to the contrary, for the purposes of calculating an employer's contribution rate, an account of an employer shall not be charged for benefits paid to an individual for unemployment that is directly caused by a presidentially declared natural disaster;

(3) An employer's account may be charged for benefits paid due to the employer's failure to respond in a timely manner to the notice of claim filing even if the determination is later reversed on appeal; and

(4) Benefits paid to individuals shall be charged against the Unemployment Trust Fund when benefits are paid but not charged against an employer's experience rating account as provided in this Code section.

(c)(1) Payments of extended benefits as provided in Code Section 34-8-197 shall be charged to an employer's experience rating account in the same proportion as regular benefits are charged, except an employer shall be charged for only 50 percent of its portion of the extended benefits paid for all weeks after the first week of extended benefits; provided, however, benefits paid that are attributable to service in the employ of any governmental entity as described in subsection (h) of Code Section 34-8-35 shall be financed in their entirety by such governmental entity which is charged as provided in this Code section.

(2) As provided by 26 U.S.C. Section 3304, only 50 percent of extended benefits paid shall be charged to the individual's employers as described in paragraph (1) of this subsection. However, if the federal

government does not reimburse the 50 percent for the first week of extended benefits paid, employers shall be charged 100 percent of such first week of extended benefits paid. When employers have been determined to be relieved from charges, such payments shall be charged against the Unemployment Trust Fund in the appropriate amount.

(d) The Commissioner shall by regulation provide for the notification of each employer of charges made against its account at intervals not less frequent than semiannually. The charges in such notification shall be binding upon each employer for all purposes unless the employer files a request for review and redetermination in writing. Such request must set forth the charges to which the employer objects and the basis of the objection. The request must be made within 15 days of the prescribed notification. Upon such request being filed, the employer shall be granted an opportunity for a fair hearing. However, no employer shall have standing in any proceeding to contest the chargeability to its account of any benefit paid in accordance with a determination, redetermination, or decision pursuant to Articles 7 and 8 of this chapter, except upon the ground that the services upon which such benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to such determination, redetermination, or decision, or to any other proceedings under this chapter in which the character of such services was determined. The employer shall be promptly notified of the Commissioner's redetermination. The redetermination shall become final unless a petition for judicial review is filed within 15 days after notice of redetermination. Such notice shall be mailed or otherwise delivered to the employer's last known address. The petition for judicial review shall be filed in the Superior Court of Fulton County or in the superior court of the county of residence of the petitioner. In any proceeding under this Code section, the findings of the Commissioner as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the Commissioner. The Commissioner may, after hearing such additional evidence, modify the determination and file such modified determination, together with a transcript of the additional record, with the court. Such proceedings shall be heard in a summary manner and shall be given precedence over all other civil cases except cases arising under Articles 7 and 8 of this chapter and Chapter 9 of this title. An appeal may be taken from the decision of the Superior Court of Fulton County or the superior court of the county of residence of the petitioner to the Court of Appeals of Georgia in the same manner as is provided in civil cases. (Code 1981, § 34-8-157, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 6, § 34; Ga. L. 1994, p. 640, § 3; Ga. L. 1995, p. 373, § 3; Ga. L. 2008, p. 324, § 34/SB 455.)

The 2008 amendment, effective May 12, 2008, part of an Act to revise, modernize, and correct the Code, redesignated subparagraph (b)(2)(A) as paragraph (2)(A).

U.S. Code. — Section 3304 of the federal Internal Revenue Code, referred to in paragraph (c)(2), is codified as 26 U.S.C. § 3304.

JUDICIAL DECISIONS

Contest of claim for compensation not retaliatory discrimination. — Employer's opposition to former employee's claim for unemployment benefits on the basis that the employee was discharged for cause was not

retaliatory in nature, and therefore was not a basis for a claim under 42 U.S.C. § 2000e-3 for retaliatory discrimination. *Baker v. Summit Unlimited, Inc.*, 855 F. Supp. 375 (N.D. Ga. 1994).

34-8-158. Financing benefits paid employees of governmental entities and nonprofit organizations.

(a) *Organizations covered.* Benefits paid to employees of governmental entities and nonprofit organizations shall be financed in accordance with this Code section and Code Sections 34-8-157 and 34-8-159 through 34-8-162. For the purpose of this Code section, a nonprofit organization is an organization or a group of organizations described in Section 501(c)(3) of the United States Internal Revenue Code which is exempt from income tax under Section 501(a) of such code. For the purposes of this Code section, a governmental entity is an organization or group of organizations described in subsection (h) of Code Section 34-8-35.

(b) *Payments in lieu of contributions.* Governmental entities and nonprofit organizations which, pursuant to Code Section 34-8-35, are or become subject to this chapter shall pay contributions under Code Sections 34-8-150 through 34-8-157 unless they elect to make payments in lieu of contributions in accordance with this subsection. All entities which elect to make payments in lieu of contributions shall pay to the Commissioner for the unemployment fund the full amount of regular benefits which are attributable to the service of individuals in their employ during the effective period of election or subjectivity to this chapter.

(c) *Procedure for payments in lieu of contributions.*

(1) For claims filed prior to January 1, 1992, governmental entities described in subsection (a) of this Code section which elect to make payments in lieu of contributions shall pay the Commissioner for the unemployment fund 100 percent of extended benefits paid which are attributable to the service of individuals in their employ during the effective period. Nonprofit organizations which elect to make payments in lieu of contributions shall pay to the Commissioner for the unemployment fund 50 percent of extended benefits paid which are attributable to the service of individuals in their employ during the effective period; provided, however, that for the first week of extended benefits paid, the reimbursement to the unemployment fund shall be 100 percent of the extended benefits paid.

(2) For claims filed on or after January 1, 1992, an employer who has elected to make payments in lieu of contributions shall pay to the Commissioner for the unemployment fund the amount of benefits paid to former employees when such entity is determined to be the "most recent employer" as defined in Code Section 34-8-43. Extended benefits paid, except as otherwise provided in paragraph (2) of subsection (b) of Code Section 34-8-157, shall be financed in their entirety by governmental entities. Nonprofit organizations shall reimburse 100 percent for the first week of extended benefits paid and 50 percent of extended benefits paid after the first week when any of such entities is determined to be the most recent employer.

(d) *Notice of election.*

(1) Those entities described in subsection (b) of this Code section may elect to become liable for payments in lieu of contributions for a period of not less than two full calendar years, provided that a written notice of such election is filed with the Commissioner within 30 days of the date of the determination of liability under this chapter. Such election shall consist of the remainder of the calendar year in which the election is made and for not less than the two full ensuing calendar years.

(2) Those entities described in subsection (b) of this Code section which elect to make payments in lieu of contributions will continue to be liable for such payments unless a written notice terminating such election is filed with the Commissioner not later than 30 days prior to the beginning of the calendar year for which such termination shall first be effective.

(3) Any entity described in subsection (b) of this Code section which has been paying contributions under this chapter for at least two full calendar years may change to a reimbursable basis. The change in status shall be accomplished by the filing of a written notice of election to become liable for payments in lieu of contributions not later than 30 days prior to the beginning of the next calendar year. Such election shall not be terminated by the organization for the next two calendar years.

(e) *Commissioner's discretion to extend period with respect to written notice of election or termination.*

(1) The Commissioner may at his or her discretion extend the period within which a notice of election or a notice of termination must be filed and may permit an election to be retroactive.

(2) The Commissioner, in accordance with such regulations as the Commissioner may prescribe, shall notify each governmental entity or nonprofit organization of any determination relative to its status as an employer and of the effective date of any election which it makes or of any termination of such election. Such determination shall be subject to

reconsideration, appeal, and review. (Code 1981, § 34-8-158, enacted by Ga. L. 1991, p. 139, § 1.)

U.S. Code. — Sections 501(c)(3) and 501(a) of the Internal Revenue Code, referred to in subsection (a), are codified as 26 U.S.C. §§ 501(c)(3) and 501(a), respectively.

Law reviews. — For survey article on recent developments in Georgia administrative law, see 34 Mercer L. Rev. 393 (1982).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Code Section 34-8-123 are included in the annotations for this Code section.

Constitutionality. — The fact that an employee is entitled to benefits based on employment by the hospital bears a substantial relationship to the purpose of these provisions. Compulsory contributions for employment security are, like many other taxes, payable without regard to fault; an employ-

ee's eligibility for benefits and the hospital authority's resulting liability do not offend the due process clause of Georgia's Constitution. *Caldwell v. Hospital Auth.*, 248 Ga. 887, 287 S.E.2d 15 (1982) (decided under former § 34-8-123).

A hospital authority may become a contributing employer by terminating its election to be a reimbursable employer. *Caldwell v. Hospital Auth.*, 248 Ga. 887, 287 S.E.2d 15 (1982) (decided under former § 34-8-123).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 23, 28.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, §§ 289, 323 et seq., 330 et seq.

ALR. — Nonprofit charitable institutions as within operation of labor statutes, 26 ALR2d 1020.

34-8-159. Specific provisions for payments in lieu of contributions.

The payments in lieu of contributions as provided in Code Section 34-8-158 shall be made in accordance with the following provisions:

(1) **DATE PAYMENT DUE.** Upon approval by the Commissioner, at the end of each calendar quarter or at the end of such other period as determined by the Commissioner, each organization or group of organizations shall be billed for payments in lieu of contributions charged to it during such quarter or other prescribed period in accordance with Code Section 34-8-158. Provisions applicable to contributing employers in subsection (a) of Code Section 34-8-157 under which employers may not be charged do not apply to employers who make payments in lieu of contributions;

(2) **PAYMENT TO BE MADE NOT LATER THAN 30 DAYS AFTER BILL MAILED.** The payment of any bill rendered under paragraph (1) of this Code section shall be made not later than 30 days after such bill was mailed to the last known address of the organization or was otherwise delivered to it unless there has been an application for review and redetermination in accordance with paragraph (4) of this Code section;

(3) **PAYMENTS MADE NOT TO BE DEDUCTED FROM REMUNERATION OF INDIVIDUALS.** Payments made by any governmental entity or nonprofit organization under this Code section shall not be deducted or deductible, in whole or in part, from the remuneration of individuals in the employ of the governmental entity or nonprofit organization;

(4) **AMOUNT SPECIFIED IN BILLING CONCLUSIVE.** The amount due specified in any billing notice from the Commissioner pursuant to paragraph (1) of this Code section shall be conclusive unless, not later than 15 days after the billing notice was mailed to its last known address or otherwise delivered to it, the organization files an application for redetermination by the Commissioner, setting forth the grounds for such application or appeal. The Commissioner shall promptly review and reconsider the amount due specified in the billing notice and shall thereafter issue a redetermination in any case in which such application for redetermination has been filed. Any such redetermination shall be conclusive with respect to the organization unless, not later than 15 days after the redetermination was mailed to its last known address or otherwise delivered, the organization files an appeal, setting forth the grounds for the appeal. Proceedings on appeal from the amount of a billing notice rendered under this Code section or a redetermination of such amount shall be in accordance with regulations as prescribed by the Commissioner; and

(5) **PAST DUE PAYMENTS.** Past due payments in lieu of contributions shall be subject to the same interest and penalties that, pursuant to Code Sections 34-8-165 and 34-8-166, apply to past due contributions. Interest or penalties shall not accrue with respect to any portion of the amount billed on which the employer prevails in the redetermination, but shall continue to accrue as to any portion of the amount billed on which the employer does not prevail. (Code 1981, § 34-8-159, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-160. Surety bond required.

(a) *Authority to require surety bond.* For the purposes of this Code section, a surety bond is a bond of surety issued by an organization licensed and authorized to issue such bond in the State of Georgia. In the discretion of the Commissioner, any organization that elects to become liable for payments in lieu of contributions shall be required, within 30 days after the effective date of its election, to execute and file with the Commissioner a cash deposit or surety bond approved by the Commissioner. In the sole discretion of the Commissioner, the department may secure such bonds and defray all or any portion of such cost to the employers covered under the bond. In the event the Commissioner elects to require any organization to execute and file a cash deposit or surety bond, the amount of such deposit or surety bond shall be determined in accordance with the provisions of subsection (b) of this Code section.

(b) *Amount; renewal; deposit.*

(1) **AMOUNT OF SURETY BOND.** The amount of the surety bond or cash deposit required by subsection (a) of this Code section shall be equal to 2.7 percent of the organization's taxable wages paid for employment, as defined in paragraph (1) of subsection (b) of Code Section 34-8-49, for the four calendar quarters immediately preceding the effective date of the election, the renewal date in the case of a surety bond, or a biennial anniversary of the effective date of election in the case of a deposit of money, whichever date shall be most recent and applicable. If the organization did not pay wages in each of such four calendar quarters, the amount of the surety bond or cash deposit shall be as determined by the Commissioner.

(2) **RENEWAL OF BOND; ADJUSTMENTS.** Any surety bond deposited under this subsection shall be in force for a period of not less than two full calendar years and shall be renewed, with the approval of the Commissioner, at such times as the Commissioner may prescribe but not less frequently than at two-year intervals as long as the organization continues to be liable for payments in lieu of contributions. The Commissioner shall require adjustments to be made in a previously filed bond as deemed appropriate. If the bond is to be increased, the adjusted bond shall be filed by the organization within 30 days of the date notice of the required adjustment was mailed or otherwise delivered to it. Failure by any organization covered by such bond to pay the full amount of payments in lieu of contributions when due, together with any applicable interest and penalties, shall render the surety liable on said bond to the extent of the bond as though the surety were such organization.

(3) **DEPOSIT OF MONEY.** Any deposit of money in accordance with this subsection shall be retained by the Commissioner in an escrow account until liability under the election is terminated, at which time it shall be returned to the organization less any deductions as provided in this paragraph. The Commissioner may deduct the amount necessary to satisfy any delinquent payments in lieu of contributions and any applicable interest, penalties, and costs as provided in Code Section 34-8-159 from the cash deposit required of an organization under this subsection. The Commissioner shall require the organization, within 30 days following any deduction from a cash deposit under the provisions of this paragraph, to deposit sufficient additional moneys to bring the organization's funds in escrow to the prior level. The Commissioner may at any time review the adequacy of the deposit made by any organization. If as a result of such review the Commissioner determines that an adjustment is necessary, the Commissioner shall require the organization to make additional deposits within 30 days of written notice of the determination or shall return to it such portion of the deposit that is no longer considered necessary, whichever action is appropriate.

(4) **FAILURE TO MAKE SECURITY DEPOSIT.** If any organization subject to this subsection fails to file a surety bond, make a cash deposit, file a surety bond in an increased amount, or increase the amount of a previously made cash deposit as provided under this Code section, the Commissioner may terminate such organization's election to make payments in lieu of contributions and such termination shall continue for not less than the eight consecutive calendar quarter periods beginning with the quarter in which such termination becomes effective; provided, however, that the Commissioner may in his or her discretion extend the posting of a cash deposit, the filing of a surety bond, or the extension of an adjustment period by not more than 30 days.

(5) **DEPOSIT OF SECURITIES.** The Commissioner may allow the deposit of securities acceptable to him or her in lieu of either the cash deposit or surety bond referenced in this Code section. The value of securities deposited shall be in accordance with regulations prescribed by the Commissioner. (Code 1981, § 34-8-160, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-161. Group accounts.

Two or more employers who have become liable for payments in lieu of contributions in accordance with the provisions of Code Section 34-8-158 may file a joint application to the Commissioner for the establishment of a group account for the purpose of sharing the cost of benefits paid that are attributable to service in the employ of such employers. Each such application shall identify and authorize a group representative to act as the group's agent for the purposes of this Code section. Upon the approval of the application, the Commissioner shall establish a group account for such employers, effective as of the beginning of the calendar quarter in which the Commissioner receives the application, and shall notify the group's representative of the effective date of the account. Such account shall remain in effect for not less than two calendar years and thereafter until terminated at the discretion of the Commissioner or upon application by the group. Upon establishment of the account, each member of the group shall be liable for payments in lieu of contributions with respect to each calendar quarter in the amount that bears the same ratio to the total benefits paid in such quarter that are attributable to service performed in the employ of all members of the group as the total wages paid for service in employment by such member in such quarter bear to the total wages paid during such quarter for service performed in the employ of all members of the group. The Commissioner shall prescribe such regulations as deemed necessary with respect to applications for establishment, maintenance, and termination of group accounts that are authorized by this Code section, for addition of new members to and withdrawal of active members from such accounts, and for the determination of the amounts that are payable under

this Code section by members of the group and the time and manner of such payments. (Code 1981, § 34-8-161, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-162. Establishment, administration, and contents of cash deposit escrow fund; deposit in and withdrawals from fund.

(a) There is established as a trust fund, separate and apart from all other public moneys or other funds of this state, a cash deposit escrow fund, which shall be administered by the Commissioner in accordance with such regulations as he or she may prescribe. This fund shall consist of all moneys deposited by employers with the Commissioner pursuant to paragraph (3) of subsection (b) of Code Section 34-8-160 and all interest thereon.

(b) The Commissioner shall be custodian of the fund and shall administer it in accordance with such regulations as the Commissioner shall prescribe. All moneys payable to the fund shall, upon receipt thereof by the Commissioner, immediately be deposited in the fund. All moneys in this fund shall be deposited in a bank or public depository in which general funds of the state may be deposited, except that moneys in this fund shall not be commingled with other state funds but shall be maintained in a separate account on the books of the depository bank. Such moneys shall be secured by the depository bank to the same extent and in the same manner as required by the general depository laws of this state; and collateral pledged for this purpose or bonds given for this purpose shall be kept separate and distinct from any collateral pledged to secure the other funds of the state. The Commissioner shall be liable on his or her official bond for the faithful performance of duties in connection with the cash deposit escrow fund. All sums recovered on any surety bond for losses sustained by the cash deposit escrow fund shall be deposited in said fund.

(c)(1) Moneys shall be withdrawn from the cash deposit escrow fund solely for the purpose of satisfying any delinquent payments in lieu of contributions owed by an organization or groups of organizations pursuant to Code Section 34-8-158. Withdrawals from the cash deposit escrow fund shall be made in accordance with regulations prescribed by the Commissioner and shall not exceed the total amount deposited in the cash deposit escrow fund by each such organization or group of organizations.

(2) Any interest which may accrue as the result of deposits to the cash deposit escrow fund shall, in the discretion of the Commissioner, be withdrawn to the extent necessary to cover deficiencies in the reimbursement account which have not been provided for by the escrow funds. Such withdrawal shall not exceed interest accrued in the cash deposit escrow fund. Interest not used for such purpose shall be retained in the cash deposit escrow fund. (Code 1981, § 34-8-162, enacted by Ga. L. 1991, p. 139, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, § 2.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 353.

34-8-163. Terminating liability to fund.

(a) Except as provided in subsection (c) of this Code section, an employing unit liable under this chapter must apply in writing to the Commissioner prior to April 30 in order to terminate liability. If the Commissioner finds that such employer did not, during the preceding calendar year, have sufficient employment or sufficient payroll to be considered an employer under this chapter, or was not otherwise subject to this chapter, then such coverage shall be terminated as of January 1 of such completed calendar year. Wage credits of any individual may not be decreased as a result of the employer being terminated. For the purpose of this Code section, two or more employing units who are predecessors or successors in a business or organization shall be treated as a single employing unit.

(b) The Commissioner may terminate the liability of an employer without written application of the employer when such employer did not have sufficient employment or sufficient payroll during a calendar year to be considered an employer under this chapter.

(c) All types of elective coverage as provided in paragraph (7) of Code Section 34-8-33 may be terminated in the discretion of the Commissioner at any time subsequent to the first two-year period. (Code 1981, § 34-8-163, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-164. Applications for adjustment or refund.

Applications for adjustment or refund of contributions, payments in lieu of contributions, or interest thereon, shall be submitted no later than three years from the date such amounts were assessed. Applications must be in writing. The Commissioner shall determine what amounts, if any, were erroneously collected. Adjustments shall be made against subsequent payments. Refunds will be issued, without interest thereon, when adjustments cannot be made. At the option of the Commissioner, the Commissioner may initiate any adjustments or refunds deemed appropriate where no written request for refund or adjustment has been received, provided such amounts were assessed within the last three years. Amounts shall be refunded from the fund into which they were deposited. (Code 1981, § 34-8-164, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-165. Tax and wage reports; penalty for failure to file; fraudulent reports.

(a)(1) In accordance with such regulations as the Commissioner may prescribe, tax and wage reports shall become due and be filed by each employer on or before the last day of the month next following the end of the calendar quarter to which such reports apply.

(2) With respect to employers as defined in paragraph (2) of subsection (a) of Code Section 34-8-33, the Commissioner shall provide by regulation for such tax and wage reports to be filed on an annual rather than on a quarterly basis in accordance with federal law. No penalty shall be due for such reports which are filed in the manner and within the time period prescribed by the Commissioner.

(3) Such reports shall list the name, social security number, the amount of wages paid each employee by such employer, and any other information the Commissioner may require.

(b) Any employer who fails to file a tax and wage report on or before the due date as provided in subsection (a) of this Code section shall be penalized in the sum of \$20.00 or .05 percent of total wages, whichever is greater, for each month or fraction of a month such report remains delinquent. Such penalty assessments shall be due and payable in the same manner as delinquent contributions. Penalty collection shall be enforced under procedures established by this chapter.

(c) In the discretion of the Commissioner, the imposition of a penalty may be waived. Inadvertent, unavoidable, or unintentional errors or omissions in a tax and wage report which is filed in due time shall not subject the employer to the imposition of the penalty provided in subsection (b) of this Code section.

(d) Fraudulent reports, including intentional errors or omissions, shall also be subject to the criminal provisions provided in Code Section 34-8-256. (Code 1981, § 34-8-165, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1995, p. 781, § 2; Ga. L. 1997, p. 143, § 34; Ga. L. 2002, p. 1084, § 2.)

34-8-166. Interest on delinquent contribution payments; waiver; reports.

(a) Contributions unpaid on the due date established by the Commissioner shall bear interest at the rate of 1.5 percent per month or any fraction of a month. Interest shall continue to accrue until all amounts due, including interest, are received by the Commissioner.

(b) The Commissioner may waive the collection of any accrued interest when it is reasonably determined that the delay in payment of contributions was due to the action or inaction of the department.

(c) The Commissioner shall file an annual report with the Attorney General, the members of the Senate Insurance and Labor Committee, and the members of the House Industrial Relations Committee stating the number of cases and the total amount of interest which is waived pursuant to this Code section. The Commissioner shall retain on file for five years a detailed statement listing the names of the employers whose interest was waived, the amount of interest waived, the number of cases, and the specified reasons for each waiver under this Code section. This statement shall be available for review by members of the General Assembly, the Attorney General, the state accounting officer, and the state auditor. (Code 1981, § 34-8-166, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 2005, p. 694, § 33/HB 293.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806, are included in the annotations for this Code section.

Cited in *Brumby v. Brooks*, 140 Ga. App. 210, 230 S.E.2d 359 (1976).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes — In light of the similarity of the provisions, opinions decided under former Code Section 34-8-125, which was repealed by Ga. L. 1991, p. 139, § 1 are included in the annotations for this Code section.

County boards of education. — County boards of education cannot resist the payment of penalties and interest assessed under former § 34-8-83 and former § 34-8-125 (see O.C.G.A. § 34-8-166). 1986 Op. Att'y Gen. No. 86-18 (decided under former § 34-8-125).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, § 9.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 284 et seq.

ALR. — Constitutionality, construction, and application of provisions of Social Security or Unemployment Compensation Acts which vary rate of employers' contributions according to period in which business has been conducted, 163 ALR 1148.

34-8-167. Collection of delinquent contribution payments generally.

(a) If, after due notice, any employer defaults in any payment of contributions or interest thereon, the amount due, including any penalty, may be collected by civil action maintained in the name of the Commissioner. The employer adjudged in default shall pay the cost of such actions. Civil actions brought under this Code section to collect contributions, interest, or penalties from an employer shall be heard by the superior court at the earliest possible date and shall be entitled to preference upon the calendar of the court over all other civil actions except petitions for judicial review under this chapter and workers' compensation cases arising under

Chapter 9 of this title and other actions to which the state is a material party and which are now given precedence.

(b) In addition to any other method provided by law for the collection of contributions, any contribution not paid when due, including any interest, penalty, and costs thereon, may be collected by the Commissioner by and with the same authority as is contained in Code Sections 48-2-55 and 48-3-1 providing for the collection of taxes by the state revenue commissioner. If any contribution or tax imposed by this chapter is not paid within ten days after notice and demand from the Commissioner, the Commissioner shall issue an execution or writ of fieri facias directed to any levying officer designated by the Commissioner, the sheriff, or the lawful deputies of the sheriff of any county of the state requiring such officer to levy upon and sell the real or personal property of any delinquent employer or liable individual found within such officer's county in sufficient amount to satisfy the execution so issued, together with penalties, interest, and all costs of executing and collecting the said execution, and to return such execution to the Commissioner, together with all such sums collected under and by virtue thereof, by a time to be therein specified, not more than 60 days from the date of the execution.

(c) Nothing contained in this Code section shall prevent the Commissioner from having the execution or writ of fieri facias entered upon the general execution docket prior to the time the execution is turned over to a levying officer designated by the Commissioner for collection. The Commissioner may file the execution with the clerk of the superior court of the employer's residence, place of business, or the county in which the employer may own property. It shall then be the duty of the clerk of the superior court of the county in which the execution is filed to enter the execution upon the lien records of the superior court of said county, with the execution being recorded in the same manner and form as prescribed by the general laws of the State of Georgia relating to executions issued by a superior court of this state and processed and transmitted electronically for inclusion in the state-wide uniform automated information system for real and personal property records, as provided in Code Section 15-6-97.

(d) The amount of any contributions not paid when due, including any interest, penalties, and costs, shall constitute a lien upon all property and rights to property and upon all after-acquired property and rights to property, both real and personal, of the employer liable for such contributions. The lien shall attach and be perfected as of the date such contributions become due and shall have parity with other tax liens and be prior, superior, and paramount to all other liens or encumbrances attaching to any of such property; provided, however, the lien shall not be preserved against purchasers, judgment creditors, pledgees, subsequent tax liens, or other liens or encumbrances until an execution for such contributions has been entered on the general execution docket. When the execution has

been issued and docketed as required in subsection (c) of this Code section, the lien shall be a perfected lien upon all property and rights to property of the employer, both real and personal, in each county of this state.

(e) All contributions, including interest, penalties, and costs thereon, imposed by this chapter are made a personal debt of the officer, major stockholder, or other person having charge of the affairs of a corporate or association employing unit who is required to file returns or pay the contributions required by this chapter. The Commissioner may assess such officer, stockholder, or other person for the amount of such contributions, penalties, and interest. The provisions of Code Section 34-8-164 and Code Section 34-8-170 shall apply to assessments made pursuant to this subsection. With respect to such officer, stockholder, or other person, the Commissioner shall have all the collection remedies set forth in this chapter.

(f) Any reference within this chapter to the collection of delinquent contributions shall also include payments in lieu of contributions as provided in Code Section 34-8-158. (Code 1981, § 34-8-167, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 2002, p. 799, § 4.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2002, “Code section” was substituted for “Code Section” in the last sentence of subsection (d).

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 are included in the annotations for this Code section.

Tax liability. — It is clear that the “person” referred to in former § 34-8-128 (see, O.C.G.A. subsections (b) through (f) of § 34-8-168) is not the employer because Ga. L. 1937, p. 806 (see O.C.G.A. § 34-8-1 et seq.) contained other provisions which, in effect, made the employer personally liable for the tax by prohibiting the employer from deducting the taxes, in whole or in part, from the wages of the employees, and by providing for collection of the unpaid taxes from the employer. Thus, if the term “person” in former § 34-8-128 was construed to

mean the “employer,” the statute would be redundant. *Brumby v. Brooks*, 234 Ga. 376, 216 S.E.2d 288 (1975), later appeal, 140 Ga. App. 210, 230 S.E.2d 359 (1976) (decided under Ga. L. 1937, p. 806).

Subsequent tax liens. — The Internal Revenue Service held a “subsequent tax lien,” as described in O.C.G.A. § 34-8-167(d), and could take advantage of the requirement that the state lien for unemployment insurance taxes be recorded in order to have priority. *Ellenberg v. J.M. Tull Metals (In re McIntyre Grading & Pipe, Inc.)*, 193 Bankr. 983 (Bankr. N.D. Ga. 1996).

Cited in *Darby v. Cook*, 201 Ga. 309, 39 S.E.2d 665 (1946).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 9, 17.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, §§ 292, 370 et seq.

ALR. — Rank or priority of lien or claim for unpaid employer’s contribution under

Social Security or Unemployment Compensation Act, 140 ALR 1042.

Receiver as within Social Security and Unemployment Compensation Acts, 143 ALR 984.

Constitutionality, construction, and appli-

cation of provisions of Social Security or Unemployment Compensation Acts which vary rate of employers' contributions accord-

ing to period in which business has been conducted, 163 ALR 1148.

34-8-168. Authorized collection procedures; application of moneys obtained; procedure to contest execution; Attorney General to represent Commissioner; Commissioner's rights, authority, and prerogatives.

(a) The Commissioner or an authorized representative of the Commissioner may use garnishment to collect the tax imposed by this chapter. Garnishment may be issued by the Commissioner in the same manner as is provided for the issuance of garnishment by the state revenue commissioner in Code Section 48-2-55 and by tax collectors in Code Sections 48-3-12 through 48-3-18 and 48-3-23, provided it is unnecessary for the Commissioner or an authorized representative of the Commissioner to make an entry of nulla bona prior to filing a garnishment action.

(b) After due notice and demand for payment, the Commissioner or an authorized representative of the Commissioner may levy upon all property and rights to property, except such as are exempt by law, belonging to such employer or liable individual. As used in this chapter, the term "property and rights to property" includes, but is not limited to, any account in or with a financial institution. Such levy shall be for the payment of the sum due, with penalty and interest for nonpayment, and such additional sums as shall be sufficient for the fees, costs, and expenses of such levy. The Commissioner or an authorized representative of the Commissioner may levy and conduct judicial sales in the manner now provided for sales by sheriffs and constables.

(c)(1) In the case of personal property, the levy shall be advertised ten days before the date of sale. Advertisements of sales shall designate the time and place of sale and give a reasonable description of the property to be sold. Advertisements of sales shall be posted and sales shall be conducted as provided in Code Section 48-2-55.

(2) In the case of real property, the Commissioner or an authorized representative of the Commissioner, after making the levy, shall make a return of such levy on the execution to the sheriff of the county in which the property is located and the sheriff shall proceed to advertise and sell the same as required by law.

(d) The department shall apply all moneys obtained under this Code section first against the expenses of the proceedings and then against the liability in respect to which the levy was made and any other liability owed to the department by the delinquent employer.

(e)(1) Any person in possession of or obligated with respect to property or rights to property subject to levy upon which a levy has been made

shall, upon demand of the Commissioner or a duly authorized representative of the Commissioner, surrender such property or rights or discharge such obligation to the Commissioner or a duly authorized representative of the Commissioner, except such part of the property or rights as is subject, at the time of such demand, to an attachment or execution under any judicial process.

(2) Any person who willfully fails or refuses to surrender any property subject to levy shall be personally liable to the Commissioner for a sum equal to the value of the property or rights not so surrendered but not exceeding the amount of contributions, interest, and penalties for the collection of which such levy has been made, together with costs and interest at the rate of 18 percent per annum from the date of such levy. Any amount other than costs recovered under this subsection shall be credited against the subject employer's liability for the collection of which such levy was made.

(3) Any person in possession of or obligated with respect to property or rights to property subject to levy upon which a levy has been made who, upon demand by the Commissioner or the duly authorized representative of the Commissioner, surrenders such property or rights to property or discharges such obligation to the Commissioner or the Commissioner's duly authorized representative shall be discharged from any obligation or liability to the delinquent employer with respect to such property or rights to property arising from such surrender or payment.

(f)(1) In the event that any employer desires to contest the execution, such employer may do so by filing an affidavit of illegality with the levying officer at the time of the levy suspending such execution, as now prescribed by the general laws relating to the filing of affidavits of illegality. When such affidavit is so filed and the tax is paid or bond for the sum sought by the Commissioner is given, it shall be the duty of the levying officer to return the execution, together with the affidavit of illegality and bond and, in case of personal property, bond for the forthcoming of the property, to the clerk of the superior court of the county of the employer or defendant in execution. The superior court of the county shall, at the first or next term, cause the issue so made to be tried by a jury in the superior court of the county of the residence of the employer under the same rules of law and evidence as prevail in this state.

(2) If the department has levied upon property, any person other than the debtor who is liable to pay the debt out of which the levy arose who claims an interest in or lien on that property and claims that property was wrongfully levied upon may bring a civil action against the state in the Superior Court of Fulton County. The action may be brought whether or not that property has been surrendered to the department. The court may grant only the relief provided under paragraph (3) of this subsection. No other action to question the validity of or to restrain or enjoin a levy by the department may be maintained.

(3) In an action under paragraph (2) of this subsection, if a levy would irreparably injure rights to property, the court may enjoin the enforcement of that levy. If the court determines that the property has been wrongfully levied upon, it may grant a judgment for the amount of money obtained by levy.

(4) For purposes of an adjudication under this subsection, the determination of the debt upon which the interest or lien of the department is based is conclusively presumed to be valid. The department shall determine its costs and expenses to be paid in all cases of levy.

(5) The department may refund or credit any amount left after the applications under paragraph (2) of this subsection to the person entitled to that amount, upon submission of a claim therefor and satisfactory proof of the claim.

(g)(1) The department may release the levy upon all or a portion of any property levied upon to facilitate the collection of the liability or to grant relief from a wrongful levy; provided, however, such release shall not prevent any later levy.

(2) If the department determines that property has been the subject of a wrongful levy, the department may return the property at any time or may return an amount of money equal to the amount of moneys levied upon.

(3) The availability of the remedy under this Code section shall not abridge the right of the department to pursue other remedies.

(h) The Attorney General shall represent the Commissioner when any such cases or contests initiated by affidavits of illegality are filed in any county or any legal action in courts results from the issuance of any execution.

(i) The Commissioner, with respect to the administration of this chapter and the collection of contributions pursuant to this chapter and in addition to the authority granted the Commissioner by the provisions of this chapter, shall have the same rights, authority, and prerogatives provided the state revenue commissioner for securing reports and for the collection of taxes as contained in Title 48. (Code 1981, § 34-8-168, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-169. Commissioner's authority to contract with outside entities to provide debt collection services.

(a) For the purpose of collecting delinquent contributions, interest, and penalties, the Commissioner may enter into an agreement with one or more private persons, companies, associations, or corporations providing debt collection services with respect to the collection of delinquent contribu-

tions, administrative assessments, interest, and penalties. The agreement may provide, at the discretion of the Commissioner, the rate of payment and the manner in which compensation for services shall be paid. The compensation, fees, and expenses may be added to the amount of the delinquent contributions, interest, and penalties and may be collected by the contractor from the debtor. The Commissioner shall provide the necessary information for the contractor to fulfill its obligation under the agreement.

(b) At the discretion of the Commissioner, the contractor may, as part of the collection process, refer the debt to legal representatives for litigation in the name of the Commissioner.

(c) No action taken by the Commissioner pursuant to this Code section shall be construed to be an election to forgo other collection procedures in this article. (Code 1981, § 34-8-169, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 2004, p. 631, § 34.)

34-8-170. Commissioner authorized to estimate contributions due; notice of assessment; jeopardy assessment.

(a) If any employer fails or neglects to make a report as required by Code Section 34-8-165 or by rules and regulations, the Commissioner may make an estimate based upon any information in the Commissioner's possession of the amount of wages paid for employment in the period or periods for which no report was filed and upon the basis of such estimate shall compute and assess the amounts of contributions payable by the employer.

(b) If the Commissioner is not satisfied with any report made and filed by any employing unit of the amount of contributions, the Commissioner may compute the amount required to be paid upon the basis of facts contained in the report or reports or may make an estimate upon the basis of any information in his or her possession or that may come into his or her possession and make an assessment of the deficiency.

(c) The assessment shall include penalty as required by Code Section 34-8-165 and interest as required by Code Section 34-8-166 together with all costs incurred in recording and canceling liens.

(d) One or more assessments may be made for the amount due for one or more than one period and overpayments may be offset against underpayments.

(e) The Commissioner shall give to the employing unit against whom an assessment is made a written notice of the assessment. Such notice shall be directed to the last known address of the employing unit as provided to the Commissioner by the employing unit.

(f)(1) Except in the case of failure without good cause to file a return, fraud, or intent to evade any provision of this chapter or authorized

regulations, every notice of assessment shall be made within three years after the last day of the month following the close of the calendar quarter during which the contribution liability included in the assessment accrued or within three years after the deficient return is filed, whichever period expires later. An employing unit may waive this limitation period or may consent to its extension.

(2) In case of failure without good cause to file a return, every notice of assessment shall be made within seven years after the last day of the month following the close of the calendar quarter during which the contribution liability included in the assessment accrued. An employer may waive this limitation period or may consent to its extension.

(g)(1) If the Commissioner finds that the collection of any contributions will be jeopardized by delay, the Commissioner shall thereupon make an assessment of those contributions, noting upon the assessment that it is a jeopardy assessment levied under this Code section and the facts upon which the Commissioner finds that collection of contributions will be jeopardized by delay. The amount of the assessment shall be immediately delinquent, whether or not the time otherwise allowed by law or authorized regulations has expired. When applicable, the penalties and interest provided in Code Sections 34-8-165 and 34-8-166 shall attach to the amount of the contributions specified in the jeopardy assessment.

(2) In levying the assessment, the Commissioner may demand a deposit of such security as the Commissioner deems necessary to ensure compliance with the department, including additional security from time to time, but not more frequently than monthly, in the amount of accumulating interest. The deposit of sufficient security to ensure compliance shall stay other collection action by the Commissioner while the assessment is under review. The deposit of the sufficient security shall not be a condition for the exercise of the review and appeal rights of the employer pursuant to this chapter. The filing of a petition for reassessment shall not stay collection action by the Commissioner while the assessment is under review but shall stay the sale of all property other than perishable goods seized by the Commissioner pursuant to the collection action until a final decision from a hearing is issued by the Office of State Administrative Hearings.

(h) A jeopardy assessment may be made only upon a finding by the Commissioner, based upon probable cause, that any of the following conditions are met:

(1) The employer is insolvent;

(2) The employer has transferred, or is about to transfer, assets for less than fair market value, and by so doing has rendered, or is likely to render, itself insolvent;

(3) The employing unit has been dissolved;

(4) Any person liable for the employer's contribution or any owner, officer, director, partner, or other person having charge of the affairs of the employer has departed or is about to depart the State of Georgia and that the departure is likely to deprive the Commissioner of a source of payment of the employer's contributions; or

(5) Any person referenced in paragraph (4) of this subsection or the employer is secreting assets or is moving, placing, or depositing assets outside of the state for the purpose of interfering with the orderly collection of any contribution. The moving, placing, or depositing of assets outside of the state which constitutes a regular business practice and which does not in any way deplete the assets of the employing unit shall not be deemed to be interfering with the orderly collection of any contribution under this chapter.

(i) Any assessment so made by the Commissioner shall be prima facie good and sufficient for all legal purposes. Notice and demand for such contributions plus interest, penalty, and costs shall be made upon such forms as the Commissioner may prescribe, and the notice and demand shall become final 15 days after the date of delivery of said notice and demand to the employer in person or by mail. Notwithstanding any of the foregoing, an employer may make application for adjustment or refund as provided in Code Section 34-8-164 if the report required by Code Sections 34-8-121 and 34-8-165 has been filed with the Commissioner. In the discretion of the Commissioner, an adjustment or refund may be made after a lien has issued and been recorded, but only if the Commissioner is satisfied the report is complete and accurate. The Commissioner shall require such documentation and may inspect any books or records of the employer as the Commissioner deems necessary to make this determination. An adjustment to the amount due may be made if the lien has not yet been satisfied. If the lien has been satisfied, a refund may be issued by the Commissioner. (Code 1981, § 34-8-170, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1997, p. 888, § 1.5.)

34-8-171. Injunction against employing individuals if reports or payments due.

An employer may be enjoined from employing individuals if such employer's reports remain unfiled or contributions remain unpaid 90 days after the end of the calendar quarter to which they apply. The Commissioner or a designee of the Commissioner may file a complaint for an injunction in the superior court of any county in which the employer may be doing business. Said employer shall be enjoined from employing individuals until all reports have been filed and all delinquent amounts have been paid to the Commissioner. (Code 1981, § 34-8-171, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-172. Surety bond required of employee leasing company.

The Commissioner shall require any employee leasing company, as defined in Code Section 34-8-32, to post a surety bond or such equivalent financial securities as approved by the Commissioner in such an amount as needed to cover the total of any potential tax liability which may reasonably be expected to be incurred by such employer. In the event an employee leasing company is unable to procure such bond or security, the employee leasing company may report such employees as being in the employment of its client employers, notwithstanding any provision of Code Section 34-8-32 to the contrary. (Code 1981, § 34-8-172, enacted by Ga. L. 1991, p. 139, § 1.)

Administrative rules and regulations. — State of Georgia, Georgia Department of Employee leasing companies, Official Com- Labor, Employment Security Law, pilation of the Rules and Regulations of the § 300-2-7.07.

34-8-173. Release or subordination of property subject to lien; authority to settle and compromise payment of contributions; annual reports.

(a) The Commissioner may release or subordinate all or any portion of the property subject to any lien obtained under provisions of this chapter if the Commissioner determines that the contributions, interest, and penalties are sufficiently secured by a lien on other property or through other security or that the release, partial release, or subordination of such lien will not endanger or jeopardize the collection of amounts due.

(b)(1) The Commissioner is authorized to settle and compromise any payment of contributions and interest thereon, including penalty, or any tax execution, where there is doubt as to the liability of the employer or where there is doubt as to the collectability and the settlement or compromise is in the best interest of the state. The Commissioner may make all reasonable rules and regulations necessary to effectuate the purpose of this Code section.

(2) The Commissioner shall file an annual report with the Attorney General, the members of the Senate Insurance and Labor Committee, and the members of the House Industrial Relations Committee, which report shall state the number of cases and the total amount of debt which is compromised under this Code section. The Commissioner shall retain on file for five years a detailed statement listing the names of the employers whose debt was compromised, the amount of debt compromised, the number of cases, and the specified reasons for each debt compromise under this Code section. This statement shall be available for review by members of the General Assembly, the Attorney General, the state accounting officer, and the state auditor. (Code 1981, § 34-8-173, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 2005, p. 694, § 34/HB 293.)

Code Commission notes. — Pursuant to substituted for “Senate Industry” in paragraph (b)(2).
 § 28-9-5, in 1991, “Senate Insurance” was

34-8-174. Payment of contributions in event of legal dissolution or distribution.

In the event of any distribution of an employer’s assets pursuant to an order of any court under the laws of this state, in proceedings relating to the administration of the estate of a decedent, receivership, assignment for benefit of creditors, adjudicated insolvency, composition, dissolution, reorganization, or similar proceedings, contributions then or thereafter due, together with interest, penalties, and cost thereon, shall be paid in full in accordance with laws of this state governing the order of payment of tax liens and tax priorities. In the event of any employer’s adjudication in bankruptcy or judicially confirmed extension proposal, contributions then or thereafter due, together with interest, penalties, and costs thereon, shall be required to be paid in accordance with the laws governing the lien and priority of taxes due this state. (Code 1981, § 34-8-174, enacted by Ga. L. 1991, p. 139, § 1.)

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 are included in the annotations for this Code section.
Cited in In re Empire Granite Co., 42 F. Supp. 450 (M.D. Ga. 1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 16 et seq., 43.
C.J.S. — 81 C.J.S., Social Security and Public Welfare, § 370 et seq.
ALR. — Rank or priority of lien or claim for unpaid employer’s contribution under Social Security or Unemployment Compensation Act, 140 ALR 1042.
 Social security and unemployment taxes as payable in respect of claims for wages earned before bankruptcy of employer, 174 ALR 1295.

34-8-175. Payment of contributions when employing unit sells or transfers business or stock of goods.

Any employing unit which sells or transfers its business or stock of goods shall file all required tax and wage reports and pay all contributions, administrative assessments, interest, and penalties within 30 days after such sale or transfer. Such reports and payments shall include all wages for employment up to the date of the sale or transfer. The purchaser, transferee, successor, or assignee shall withhold a sufficient amount from the purchase money to cover the amount of all contributions, administrative assessments, interest, and penalties due and unpaid by the seller or transferor. If the seller or transferor fails to make required payments within the 30 days specified, then the purchaser, transferee, successor, or assignee

shall pay the money so withheld. If the purchaser, transferee, successor, or assignee fails to do so, it shall become liable for such contributions, administrative assessments, interest, and penalties. After 30 days the purchaser, transferee, or successor will also become jointly and severally responsible with the predecessor for filing of any delinquent reports. If the payment of moneys is not involved in the sale or transfer, such purchaser shall withhold the performance of the condition that constitutes the consideration for the transfer until the Commissioner certifies that all reports have been filed and all contributions, administrative assessments, interest, and penalties have been paid. (Code 1981, § 34-8-175, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 776, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, § 16.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, §§ 350, 351.

34-8-176. Applicability of collection, penalty, and sanction provisions to public employers.

All collection, penalty, and sanction provisions in this chapter that are applicable to private employers are made equally applicable to all public employers who are liable for the payment of contributions or payments in lieu of contributions pursuant to this chapter. (Code 1981, § 34-8-176, enacted by Ga. L. 1991, p. 139, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 9, 17, 28, 40.

Public Welfare, §§ 284, 285, 287, 292, 330, 331, 370 et seq.

C.J.S. — 81 C.J.S., Social Security and

34-8-177. Procedure for collecting delinquent contribution payments from public employers.

Should any department or political subdivision of the state, any instrumentality of a political subdivision of the state, or any instrumentality of one or more of the foregoing become more than 120 days delinquent in contributions or payments in lieu of contributions due to the Unemployment Compensation Fund, the Department of Labor shall certify to the Office of Treasury and Fiscal Services the amount due. The Office of Treasury and Fiscal Services shall transfer the amount due to the Department of Labor from funds it has available for distribution to the respective department or political subdivision of the state, instrumentality of a political subdivision of the state, or instrumentality of one or more of the foregoing. The certification shall be signed by the Commissioner and shall be conclusive proof of the delinquency. The Commissioner shall mail a copy of the certification to the delinquent public employer on the date of

transmittal to the Department of Administrative Services. Should the public employer wish to appeal the Commissioner's decision, it shall so notify the Commissioner within 15 days from the date the certification is mailed to the public employer. The Commissioner shall, upon receipt of the notice, request the Attorney General to appoint an independent attorney as an administrative hearing officer to hear all issues involved and render a decision. Should the public employer or the Commissioner contest the administrative hearing officer's decision, an appeal may be filed, within 30 days after the decision of the administrative hearing officer has been mailed, in the superior court of the county in which the decision was rendered. The Attorney General shall represent the Commissioner in any such matters appealed. (Code 1981, § 34-8-177, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1993, p. 1402, § 18.)

Cross references. — Procedure in contested cases generally, § 50-13-13.

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes — In light of the similarity of the provisions, opinions decided under former Code Section 34-8-74, which was repealed by Ga. L. 1991, p. 139, § 1, are included in the annotations for this Code section.

Legal representation by Attorney General. — The Attorney General is to represent the Department of Labor. See 1984 Op. Att'y Gen. No. 84-48 (decided under former § 34-8-74).

34-8-178. Voluntary contributions by employers.

Any employer may make voluntary payments in addition to the contributions required under this chapter, and the same shall be credited to the employer's experience account; provided, however, that such voluntary contributions shall not be used in the computation of reduced rates unless such contributions are paid within 30 days following the date upon which the Commissioner mails notice that such payments may be made with respect to a calendar year, and in no event shall such payments be made later than the expiration of 120 days after the beginning of the year for which such rates are effective. Such voluntary payments when accepted from an employer will not be refunded in whole or in part. (Code 1981, § 34-8-178, enacted by Ga. L. 1995, p. 373, § 4; Ga. L. 1996, p. 693, § 3.)

ARTICLE 6

ADMINISTRATIVE ASSESSMENTS

Editor's notes. — Code Section 34-8-185 provides that: "This article shall stand repealed in its entirety on December 31, 2011."

Ga. L. 1999, p. 449, § 1, and Ga. L. 1999,

p. 521, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Workforce Reinvestment Act of 1999'."

34-8-180. (Repealed effective December 31, 2011) Creation of administrative assessment upon all wages; assessments due quarterly.

(a) For the periods on or after April 1, 1987, but on or before January 1, 2000, there is created an administrative assessment of .06 percent to be assessed upon all wages, as defined in Code Section 34-8-49, except wages of the following employers:

(1) Those employers who have elected to make payments in lieu of contributions as provided by Code Section 34-8-158 or who are liable for the payment of contributions as provided in said Code section; or

(2) Those employers who, by application of the State-wide Reserve Ratio as provided in Code Section 34-8-156, have been assigned the minimum positive reserve rate or the maximum deficit reserve rate.

(b) For the periods on or after January 1, 2000, but on or before December 31, 2011, there is created an administrative assessment of 0.08 percent to be assessed upon all wages as defined in Code Section 34-8-49, except the wages of:

(1) Those employers who have elected to make payments in lieu of contributions as provided by Code Section 34-8-158 or who are liable for the payment of contributions as provided in said Code section; or

(2) Those employers who, by application of the State-wide Reserve Ratio as provided in Code Section 34-8-156, have been assigned the minimum positive reserve rate or the maximum deficit reserve rate.

(c) Assessments pursuant to this Code section shall become due and shall be paid by each employer and must be reported on the employer's quarterly tax and wage report according to such rules and regulations as the Commissioner may prescribe. The assessments provided in this Code section shall not be deducted, in whole or in part, from the remuneration of individuals in the employ of the employer. Any deduction in violation of this subsection is unlawful. (Code 1981, § 34-8-180, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1999, p. 449, § 5; Ga. L. 1999, p. 521, § 5; Ga. L. 2005, p. 1200, § 6/HB 520.)

Editor's notes. — See the Editor's note following the article heading as to the repeal of this Code section.

34-8-181. (Repealed effective December 31, 2011) Additional assessment for new or newly covered employer.

(a) For the periods on or after April 1, 1987, but on or before December 31, 1999, in addition to the rate paid under Code Section 34-8-151, each new or newly covered employer shall pay an administrative assessment of .06 percent of wages payable by it with respect to employment during each

calendar year until it is eligible for a rate calculation based on experience as defined in this chapter, except as provided in Code Section 34-8-158.

(b) For the periods on or after January 1, 2000, but on or before December 31, 2011, in addition to the rate paid under Code Section 34-8-151, each new or newly covered employer shall pay an administrative assessment of 0.08 percent of wages payable by it with respect to employment during each calendar year until it is eligible for a rate calculation based on experience as defined in this chapter, except as provided in Code Section 34-8-158. (Code 1981, § 34-8-181, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1999, p. 449, § 6; Ga. L. 1999, p. 521, § 6; Ga. L. 2005, p. 1200, § 7/HB 520.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1999, “periods” was substituted for “period” in subsections (a) and (b).

Editor’s notes. — Ga. L. 1999, p. 449, § 1, and Ga. L. 1999, p. 521, § 1, not codified by

the General Assembly, provide that: “This Act shall be known and may be cited as the ‘Workforce Reinvestment Act of 1999.’”

See the Editor’s note following the article heading as to the repeal of this Code section.

34-8-182. (Repealed effective December 31, 2011) Authority to collect administrative assessment and deposit funds in clearing account; appropriation of funds.

(a) The Commissioner is authorized to collect the administrative assessment as provided in Code Section 34-8-180 and to deposit the funds in the clearing account of the Unemployment Compensation Fund created by Code Section 34-8-83; provided, however, that such funds shall not be considered as part of the Unemployment Compensation Fund and shall not be deposited with the secretary of the treasury of the United States. The Commissioner is further authorized to transfer the funds from that account to the state treasury.

(b) The General Assembly is authorized to appropriate to the department all funds collected and deposited in the state treasury under this article. These funds shall be payable upon requisition of the Commissioner. (Code 1981, § 34-8-182, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 6, § 34.)

Editor’s notes. — See the Editor’s note following the article heading as to the repeal of this Code section.

34-8-183. (Repealed effective December 31, 2011) Authority to promulgate rules and regulations.

The Commissioner may promulgate such rules and regulations as are necessary to implement and effectuate the provisions of this article. (Code 1981, § 34-8-183, enacted by Ga. L. 1991, p. 139, § 1.)

Editor's notes. — See the Editor's note following the article heading as to the repeal of this Code section.

34-8-184. (Repealed effective December 31, 2011) Article administered in accordance with corresponding provisions of chapter; Commissioner's authority.

(a) Except as otherwise provided in this article and in the rules and regulations promulgated pursuant to this article, the provisions of this article shall be administered in accordance with corresponding provisions for the administration of this chapter. Such provisions shall be subject to the same calculations, assessments, method of payment, penalties, interest, costs, and collection procedures otherwise provided in this chapter.

(b) In the administration of this article and the collection of the administrative assessment created by this article, the Commissioner is granted the same authority as he or she possesses pursuant to other provisions of this chapter. Such authority includes, but is not limited to, the collection of payments; the imposition of interest, penalties, and costs; injunctive relief; and all other rights, authority, and prerogatives granted the Commissioner under this chapter.

(c) The rights, authority, and prerogatives created under this article shall not in any manner diminish the other rights, authority, and prerogatives of the Commissioner with respect to the administration of this chapter. (Code 1981, § 34-8-184, enacted by Ga. L. 1991, p. 139, § 1.)

Editor's notes. — See the Editor's note following the article heading as to the repeal of this Code section.

34-8-185. (Repealed effective December 31, 2011) Repealer.

This article shall stand repealed in its entirety on December 31, 2011. (Code 1981, § 34-8-185, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1995, p. 373, § 5; Ga. L. 1999, p. 449, § 7; Ga. L. 1999, p. 521, § 7; Ga. L. 2005, p. 1200, § 8/HB 520.)

Editor's notes. — Ga. L. 1999, p. 449, § 1, and Ga. L. 1999, p. 521, § 1, not codified by the General Assembly, provide that: "This Act shall be known and may be cited as the 'Workforce Reinvestment Act of 1999.'"

See the editor's note following the article heading as to the repeal of this Code section.

ARTICLE 7

BENEFITS

34-8-190. Requirements governing claims for benefits.

(a) Claims for benefits shall be made in accordance with such rules or regulations as the Commissioner may prescribe. The Commissioner may provide for employer initiated claims under such circumstances as prescribed in rules or regulations.

(b) Each employer shall post and maintain, in places readily accessible to employees, printed statements concerning such regulations or such other matters as the Commissioner may by regulation prescribe. Each employer shall make available to its employees copies of such printed statements or materials relating to claims for benefits as the Commissioner may by regulation prescribe.

(c) Each employer shall furnish to each employee a separation notice at such time as the employee leaves the employment of the employer. The separation notice shall contain detailed reasons for the employee's separation. The employee shall tender this separation notice at the time of filing a claim for benefits. This separation notice shall be in such form as prescribed by rules or regulations of the Commissioner. The Commissioner shall by rule or regulation prescribe the circumstances under which such form must be furnished to the department. (Code 1981, § 34-8-190, enacted by Ga. L. 1991, p. 139, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 and former Code Section 34-8-170, which was repealed by Ga. L. 1991, p. 139, § 1, effective January 1, 1992, are included in the annotations for this Code section.

Tortious interference. — No cause of action exists for "tortious interference with a claim for unemployment compensation," in part because the inchoate expectation of receiving unemployment compensation benefits prior to a final determination of eligi-

bility does not constitute a vested property right, generally, and in part because to allow such a cause of action would render illusory the finality afforded administrative determinations. *Miles v. Bibb Co.*, 177 Ga. App. 364, 339 S.E.2d 316 (1985) (decided under former § 34-8-170).

Cited in *Huiet v. Schwob Mfg. Co.*, 196 Ga. 855, 27 S.E.2d 743 (1943); *Huiet v. Callaway Mills*, 70 Ga. App. 538, 29 S.E.2d 106 (1944); *Epps Air Serv., Inc. v. Lampkin*, 125 Ga. App. 779, 189 S.E.2d 127 (1972).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes — In light of the similarity of the provisions, opinions decided under Ga. L. 1937, p. 806, are included in the annotations for this Code section.

Separation notice. — Although the lan-

guage of this section appeared to be mandatory in requiring a prospective claimant to present a separation notice before the claimant could file a claim for benefits, those provisions should be interpreted to mean, as

the General Assembly undoubtedly intended for it to mean, that the claimant must tender a separation notice if one has been furnished to the claimant. 1977 Op. Att'y Gen. No. 77-88 (decided under former Ga. L. 1937, p. 806; see O.C.G.A. § 34-8-190).

An employer may be penalized for failure

to furnish an employee with a separation notice at the time of separation by having the employer's account charged for any benefits paid to the former employee, notwithstanding any disqualification of that employee. 1977 Op. Att'y Gen. No. 77-88 (decided under former Ga. L. 1937, p. 806).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 31, 32.

C.J.S. — 81A C.J.S., Social Security and Public Welfare, §§ 475, 476.

34-8-191. Benefits to be paid pursuant to rules and regulations.

All benefits payable from and out of the Unemployment Compensation Fund shall be paid as provided in this chapter and through the employment offices of the department in accordance with such rules and regulations as the Commissioner may prescribe. (Code 1981, § 34-8-191, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-192. Initial determination and redetermination of eligibility for, amount of, and duration of benefits.

(a) Employees of the department designated by the Commissioner shall take the initial claim. An initial determination thereon shall be made promptly and shall include a determination with respect to whether or not benefits are payable, the week with respect to which benefits shall commence, the weekly benefit amount payable, and the maximum duration of benefits.

(b) Whenever a determination involves the application of paragraph (4) of Code Section 34-8-194 or involves multiple claimants and difficult issues of fact or law, the Commissioner may appoint a panel of three administrative hearing officers for hearing and decision in accordance with subsection (a) of Code Section 34-8-220. The claimant and any other parties to the determination or redetermination shall be promptly notified of the decision and the reasons therefor.

(c) A determination shall be final unless a party entitled to notice applies for reconsideration of the determination or appeals the determination within 15 days after the notice was mailed to the party's last known address or otherwise delivered to the party. Before a determination becomes final as provided in this Code section, the Commissioner may issue a redetermination if good cause is shown. Such redetermination is subject to further appeal by any party entitled to notice as provided in this chapter.

(d) Notwithstanding any provision in this Code section or this chapter to the contrary, benefits shall be paid promptly in accordance with a determi-

nation or redetermination under this Code section or the decision of an administrative hearing officer, the board of review, or a reviewing court allowing benefits upon the issuance of such determination or redetermination without such payments being withheld pending outcome of the hearing of an appeal, review by the board of review, or decision of a court, unless and until such determination has been modified or reversed by a subsequent decision. In that event, benefits shall be paid or denied for any weeks of unemployment in accordance with such modifying or reversing decision. Neither the board of review nor any court shall issue an injunction, supersedeas, stay, or other writ or process suspending the payment of such benefits pending the disposition of such appeal. (Code 1981, § 34-8-192, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 776, § 3.)

Law reviews. — For note discussing administrative records and reports of public employment agencies with emphasis on the critical role of the employer, and advocating

a qualified, rather than absolute, privilege placed on confidential employer reports, see 11 Mercer L. Rev. 345 (1960).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 and former Code Section 34-8-171, which was repealed by Ga. L. 1991, p. 139, § 1, effective January 1, 1992, are included in the annotations for this Code section.

Constitutional attack on a notice of appeal provision must first be made before the agency and then before the superior court. *Sparks v. Caldwell*, 244 Ga. 530, 261 S.E.2d 590 (1979) (decided under Ga. L. 1937, p. 806).

Adequacy of notice if claimant illiterate. — An illiterate claimant's case was remanded for a new administrative determina-

tion on the issue of the adequacy of the notice and timeliness of the appeal. *Hollis v. Tanner*, 177 Ga. App. 759, 341 S.E.2d 290 (1986) (decided under former § 34-8-171).

Cited in *Zachos v. Huiet*, 195 Ga. 780, 25 S.E.2d 806 (1943); *Ford Motor Co. v. Abercrombie*, 207 Ga. 464, 62 S.E.2d 209 (1950); *Horton v. Huiet*, 113 Ga. App. 166, 147 S.E.2d 669 (1966); *Epps Air Serv., Inc. v. Lampkin*, 125 Ga. App. 779, 189 S.E.2d 127 (1972); *Smith v. Caldwell*, 142 Ga. App. 130, 235 S.E.2d 547 (1977); *Johnson v. Caldwell*, 148 Ga. App. 617, 251 S.E.2d 837 (1979); *Tucker v. Caldwell*, 608 F.2d 140 (5th Cir. 1979).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes — In light of the similarity of the provisions, opinions decided under Ga. L. 1937, p. 806, are included in the annotations for this Code section.

Notification of determination. — The

State Department of Labor Board of Review cannot require that notification to claimants of determinations as to payment be by registered mail. 1972 Op. Att'y Gen. No. U72-57 (decided under Ga. L. 1937, p. 806).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 31, 85, 88.

C.J.S. — 81A C.J.S., Social Security and Public Welfare, § 476 et seq.

ALR. — Right to unemployment compen-

sation as affected by misrepresentation in original employment application, 23 ALR4th 1272.

Unemployment Compensation: Eligibility as affected by claimant's refusal to work at

particular times or on particular shifts for domestic or family reasons, 2 ALR5th 475.

34-8-193. Determination of weekly benefit amount.

(a) The weekly benefit amount of an individual's claim shall be that amount computed by dividing the two highest quarters of wages paid in the base period by 42. Any fraction of a dollar shall then be disregarded. Wages must have been paid in at least two quarters of the base period and total wages in the base period must equal or exceed 150 percent of the highest quarter base period wages. For claims that fail to establish entitlement due to failure to meet the 150 percent requirement, an alternative computation shall be made. In such event, the weekly benefit amount shall be computed by dividing the highest single quarter of base period wages paid by 21. Any fraction of a dollar shall then be disregarded. Under this alternative computation, wages must have been paid in at least two quarters of the base period and total base period wages must equal or exceed 40 times the weekly benefit amount. Regardless of the method of computation used, wages must have been paid for insured work, as defined in Code Section 34-8-41.

(b) Weekly benefit amount entitlement as computed in this Code section shall be no less than \$27.00 per week for benefit years beginning on or after July 1, 1983; provided, however, that for benefit years beginning on or after July 1, 1987, when the weekly benefit amount, as computed, would be more than \$26.00 but less than \$37.00, the individual's weekly benefit amount will be \$37.00, and no weekly benefit amount shall be established for less than \$37.00; provided, further, that for benefit years beginning on or after July 1, 1997, when the weekly benefit amount, as computed, would be more than \$26.00 but less than \$39.00, the individual's weekly benefit amount will be \$39.00, and no weekly benefit amount shall be established for less than \$39.00; provided, further, that for benefit years beginning on or after July 1, 2002, when the weekly benefit amount, as computed, would be more than \$26.00 but less than \$40.00, the individual's weekly benefit amount will be \$40.00, and no weekly benefit amount shall be established for less than \$40.00; provided, further, that for benefit years beginning on or after July 1, 2005, when the weekly benefit amount, as computed, would be more than \$26.00 but less than \$42.00, the individual's weekly benefit amount will be \$42.00, and no weekly benefit amount shall be established for less than \$42.00; provided, further, that for benefit years beginning on or after July 1, 2007, when the weekly benefit amount, as computed, would be more than \$26.00 but less than \$44.00, the individual's weekly benefit amount will be \$44.00, and no weekly benefit amount shall be established for less than \$44.00.

(c) Weekly benefit amount entitlement as computed in this Code section shall not exceed these amounts for the applicable time period:

- (1) For claims filed on or after July 1, 1990, but before July 1, 1994, the maximum weekly benefit amount shall not exceed \$185.00;
 - (2) For claims filed on or after July 1, 1994, but before July 1, 1995, the maximum weekly benefit amount shall not exceed \$195.00;
 - (3) For claims filed on or after July 1, 1995, but before July 1, 1996, the maximum weekly benefit amount shall not exceed \$205.00;
 - (4) For claims filed on or after July 1, 1996, but before July 1, 1997, the maximum weekly benefit amount shall not exceed \$215.00;
 - (5) For claims filed on or after July 1, 1997, but before July 1, 1998, the maximum weekly benefit amount shall not exceed \$224.00;
 - (6) For claims filed on or after July 1, 1998, but before July 1, 1999, the maximum weekly benefit amount shall not exceed \$244.00;
 - (7) For claims filed on or after July 1, 1999, but before July 1, 2000, the maximum weekly benefit amount shall not exceed \$264.00;
 - (8) For claims filed on or after July 1, 2000, but before July 1, 2001, the maximum weekly benefit amount shall not exceed \$274.00;
 - (9) For claims filed on or after July 1, 2001, but before July 1, 2002, the maximum weekly benefit amount shall not exceed \$284.00;
 - (10) For claims filed on or after July 1, 2002, but before July 1, 2003, the maximum weekly benefit amount shall not exceed \$295.00;
 - (11) For claims filed on or after July 1, 2003, but before July 1, 2005, the maximum weekly benefit amount shall not exceed \$300.00;
 - (12) For claims filed on or after July 1, 2005, but before July 1, 2006, the maximum weekly benefit amount shall not exceed \$310.00;
 - (13) For claims filed on or after July 1, 2006, but before July 1, 2008, the maximum weekly benefit amount shall not exceed \$320.00; and
 - (14) For claims filed on or after July 1, 2008, the maximum weekly benefit amount shall not exceed \$330.00.
- (d) The maximum benefits payable to an individual in a benefit year shall be the lesser of 26 times the weekly benefit amount or one-fourth of the base period wages. If the amount computed is not a multiple of the weekly benefit amount, the total will be adjusted to the nearest multiple of the weekly benefit amount. The duration of benefits shall be extended in accordance with Code Section 34-8-197.
- (e)(1) An otherwise eligible individual shall be paid the weekly benefit amount, less gross earnings in excess of \$30.00, payable to the individual applicable to the week for which benefits are claimed. Such remaining benefit, if not a multiple of \$1.00, shall be computed to the nearest

multiple of \$1.00. Earnings of \$30.00 or less will not affect entitlement to benefits. For the purpose of this subsection, jury duty pay shall not be considered as earnings.

(2) For claims filed on or after July 1, 2002, an otherwise eligible individual shall be paid the weekly benefit amount, less gross earnings in excess of \$50.00, payable to the individual applicable to the week for which benefits are claimed. Such remaining benefit, if not a multiple of \$1.00, shall be computed to the nearest multiple of \$1.00. Earnings of \$50.00 or less will not affect entitlement to benefits. For the purpose of this paragraph, jury duty pay shall not be considered as earnings.

(f)(1) The amount of unemployment compensation payable to an individual for any week which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment which is reasonably attributable to such week. Such remaining benefit, if not a multiple of \$1.00, shall be computed to the nearest multiple of \$1.00.

(2) The requirements of this subsection shall apply to any pension, retirement or retired pay, annuity, or other similar periodic payment only if:

(A) Such pension, retirement or retired pay, annuity, or similar payment is under a plan maintained or contributed to by a base-period employer or chargeable employer as determined under applicable law; and

(B) Payments for services performed for such employer by the individual after the beginning of the base period affect eligibility for or increase the amount of such pension, retirement or retired pay, annuity, or similar payment, except in the case of pensions paid under the federal Social Security Act, the Railroad Retirement Act of 1974, or the corresponding provisions of prior law.

(3) The Commissioner shall take into consideration the amount contributed by the individual for the pension, retirement or retired pay, annuity, or other similar periodic payment and shall limit such reduction based on the percent share contributed by such individual. An individual who, while working, contributed 50 percent or more toward such plan shall not be subject to a reduction in the weekly benefit amount of the claim.

(g) Between the filing of one benefit year claim and the filing of another benefit year claim, an individual must have performed services in bona fide employment and earned insured wages for such services. These wages for

insured work must equal or exceed ten times the weekly benefit amount of the new claim in order to establish entitlement.

(h) The wage credits and benefit rights of persons who entered the armed services of the United States during a national emergency are preserved for the period of their actual service and six months thereafter in accordance with regulations of the Commissioner. (Code 1981, § 34-8-193, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1994, p. 640, § 4; Ga. L. 1996, p. 670, § 3; Ga. L. 1997, p. 831, §§ 2, 3; Ga. L. 1998, p. 1501, § 6; Ga. L. 1999, p. 449, § 8; Ga. L. 1999, p. 521, § 8; Ga. L. 2002, p. 1119, § 6; Ga. L. 2005, p. 1200, § 9/HB 520; Ga. L. 2007, p. 394, § 3/HB 443; Ga. L. 2008, p. 324, § 34/SB 455.)

The 2007 amendment, effective July 1, 2007, in subsection (a), substituted “42” for “44” in the first sentence and substituted “21” for “22” in the fifth sentence; added the proviso to the end of subsection (b); in paragraph (c)(13), inserted “but before July 1, 2008,” and substituted “; and” for a period at the end; and added paragraph (c)(14).

The 2008 amendment, effective May 12, 2008, part of an Act to revise, modernize, and correct the Code, deleted “and” at the end of paragraph (c)(12).

Editor’s notes. — Ga. L. 1999, p. 449, § 1,

and Ga. L. 1999, p. 521, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Workforce Reinvestment Act of 1999’.”

U.S. Code. — The federal Social Security Act and the federal Railroad Retirement Act of 1974, referred to in subparagraph (f)(2)(B), are codified at 42 U.S.C. § 301 et seq. and 45 U.S.C. § 231 et seq., respectively.

Law reviews. — For annual survey of labor and employment law, see 57 Mercer L. Rev. 251 (2005).

For note on the 2002 enactment of this chapter, see 19 Ga. St. U.L. Rev. 258 (2002).

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 and former Code Section 34-8-153, which was repealed by Ga. L. 1991, p. 139, § 1, effective January 1, 1992, are included in the annotations for this Code section.

Statutory interpretation. — The provisions of former § 34-8-158(4) (see O.C.G.A. § 34-8-194) providing for disqualification of benefits constitutes a list of exceptions to the general grant of such benefits contained in former § 34-8-153 (see O.C.G.A. § 34-8-153). The general rule is that “statutes making exceptions to general rules must be strictly construed.” Dalton Brick &

Tile Co. v. Huiet, 102 Ga. App. 221, 115 S.E.2d 748 (1960) (decided under Ga. L. 1937, p. 806).

Social security payment offset. — Social security payments shall be offset against unemployment compensation. Metropolitan Atlanta Rapid Transit Auth. v. Barnholdt, 179 Ga. App. 312, 346 S.E.2d 105 (1986) (decided under former § 34-8-153).

Cited in National Trailer Convoy, Inc. v. Undercoffer, 109 Ga. App. 703, 137 S.E.2d 328 (1964); Massey v. Thiokol Chem. Corp., 368 F. Supp. 668 (S.D. Ga. 1973); Powell v. Dougherty Christian Academy, Inc., 215 Ga. App. 551, 451 S.E.2d 465 (1994).

OPINIONS OF THE ATTORNEY GENERAL

Editor’s notes — In light of the similarity of the provisions, opinions decided under Ga. L. 1937, p. 806, are included in the annotations for this Code section.

Substitute teacher’s eligibility. — While it cannot categorically be said that under no circumstances could a substitute teacher ever, by virtue of employment as such, be

entitled to unemployment compensation (each application would have to be evaluated on an individual basis), it would be extraordinarily rare for such a voluntarily,

part-time only teacher to be able to meet the law's eligibility requirements. 1977 Op. Att'y Gen. No. 77-45 (decided under Ga. L. 1937, p. 806).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 68 et seq., 74 et seq.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, §§ 283, 284.

81A C.J.S., Social Security and Public Welfare, §§ 421 et seq., 510 et seq.

ALR. — Amount which employee, or one wrongfully denied employment, has earned, or might have earned, in other employment as affecting computation of amount to compensate him for loss of time due to unfair labor practice, 133 ALR 1235; 144 ALR 399.

Severance payments as affecting right to

unemployment compensation, 93 ALR2d 1319.

Eligibility of strikers to obtain public assistance, 57 ALR3d 1303.

What constitutes participation or direct interest in, or financing of, labor dispute or strike within disqualification provisions of unemployment compensation acts, 62 ALR3d 314.

Refusal of nonstriking employee to cross picket line as justifying denial of unemployment compensation benefits, 62 ALR3d 380.

34-8-194. Grounds for disqualification of benefits.

An individual shall be disqualified for benefits:

(1) For the week or fraction thereof in which the individual has filed an otherwise valid claim for benefits after such individual has left the most recent employer voluntarily without good cause in connection with the individual's most recent work. Good cause shall be determined by the Commissioner according to the circumstances in the case; provided, however, that leaving an employer to accompany a spouse who has been reassigned from one military assignment to another shall be deemed to be for good cause; provided, however, that the employer's account shall not be charged for any benefits paid out to the person who leaves to accompany a spouse reassigned from one military assignment to another. To requalify following a disqualification, an individual must secure subsequent employment for which the individual earns insured wages equal to at least ten times the weekly benefit amount of the claim and then becomes unemployed through no fault on the part of the individual. Notwithstanding the foregoing, in the Commissioner's determination the burden of proof of good work connected cause for voluntarily leaving such work shall be on the individual. Benefits shall not be denied under this paragraph, however, to an individual for separation from employment pursuant to a labor management contract or agreement or pursuant to an established employer plan, program, policy, layoff, or recall which permits the individual, because of lack of work, to accept a separation from employment;

(2)(A) For the week or fraction thereof in which such individual has filed an otherwise valid claim for benefits after the individual has been

discharged or suspended from work with the most recent employer for failure to obey orders, rules, or instructions or for failure to discharge the duties for which the individual was employed as determined by the Commissioner according to the circumstances in the case. To requalify following a disqualification, an individual must secure subsequent employment for which the individual earns insured wages equal to at least ten times the weekly benefit amount of the claim and then becomes unemployed through no fault on the part of the individual. Notwithstanding the foregoing, in the Commissioner's determination the burden of proof of just discharge or suspension for cause as set forth shall be on the employer and the presumption shall be with the employee; provided, however, that:

(i) An individual shall secure employment and show to the satisfaction of the Commissioner that such individual has performed services in bona fide employment and earned insured wages equal to at least 12 times the weekly benefit amount of the claim and has lost that job through no fault on the part of such individual, if it is determined by the Commissioner that the individual has been discharged for cause by the most recent employer for one or more of the following reasons:

(I) Intentional conduct on the premises of the employer or while on the job which results in a physical assault upon or bodily injury to the employer, fellow employees, customers, patients, bystanders, or the eventual consumer of products; or

(II) Intentional conduct that results in the employee's being discharged for, and limited to, the following: theft of property, goods, or money valued at \$100.00 or less; and

(ii) An individual shall secure employment and show to the satisfaction of the Commissioner that he or she has performed services in bona fide employment and earned insured wages equal to at least 16 times the weekly benefit amount of the claim if it is determined by the Commissioner that the individual has been discharged for cause by the most recent employer for one or more of the following reasons:

(I) Intentional conduct by the employee which results in property loss or damages amounting to \$2,000.00 or more; or

(II) Intentional conduct that results in the employee's being discharged for, and limited to, the following: theft of property, goods, or money valued at over \$100.00, sabotage, or embezzlement.

(B) An individual shall not be disqualified for benefits under subparagraph (A) of this paragraph if, based on the rules and

regulations promulgated by the Commissioner, the Commissioner determines:

(i) The individual made a good faith effort to perform the duties for which hired but was simply unable to do so;

(ii) The individual did not intentionally fail or consciously neglect to perform his or her job duties;

(iii) The discharge occurred because of absenteeism and the absences were caused by illness of the claimant or a family member, unless the claimant has without justification failed to notify the employer or the absence for such illness which led to discharge followed a series of absences, the majority of which were attributable to fault on the part of the claimant in direct violation of the employer's attendance policy and regarding which the claimant has been advised in writing, prior to any of the absences, that unemployment benefits may be denied due to such violations of the employer's policy on attendance; provided, however, that no waiver of an employee's rights under the federal Family and Medical Leave Act of 1993, as amended, or any other applicable state or federal law shall be construed under this division;

(iv) The discharge occurred as a violation of the employer's rule of which the claimant was not informed by having been made aware thereof by the employer or through common knowledge. Consistency of prior enforcement shall be taken into account as to the reasonableness or existence of the rule and such rule must be lawful and reasonably related to the job environment and job performance; or

(v) Except for activity requiring disqualification under paragraph (4) of this Code section, the employee was exercising a protected right to protest against wages, hours, working conditions, or job safety under the federal National Labor Relations Act or other laws.

(C) For the week or fraction thereof in which such individual has filed an otherwise valid claim for benefits after the individual has been discharged or suspended for violation of the employer's drug-free workplace policy as determined by the Commissioner according to the circumstances in the case. To requalify following a disqualification under this subparagraph, an individual must secure subsequent employment for which the individual earns insured wages equal to at least ten times the weekly benefit amount of the claim and then become unemployed through no fault on the part of the individual. Notwithstanding the foregoing, in the Commissioner's determination the burden of proof of just discharge or suspension for cause as set forth in this subparagraph shall be on the employer and the presumption of eligibility shall be with the employee; provided, however, that in cases

where a drug or alcohol test is utilized to prove a violation of the employer's drug-free workplace policy:

(i) The employer's burden of proof of just discharge or suspension shall be presumed met if the individual fails a drug screening test which is required by terms of the employer's drug-free workplace policy and said policy complies with the provisions of Article 11 of Chapter 9 of this title, other substantially equivalent or more stringent standards established by federal law or regulations, or with rules and regulations prescribed by the Commissioner;

(ii) The laboratory test results, including but not limited to, documentation of the chain of custody, methodology, and the accuracy of the drug screening test shall be admissible and self-authenticating in an administrative hearing conducted by the Commissioner with respect to a disputed claim for unemployment benefits under this chapter, and such evidence shall create a rebuttable presumption that the individual violated the employer's drug-free workplace policy; provided, however, that any other evidence relating to the issue of eligibility and the provisions of this subparagraph may be received in person or by telecommunications at the hearing; and

(iii) Laboratory test results submitted by the individual, including but not limited to documentation of the chain of custody, methodology, and the accuracy of the drug screening test shall be admissible and self-authenticating in an administrative hearing conducted by the Commissioner with respect to a disputed claim for unemployment benefits under this chapter;

(3)(A) If, after the claimant has filed an otherwise valid claim for benefits, the claimant has failed without good cause either to apply for available, suitable work when so directed by an employment office or the Commissioner or to accept suitable work when offered to the claimant by any employer. Such disqualification shall continue until he or she has secured subsequent employment for which the individual has earned insured wages equal to at least ten times the weekly benefit amount of the claim and has lost that job through no fault on the part of the individual.

(B) In determining whether or not any work is suitable for an individual, the Commissioner shall consider the degree of risk involved to his or her health, safety, and morals; his or her physical fitness and prior training; his or her experience and prior earnings; his or her length of unemployment and prospects for securing local work in his or her customary occupation; and the distance of the available work from his or her residence. The length of unemployment shall be given full consideration and, after an adjustment period, the claimant must

accept work involving less competence and at a lower remuneration. If a claimant has received ten weeks of benefits during his or her current period of unemployment, no work otherwise suitable shall be considered unsuitable because of prior training, experience, prior earnings, or level of compensation, provided such compensation is equal to or exceeds 66 percent of the claimant's highest calendar quarter base period earnings; provided, however, that such compensation must be equal to or greater than the minimum wage established by federal or state laws.

(C) Notwithstanding any other provisions of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work:

(i) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(ii) If the wages, hours, or other conditions of the work offered are less favorable to the individual than those prevailing for similar work in the locality; or

(iii) If, as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

(4) For any week with respect to which the Commissioner finds that his or her total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he or she is or was last employed. If, in any case, separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purposes of this paragraph, be deemed to be a separate factory, establishment, or other premises. This paragraph shall not apply if it is shown to the satisfaction of the Commissioner that:

(A) He or she is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work;

(B) He or she does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute; or

(C) A lockout has occurred following the expiration of the most recent working agreement without any offer of or refusal to continue that agreement during continued negotiations for a new agreement acceptable to employer and employee.

When a stoppage of work due to a labor dispute ceases and operations are resumed at the factory, establishment, or other premises at which the employee is or was last employed but the employee has not been restored to such last employment, the employee's disqualification for benefits under this paragraph shall be deemed to have ceased at such time as the Commissioner shall determine such stoppage of work to have ceased and such operations to have been resumed. Benefits shall not be paid for any week during which the employee is engaged in picketing or is a participant in a picket line at the factory, establishment, or other premises at which the employee is or was last employed even though the stoppage of work shall have ceased and operations have been resumed;

(5) For any week with respect to which the employee is receiving or has received remuneration in the form of:

(A) Wages in lieu of notice, terminal leave pay, severance pay, separation pay, or dismissal payments or wages by whatever name, regardless of whether the remuneration is voluntary or required by policy or contract; provided, however, such remuneration shall only affect entitlement if the remuneration for such week exceeds the individual's weekly benefit amount. Remuneration for accrued but unused annual leave, vacation pay, sick leave, or payments from employer funded supplemental unemployment plans, pension plans, profit-sharing plans, deferred compensation, or stock bonus plans or seniority buyback plans shall not affect entitlement. In the case of lump sum payments or periodic payments which are less than the individual's weekly wage, such payments shall be prorated by weeks on the basis of the most recent weekly wage of the individual for a standard work week; or

(B) Compensation for temporary partial or temporary total disability under the workers' compensation law of any state or under a similar law of the United States;

(6) For any week with respect to which he or she has received or is seeking unemployment compensation under an unemployment compensation law of another state or of the United States; or

(7) If while attending a training course as provided in Code Section 34-8-195, he or she voluntarily ceases attending such course without good cause. Such disqualification shall continue pursuant to the provisions of paragraph (1) of this Code section. However, if any individual is separated from training approved under Code Section 34-8-195 due to the individual's own failure to abide by rules of the training facility, he or she shall be disqualified for benefits under the provisions of paragraph (2) of this Code section. (Code 1981, § 34-8-194, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1996, p. 693, § 4; Ga. L. 2005, p. 219, § 1/ HB 404; Ga. L. 2005, p. 1200, § 9A/ HB 520.)

U.S. Code. — The federal National Labor Relations Act, referred to in subparagraph (2)(B)(v), is codified at 29 U.S.C. § 151.

Law reviews. — For annual survey of recent developments, see 38 Mercer L. Rev. 473 (1986). For annual survey of labor and employment law, see 57 Mercer L. Rev. 251 (2005).

For note discussing administrative records and reports of public employment agencies with emphasis on the critical role of the

employer, and advocating a qualified, rather than absolute, privilege placed on confidential employer reports, see 11 Mercer L. Rev. 345 (1960).

For comment on *Ford Motor Co. v. Abercrombie*, 207 Ga. 464, 62 S.E.2d 209 (1950), see 13 Ga. B.J. 348 (1951). For comment on *Meakins v. Huiet*, 100 Ga. App. 557, 112 S.E.2d 167 (1959), see 11 Mercer L. Rev. 395 (1960).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DISQUALIFICATION

CAUSE FOR LEAVING EMPLOYMENT

General Consideration

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 and former Code Section 34-8-158, which was repealed by Ga. L. 1991, p. 139, § 1, effective January 1, 1992, are included in the annotations for this Code section.

Legislative intent. — The legislative intent, that only the involuntarily unemployed whose unemployment is not the result of their own fault are entitled to compensation, is the foundation upon which the entire act rests; and that intent is supreme and controlling in the construction of all paragraphs and sentences. *Ford Motor Co. v. Abercrombie*, 207 Ga. 464, 62 S.E.2d 209 (1950), for comment, see 13 Ga. B.J. 348 (1951) (decided under Ga. L. 1937, p. 806).

The intent of the legislature was to pay unemployment compensation during periods of unemployment to those workers whose unemployment is involuntary and is not the result of their own fault. *Ford Motor Co. v. Abercrombie*, 207 Ga. 464, 62 S.E.2d 209 (1950); *Smith v. Caldwell*, 142 Ga. App. 130, 235 S.E.2d 547 (1977); *Colbert v. Caldwell*, 144 Ga. App. 220, 240 S.E.2d 769 (1977); *Carter v. Caldwell*, 151 Ga. App. 687, 261 S.E.2d 431 (1979) (all decided under Ga. L. 1937, p. 806).

Statutory construction. — To disqualify for benefits, the stoppage of work must exist because of a labor dispute; in other words a labor dispute must be the prime, efficient,

proximate, motivating cause of unemployment. The evidence must at least preponderate to the conclusion that had there not been a labor dispute the work stoppage would not have occurred, whether or not other things combined with the dispute to bring about the unemployment. Since the general statutory enactment is one granting benefits upon proof of unemployment and other conditions of eligibility, an employer seeking to deny benefits to one otherwise eligible because of an excepting clause within the act has the burden of showing by a preponderance of the evidence that the employee comes within such exception. *Dalton Brick & Tile Co. v. Huiet*, 102 Ga. App. 221, 115 S.E.2d 748 (1960) (decided under Ga. L. 1937, p. 806).

Required determinations of Board of Review. — In a case where unemployment benefits were denied to an employee who was discharged for striking a co-worker and where the Department of Labor Board of Review failed to make a critical factual determination as to provocation pursuant to department rules, it was error for the superior court to make new factual determinations on the issue, but, rather, the case should have been remanded to the department for determining provocation. *TNS Mills v. Russell*, 213 Ga. App. 14, 443 S.E.2d 658 (1994).

Burden of showing employee's ineligibility. — Since the general statutory enactment is one granting benefits upon proof of unemployment and other conditions of eligibil-

General Consideration (Cont'd)

ity, an employer seeking to deny benefits to one otherwise eligible because of an excepting clause within the law has the burden of showing by a preponderance of the evidence that the employee comes within such exception. *Dalton Brick & Tile Co. v. Huiet*, 102 Ga. App. 221, 115 S.E.2d 748 (1960) (decided under Ga. L. 1937, p. 806; see O.C.G.A. Ch. 8, T. 34).

Deliberate misconduct. — Misconduct constituting fault on the employee's part must be deliberate, willing, knowing, and in violation of an employer's rule that has been uniformly enforced. *Millen v. Caldwell*, 253 Ga. 112, 317 S.E.2d 818 (1984) (decided under Ga. L. 1937, p. 806).

United States Labor Department guidelines. — It has not been shown that the United States Labor Department guidelines are controlling in questions involving the state implementation of the unemployment compensation programs. *Carter v. Caldwell*, 151 Ga. App. 687, 261 S.E.2d 431 (1979) (decided under Ga. L. 1937, p. 806).

Severance allowance. — A severance allowance does not necessarily constitute wages in lieu of notice. *Meakins v. Huiet*, 100 Ga. App. 557, 112 S.E.2d 167 (1959) (decided under Ga. L. 1937, p. 806). For comment, see 11 *Mercer L. Rev.* 395 (1960).

Separate facilities of manufacturing process. — "Factory, establishment, or other premises" are not separate where their function is indispensable and inseparable from the manufacturing process, where the failure to function upon the part of either would defeat the single objective of both; mere separate locations, regardless of distance, of the indispensable functions, cannot change them into "separate factories, establishments, or other premises." *Ford Motor Co. v. Abercrombie*, 207 Ga. 464, 62 S.E.2d 209 (1950) (decided under Ga. L. 1937, p. 806). For comment, see 13 *Ga. B.J.* 348 (1951).

Proof of sexual harassment. — The superior court erred in reversing the board's decision that the employer failed to prove that claimant sexually harassed employees, because there was evidence to support the board's findings of fact and the hearing officer properly gave more weight to the sworn testimony than to the hearsay state-

ments about sexual harassment. *McGahee v. Yamaha Motor Mfg. Corp.*, 214 Ga. App. 473, 448 S.E.2d 249 (1994).

Collateral estoppel. — Where, following an administrative hearing on an employee's claim for state unemployment compensation benefits, the superior court found that the employee had been terminated for cause, collateral estoppel applied to bar revisiting the alleged reasons behind the employee's dismissal in a discriminatory discharge case brought under federal law. *Shields v. Bellsouth Adv. & Publishing Corp.*, 273 Ga. 774, 545 S.E.2d 898 (2001).

Cited in *Peerless Woolen Mills v. Huiet*, 69 Ga. App. 166, 24 S.E.2d 866 (1943); *Huiet v. Schwob Mfg. Co.*, 196 Ga. 855, 27 S.E.2d 743 (1943); *Abercrombie v. Ford Motor Co.*, 81 Ga. App. 690, 59 S.E.2d 664 (1950); *Utica Mut. Ins. Co. v. Pioda*, 90 Ga. App. 593, 83 S.E.2d 627 (1954); *Huiet v. Wallace*, 108 Ga. App. 208, 132 S.E.2d 523 (1963); *Banks v. Huiet*, 111 Ga. App. 607, 142 S.E.2d 421 (1965); *Epps Air Serv., Inc. v. Lampkin*, 229 Ga. 792, 194 S.E.2d 437 (1972); *Caldwell v. Jones*, 129 Ga. App. 893, 201 S.E.2d 823 (1973); *Barnes v. Caldwell*, 139 Ga. App. 384, 228 S.E.2d 325 (1976); *Caldwell v. Corbin*, 152 Ga. App. 153, 262 S.E.2d 516 (1979); *Tucker v. Caldwell*, 608 F.2d 140 (5th Cir. 1979); *Kilgore v. Caldwell*, 152 Ga. App. 863, 264 S.E.2d 312 (1980); *Miller Brewing Co. v. Carlson*, 162 Ga. App. 94, 290 S.E.2d 200 (1982); *Brown v. Caldwell*, 165 Ga. App. 743, 302 S.E.2d 359 (1983); *Shields v. BellSouth Adver. & Publ'g Co.*, 228 F.3d 1284 (11th Cir. 2000).

Disqualification

Disqualification because of fault. — There must be some fault chargeable to the employee in order to have a valid disqualification under this section. *Smith v. Caldwell*, 142 Ga. App. 130, 235 S.E.2d 547 (1977); *Carter v. Caldwell*, 151 Ga. App. 687, 261 S.E.2d 431 (1979) (decided under Ga. L. 1937, p. 806; see O.C.G.A. § 34-8-194).

Unless there is fault (an "offense") chargeable to the employee, there is no disqualification under this section. *Caldwell v. Amoco Fabrics Co.*, 165 Ga. App. 674, 302 S.E.2d 596 (1983) (decided under Ga. L. 1937, p. 806; see O.C.G.A. § 34-8-194).

Employee's failure to attain proficiency. — Evidence showing that an employee failed

to attain the necessary proficiency does not demand a finding of failure through fault or conscious neglect. *Smith v. Caldwell*, 142 Ga. App. 130, 235 S.E.2d 547 (1977) (decided under Ga. L. 1937, p. 806).

Failure, through no fault of the employee, to perform the employee's job as expected does not serve as a basis for disqualification from unemployment benefits. *Colbert v. Caldwell*, 144 Ga. App. 220, 240 S.E.2d 769 (1977) (decided under Ga. L. 1937, p. 806).

An employee was not disqualified from entitlement to unemployment benefits, where the employee's violations of the employer's policy prohibiting overages or shortages in excess of \$2 resulted from the employee's inability to perform the employee's job duties proficiently rather than from conscious neglect on the employee's part. *Lamb v. Tanner*, 178 Ga. App. 740, 344 S.E.2d 534 (1986) (decided under former § 34-8-158).

Unknown work requirements. — Benefits should not be denied to an employee who has been fired for failure to comply with unknown work requirements, or requirements which could not have been reasonably anticipated. *Millen v. Caldwell*, 253 Ga. 112, 317 S.E.2d 818 (1984) (decided under former § 34-8-158).

Conduct leading to incarceration. — Where an employee engages in conduct which leads to the employee's incarceration, and because of the employee's inability to report to work the employee is dismissed from employment, the denial of unemployment compensation is the correct interpretation of the statutory mandate. *Carter v. Caldwell*, 151 Ga. App. 687, 261 S.E.2d 431 (1979) (decided under Ga. L. 1937, p. 806; see O.C.G.A. § 34-8-194).

Stoppage of work. — The stoppage of work means at the place of work rather than stoppage on the part of the individual worker. *M.A. Ferst, Ltd. v. Huiet*, 78 Ga. App. 855, 52 S.E.2d 336 (1949) (decided under Ga. L. 1937, p. 806).

To disqualify for benefits the stoppage of work must exist because of a labor dispute; in other words, a labor dispute must be the prime, efficient, proximate, motivating cause of the unemployment. The evidence must at least preponderate to the conclusion that had there not been a labor dispute the work stoppage would not have occurred, whether or not other things combined with

the dispute to bring about the unemployment. *Dalton Brick & Tile Co. v. Huiet*, 102 Ga. App. 221, 115 S.E.2d 748 (1960) (decided under Ga. L. 1937, p. 806).

Where the stoppage of the work is caused by a labor dispute, any employee or class of employees whose wages are involved in the dispute and would be affected by the result of the dispute is directly interested in the dispute and an employee so directly interested in the dispute or who belongs to a grade or class of workers who immediately before the commencement of the stoppage of the work consisted of members employed on the premises at which the stoppage occurred is disqualified from receiving the benefits for unemployment provided in Ga. L. 1937, p. 806 (see O.C.G.A. § 34-8-1 et seq.). *Huiet v. Boyd*, 64 Ga. App. 564, 13 S.E.2d 863 (1941) (decided under Ga. L. 1937, p. 806).

Union-authorized work stoppages. — The law is more concerned with whether or not unemployment is chargeable to the claimants than with the method or means by which they bring it about. Obviously, the claimants would be disqualified if they cause their unemployment by direct action in simply walking away from their work stations and refusing to return. They are not allowed to accomplish the same result by indirection, in having their labor union authorize work stoppage in a parts-producing plant, which they know must inevitably compel work stoppage at their own plant. *Ford Motor Co. v. Abercrombie*, 207 Ga. 464, 62 S.E.2d 209 (1950) (decided under Ga. L. 1937, p. 806). For comment, see 13 Ga. B.J. 348 (1951).

Action of union officials. — Under the law of agency, the actions of union officials in allowing a strike is the action of the union members, just as effectively as if each of the claimants personally cast a vote in favor of that strike. *Ford Motor Co. v. Abercrombie*, 207 Ga. 464, 62 S.E.2d 209 (1950) (decided under Ga. L. 1937, p. 806). For comment, see 13 Ga. B.J. 348 (1951).

Violation of employer's drug-free workplace policy. — An employee who violates an employer's anti-drug policy may be disqualified from receiving unemployment benefits, even though the employer has not met the statutory requirements for establishing a drug-free workplace program. *Georgia-Pacific Corp. v. Ivey*, 250 Ga. App. 181,

Disqualification (Cont'd)

549 S.E.2d 471 (2001).

Responsibility for providing transportation to and from work. — An automobile accident resulting in an employee's loss of the employee's usual mode of transportation, even though the accident was through no fault of the employee's own, still places the responsibility of providing transportation to and from work on the employee; thus, the employee was considered at fault for purposes of unemployment compensation. *Roberson v. Tanner*, 174 Ga. App. 128, 329 S.E.2d 210 (1985) (decided under former § 34-8-158).

Schoolteachers' failure to pass teacher certification tests did not disqualify them for unemployment compensation benefits, even though they did not take the test all of the times it was offered before the termination of their employment and did not participate in staff development services available to assist teachers in preparing for the test, where it was undisputed that each claimant did take the test several times and utilized other study aids. *Tanner v. Golden*, 189 Ga. App. 894, 377 S.E.2d 875 (1989) (decided under former § 34-8-158).

Schoolteacher who was advised to resign after the teacher's teaching certificate expired and after the teacher failed a competency exam three times was entitled to unemployment compensation even though the teacher could have taken the test on several other occasions but did not. *Troup County Bd. of Educ. v. Daniel*, 191 Ga. App. 370, 381 S.E.2d 586 (1989) (decided under former § 34-8-158).

Child care conflicting with overtime requirement. — Where an employee was told that working overtime would be required of employees, and the employee was unable to work overtime due to child care problems but subsequently cured the problems, it could not be said that the employer showed that there was a reasonable expectation of termination when the employee cured the problems. Hence, the employee was entitled to benefits. *Barron v. Poythress*, 219 Ga. App. 775, 466 S.E.2d 665 (1996).

Failure to obey employer's rules. — There was some evidence to support the conclusion that the claimant was not entitled to unemployment benefits due to the claim-

ant's failure to obey the employer's rules, which was grounds for disqualification for unemployment benefits under O.C.G.A. § 34-8-194(2)(A); evidence indicated that the claimant intended to leave the job due to the claimant's dissatisfaction with the claimant's assignment rather than complete deliveries as was required by the employer. *Jamal v. Thurmond*, 263 Ga. App. 320, 587 S.E.2d 809 (2003).

Department of Labor properly denied an employee unemployment benefits based on the employee's failure to obey the employer's policy to issue parking passes to students taking training courses on the employer's premises after being informed that a failure to do so would result in termination. *Solinet v. Johnson*, 280 Ga. App. 227, 633 S.E.2d 626 (2006).

Cause for Leaving Employment

Personal dislike. — "Good cause" for voluntarily leaving employment cannot be established by solely referring to a personal dislike in working with another coworker. *Moore v. Tanner*, 172 Ga. App. 792, 324 S.E.2d 772 (1984) (decided under former § 34-8-158).

Accepted "unethical" conditions not good cause. — Where the record showed employee worked for two months under contested "unethical" conditions, employee accepted those conditions as part of the employee's working conditions; thus, disqualification for benefits was proper. *Young v. Scott*, 212 Ga. App. 572, 442 S.E.2d 768 (1994).

Medical condition. — If an employee, in fact, voluntarily quit a job because the work environment caused or aggravated a pre-existing medical condition to the extent that the employee either was unable to perform properly the employee's employment duties, or was unable to perform properly the employee's employment duties without unreasonable risk of harm to the employee's health due to continued employment, and that the employee timely notified the employer of the reason for the employee's decision, such voluntary quitting would be with due cause as a matter of law. *Holstein v. North Chem. Co.*, 194 Ga. App. 546, 390 S.E.2d 910 (1990) (decided under former § 34-8-158).

Moving to different locality. — If, in fact, the employee quits a job, not because of health risk or inability to perform duties resulting from any existing medical condition, but to facilitate the employee's moving to a different locality, such voluntary quitting would be without due cause as a matter of law. *Holstein v. North Chem. Co.*, 194 Ga. App. 546, 390 S.E.2d 910 (1990) (decided under former § 34-8-158).

Undesirable transfer. — Where employee was notified that the employee was to be transferred to California, and the employee quit the employee's job rather than move since the employee's spouse was not transferred and the cost of living was higher in California, this was not a good cause reason to voluntarily quit the job and thus unemployment benefits were denied because the employee, as a union member, worked under a collective bargaining agreement that authorized such transfers and did not call for spouse transfers or cost of living increases as a term of employment. *Western Elec. Co. v. Ellison*, 170 Ga. App. 565, 317 S.E.2d 595 (1984) (decided under former § 34-8-158).

Family matters. — An individual who is absent from work due to compulsory process to attend a juvenile court proceeding for the individual's child is not at fault in the individual's discharge even though the individual may have previously demonstrated attendance problems for which the individual had been warned. *Glover v. Scott*, 210 Ga. App. 25, 435 S.E.2d 250 (1993).

Employee striking another worker. — In determining whether an individual was at fault in the individual's discharge for striking another worker, the department must consider the extent to which the claimant's action was provoked by a co-worker and whether or not the individual was threatened by the coworker. *TNS Mills v. Russell*, 213 Ga. App. 14, 443 S.E.2d 658 (1994).

Resentment of fellow employees. — When an individual who contends the individual was required to follow improper bookkeeping procedures nonetheless continues for several months to follow those bookkeeping procedures, and quits during the middle

of a shift because the individual resented a new employee whom the individual was training making more money, it cannot be held as a matter of law that the individual quit for good cause connected with the work. *Young v. Scott*, 212 Ga. App. 572, 442 S.E.2d 768 (1994).

Verbal and physical abuse. — Voluntary cessation of employment due to the verbally or physically abusive conduct of an employer or supervisory personnel which is of such a gravity that would justify a reasonable person to leave the ranks of the employed and join the ranks of the unemployed constitutes the requisite good cause to prevent disqualification. *Blair v. Poythress*, 211 Ga. App. 674, 440 S.E.2d 261 (1994).

Leaving work after receiving notice of termination. — An employee has not left the employee's employment "voluntarily without good cause" if the employee chooses not to work during a part or all of the period between notice of termination and the date of termination set by the employer. *Elizabeth v. Caldwell*, 160 Ga. App. 549, 287 S.E.2d 590 (1981) (decided under Ga. L. 1937, p. 806).

Where the employee is otherwise eligible for unemployment compensation benefits, the employee's leaving work after the employee was given definite notice will not deprive the employee of those benefits during the period of involuntary unemployment. *Elizabeth v. Caldwell*, 160 Ga. App. 549, 287 S.E.2d 590 (1981) (decided under Ga. L. 1937, p. 806).

Consent not required for resignation. — Mutual consent of the parties is not always necessary to effect a resignation. A resignation may become effective without acceptance by a higher authority. *Bulloch Academy v. Cornett*, 184 Ga. App. 42, 360 S.E.2d 615 (1987) (decided under former § 34-8-158).

Standard on review. — An administrative hearing officer's finding that the employee voluntarily resigned from employment without good cause must be reviewed by the court using an "any evidence" standard. *Bulloch Academy v. Cornett*, 184 Ga. App. 42, 360 S.E.2d 615 (1987) (decided under former § 34-8-158).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the provisions, opinions decided under Ga. L. 1937, p. 806, and former Code Section 34-8-158, which was repealed by Ga. L. 1991, p. 139, § 1, effective January 1, 1992, are included in the annotations for this Code section.

Determination of disqualification period. — If an unemployment compensation claimant is required to serve a disqualification period, that period cannot begin until the claimant becomes eligible for unemployment benefits under the state law; the claimant cannot count as part of the claimant's disqualification any period subsequent to the time the claimant became unemployed and prior to the time the claimant became eligible for benefits under the state law. 1976 Op. Att'y Gen. No. 76-27 (decided under Ga. L. 1937, p. 806).

An unemployment compensation claimant who left the claimant's most recent employment under disqualifying circumstances cannot begin the claimant's disqualification period until after the claimant has filed a valid unemployment compensation claim under state law; the claimant cannot count as part of the claimant's disqualification period the time between the day the claimant became unemployed and the day the

claimant filed a valid state claim, regardless of whether the claimant has received public funds from any other source during this interim time or served a disqualification period under any other program. 1976 Op. Att'y Gen. No. 76-27 (decided under Ga. L. 1937, p. 806).

Polygraph examinations. — Whether the refusal to submit to a polygraph examination disqualifies a former employee from the receipt of unemployment benefits must be decided on a case-by-case basis in light of the internal policies and practices of the employer. 1985 Op. Att'y Gen. No. 85-55 (decided under former § 34-8-158).

The results of a properly conducted polygraph examination given with respect to employment are admissible in an administrative proceeding dealing solely with employment upon stipulation of the parties. 1985 Op. Att'y Gen. No. 85-55 (decided under former § 34-8-158).

Claimant with direct interest in labor dispute is disqualified from receiving unemployment benefits until that claimant completely severs the relationship with the employer involved in the dispute and reenters the labor market through an active, good faith attempt to obtain full-time, continuous employment. 1991 Op. Att'y Gen. No. 91-19.

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, § 48 et seq.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, §§ 290, 296, 380 et seq.

ALR. — Amount which employee, or one wrongfully denied employment, has earned, or might have earned, in other employment, or received from other sources as affecting computation of amount to compensate him for loss of time due to unfair labor practice, 144 ALR 399.

What amounts to "misconduct" which precludes benefits under Unemployment Compensation Act to discharged employees, 146 ALR 243.

One who uses his own truck as an independent contractor or an employee of concern for which he transports goods, within social security or Unemployment Compensation Act, 151 ALR 1331.

Power of administrative officer to limit period or disqualification for unemployment benefits, 155 ALR 411.

Circumstances of leaving employment, availability for work, or nature of excuse for refusing re-employment, as affecting right to social security or unemployment compensation, 158 ALR 396; 165 ALR 1382.

Unemployment compensation benefits and incidence of tax upon employer where, during the base year, employee worked in different states for same employer, 9 ALR2d 646.

Leaving employment, or unavailability for particular job or duties, because of sickness or disability, as affecting right to unemployment compensation, 14 ALR2d 1308.

Private employee's loss of employment because of refusal to submit to drug test as

affecting right to unemployment compensation, 86 ALR4th 309.

Unemployment Compensation: Eligibility as affected by claimant's refusal to work at particular times or on particular shifts for domestic or family reasons, 2 ALR5th 475.

Unemployment compensation claimant's eligibility as affected by loss of, or failure to obtain, license, certificate, or similar qualification for continued employment, 15 ALR5th 653.

Eligibility for unemployment compensation as affected by claimant's voluntary separation or refusal to work alleging that the work is illegal or immoral, 41 ALR5th 123.

Leaving employment or unavailability for particular job or duties because of sickness or disability, as affecting right to unemployment compensation, 68 ALR5th 13.

Eligibility for unemployment compensation of employee who retires voluntarily, 75 ALR5th 339.

Work-related inefficiency, incompetence, or negligence as "misconduct" barring unemployment compensation, 95 ALR5th 329.

Use of employer's e-mail or internet system as misconduct precluding unemployment compensation, 106 ALR5th 297.

Unemployment compensation: Harassment or other mistreatment by coworker as "good cause" justifying abandonment of employment, 121 ALR5th 467.

Conduct or activities of employees during off-duty hours as misconduct barring unemployment compensation benefits, 18 ALR6th 195.

Eligibility for unemployment compensation as affected by voluntary resignation because of change of location of residence under statute conditioning benefits upon leaving for "good cause," "just cause," or cause of "necessitous and compelling nature," 25 ALR6th 101.

Eligibility for compensation as affected by voluntary resignation because of change of location of residence under statute conditioning benefits upon leaving for "good cause attributable to the employer," 26 ALR6th 111.

Eligibility for unemployment compensation as affected by voluntary resignation because of change of location of residence under statute denying benefits to certain claimants based on particular disqualifying motive for move or unavailability for, 27 ALR6th 123.

34-8-195. Determination of eligibility for unemployment benefits generally; eligibility while in training; deductions and withholdings from compensation.

(a) An unemployed individual shall be eligible to receive benefits for any week only if such unemployed individual shows to the satisfaction of the Commissioner that each of the following conditions has been met:

(1) The individual has made a claim, has been unemployed or employed less than full time during the regular work week, and has reported his or her deductible earnings in accordance with Code Section 34-8-190;

(2) The individual has registered for work and has continued to report to an employment office as required by regulations prescribed by the Commissioner. The Commissioner may, by regulation, waive or alter either or both of the requirements of this paragraph for cases or situations in which the Commissioner finds that compliance with the requirements would be oppressive or inconsistent with the purposes of this chapter;

(3)(A) The individual is able to work, is available for work, is actively seeking work, and is bona fide in the labor market; provided, however,

that no individual shall be considered available for work or receive benefits for any period that:

(i) The individual is away from work on vacation or leave of absence at the individual's own request;

(ii) The individual is away from work for a vacation period as provided in an employment contract or collective bargaining agreement; or

(iii) The individual is away from work for a vacation period in the absence of an employment contract or collective bargaining agreement and such vacation period is either pursuant to:

(I) An established employer custom, practice, or policy as evidenced by the previous year or years; or

(II) A vacation policy and practice established by the employer by an announcement, made at least 30 days before the beginning of the scheduled period, of a paid vacation plan applicable to the employees who meet the eligibility requirements of the plan.

(B) In no event shall an employee be held unavailable for work or ineligible for benefits under divisions (ii) and (iii) of subparagraph (A) of this paragraph for any period of more than two weeks in any calendar year when such employee is not paid for such period directly or indirectly by the employer or from a fund to which the employer contributes. The usual eligibility requirements shall apply to individuals laid off due to lack of work or for a purported vacation not meeting the conditions set forth in subparagraph (A) of this paragraph;

(4) The individual has participated in reemployment services, such as job search assistance services, if the individual was determined to be likely to exhaust regular benefits and to need reemployment services pursuant to a profiling system established by the Commissioner unless the Commissioner determines that:

(A) Such individual has completed such reemployment services; or

(B) There is justifiable cause for such individual's failure to participate in such reemployment services;

(5) The individual is willing to work under the same general terms and conditions as existed since the beginning of the base period; and

(6) The individual has been paid sufficient wages for insured work to qualify for a weekly benefit amount as provided in Code Section 34-8-193.

(b) An individual who is laid off with a scheduled return-to-work date within six weeks from the date of separation shall be considered attached to the employer and exempt from seeking work. However, if the employee has

not returned to work at the end of that period, the employee must meet the requirements of subsection (a) of this Code section.

(c) An individual shall not be deemed to be unemployed in any week such individual refuses an intermittent or temporary assignment without good cause when the assignment offered is comparable to previous work or assignments performed by the individual or meets the conditions of employment previously agreed to between the individual and the employer. Such individual may be considered unemployed with respect to any week an assignment or work is not offered by the employer; provided, however, an employee of a temporary help contracting firm, an employee leasing company, or a professional employer organization as defined in Code Section 34-7-6 will be presumed to have voluntarily left employment without good cause if the employee does not contact the temporary help contracting firm, employee leasing company, or professional employer organization for reassignment upon completion of an assignment; provided, further, that such failure to contact the temporary help contracting firm, employee leasing company, or professional employer organization will not be considered a voluntary departure from employment unless the employee has been advised in writing of the obligation to contact such employer upon completion of assignments and has been advised in writing that unemployment benefits may be denied for failure to do so.

(d) No otherwise eligible individual shall be denied benefits because that individual is in training with the approval of the Commissioner. Individuals attending such approved training are exempt from the availability and work search requirements of this Code section. Such individual may also refuse work or referrals to job openings while in training without being subject to disqualification under paragraph (3) of Code Section 34-8-194.

(e) A claimant shall not be deemed ineligible or disqualified for benefits because he or she is in training approved by the United States secretary of labor pursuant to the Trade Act of 1974, as amended, or the Job Training Partnership Act of 1982, as amended, even though he or she voluntarily quit work which was not suitable to enter such training or he or she is not able, available, or actively seeking work or he or she refused work during any week of such training. For the purpose of this subsection, the term "suitable work" means, with respect to a claimant, work of a substantially equal or higher skill level than the claimant's past adversely affected work and wages for such work are not less than 80 percent of the claimant's average weekly wage in the adversely affected work; provided, however, no claimant shall be deemed ineligible or disqualified for benefits by operation of paragraph (7) of subsection (a) of Code Section 34-8-197 who is in approved training as referred to in this subsection; provided, further, should the employer respond timely and such voluntary separation on the part of the claimant is without good cause in connection with the claimant's most recent work,

such employer's experience rating account shall not receive charges for any benefits paid as provided for in Code Section 34-8-157; provided, further, should the claimant refuse suitable work while in training and the employer files timely information as provided by regulation, such employer's experience rating account shall not be charged; provided, further, pursuant to Code Section 34-8-159, an employer under Code Section 34-8-158 who has elected to make payments in lieu of contributions is subject to relief of charges under this subsection, only with respect to claims filed with benefit years beginning on or after January 1, 1992.

(f)(1) An individual who files a new claim for unemployment compensation shall, at the time of filing such claim, be advised that:

(A) Unemployment compensation is subject to federal and state income tax;

(B) Requirements exist pertaining to estimated tax payments;

(C) An individual may elect to have federal income tax deducted and withheld from the individual's payment of unemployment compensation in the amount specified in the United States Internal Revenue Code of 1986;

(D) An individual may elect to have state income tax deducted and withheld from the individual's payment of unemployment compensation at the rate of 6 percent; and

(E) An individual shall be permitted to change a previously elected withholding status.

(2) Amounts deducted and withheld from unemployment compensation shall remain in the unemployment fund until transferred to the federal or state taxing authority as payment of income tax.

(3) The Commissioner may follow procedures specified by the United States Department of Labor and the Internal Revenue Service pertaining to the deducting and withholding of income tax.

(4) Amounts shall be deducted and withheld under this Code section only after amounts have been deducted and withheld for any overpayments of unemployment compensation, child support obligations, food stamp overissuances, or other purposes as required under this chapter. (Code 1981, § 34-8-195, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 6, § 34; Ga. L. 1995, p. 348, § 1; Ga. L. 1995, p. 373, § 6; Ga. L. 1996, p. 693, § 5; Ga. L. 2003, p. 362, § 2.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, "overissuances" was substituted for "over issuances" in paragraph (f)(4).

U.S. Code. — The federal Trade Act of 1974 and the federal Job Training Partner-

ship Act of 1982, referred to in subsection (e), are codified at 19 U.S.C. § 2101 et seq. and 29 U.S.C. § 1501 et seq., respectively.

Law reviews. — For note discussing administrative records and reports of public employment agencies with emphasis on the

critical role of the employer, and advocating a qualified, rather than absolute privilege

placed on confidential employer reports, see 11 Mercer L. Rev. 345 (1960).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806, and former Code Section 34-8-151 are included in the annotations for this Code section.

Legislative intent and purpose. — The legislative intent and purpose, that only the involuntarily unemployed whose unemployment is not the result of their own fault, is the foundation upon which Ga. L. 1937, p. 806 (see O.C.G.A. Ch. 8, T. 34) rests. Even though the inability to secure transportation may not be the "fault" of the claimant, there is "fault" attributable to the claimant when the claimant is unable to carry the burden of providing transportation. The claimant must assume the risk of nonpersuasion. *Huiet v. Wallace*, 108 Ga. App. 208, 132 S.E.2d 523 (1963) (decided under Ga. L. 1937, p. 806).

Reasonable availability of claimant. — A claimant does not have to be available for work at all times for all jobs but must be reasonably available. *Caldwell v. Jones*, 129 Ga. App. 893, 201 S.E.2d 823 (1973) (decided under Ga. L. 1937, p. 806).

Willing and able to work. — Evidence that the claimant was able to work approximately seven hours if the claimant could rest off and

on demonstrated that the claimant was willing and able to work. *Caldwell v. Amoco Fabrics Co.*, 163 Ga. App. 74, 293 S.E.2d 57 (1982) (decided under former § 34-8-151).

Substitute teacher was employed on an as-needed basis and was not guaranteed employment with the school system for a certain period of time. The teacher's employment with the school system was intermittent by nature and not the type of employment that the state Employment Security Law was designed to encourage. Consequently, the teacher was not unemployed as defined by statute as a matter of law at the time that the teacher filed a claim for unemployment benefits, and the teacher's claim for benefits was properly denied. *Campbell v. Poythress*, 216 Ga. App. 834, 456 S.E.2d 110 (1995).

Cited in *Huiet v. Schwob Mfg. Co.*, 196 Ga. 855, 27 S.E.2d 743 (1943); *Huiet v. Callaway Mills*, 70 Ga. App. 538, 29 S.E.2d 106 (1944); *Banks v. Huiet*, 111 Ga. App. 607, 142 S.E.2d 421 (1965); *Horton v. Huiet*, 113 Ga. App. 166, 147 S.E.2d 669 (1966); *Finch v. Weinberger*, 407 F. Supp. 34 (N.D. Ga. 1975); *Smith v. Caldwell*, 142 Ga. App. 130, 235 S.E.2d 547 (1977); *Johnson v. Caldwell*, 164 Ga. App. 302, 297 S.E.2d 65 (1982).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the provisions, opinions decided under Ga. L. 1937, p. 806 and former Code Section 34-8-151, which was repealed by Ga. L. 1991, p. 139, § 1, effective January 1, 1992, are included in the annotations for this Code section.

Substitute teacher's eligibility. — While it cannot categorically be said that under no circumstances could a substitute teacher ever, by virtue of employment as such, be entitled to unemployment compensation (each application would have to be evaluated on an individual basis), it would be extraordinarily rare for such a voluntarily, part-time only teacher to be able to meet the law's eligibility requirements. 1977 Op. Att'y

Gen. No. 77-45 (decided under Ga. L. 1937, p. 806).

Determination of disqualification period.

— An unemployment compensation claimant who left the claimant's most recent employment under disqualifying circumstances cannot begin claimant's disqualification period until after the claimant has filed a valid unemployment compensation claim under state law; the claimant cannot count as part of the claimant's disqualification period the time between the day the claimant became unemployed and the day the claimant filed a valid state claim, regardless of whether the claimant has received public funds from any other source during this interim time or served a disqualification period under any

other program. 1976 Op. Att'y Gen. No. 76-27 (decided under Ga. L. 1937, p. 806).

Production of documents under federal immigration provisions. — The Georgia Department of Labor can legally require applicants for employment service to produce the documents required under the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a, for employment before allowing the individuals to register with the employment service or otherwise receive employment service benefits. 1987 Op. Att'y Gen.

No. 87-23 (decided under former § 34-8-151).

Claimant with direct interest in labor dispute is disqualified from receiving unemployment benefits until that claimant completely severs the relationship with the employer involved in the dispute and reenters the labor market through an active, good faith attempt to obtain full-time, continuous employment. 1991 Op. Att'y Gen. No. 91-19.

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 13, 29 et seq.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, §§ 290, 380 et seq.

ALR. — Who is an independent contractor rather than an employee within social security acts or unemployment compensation acts, 124 ALR 682.

Salesman on commission as within unemployment compensation or social security acts, 138 ALR 1413; 29 ALR2d 751.

What amounts to "misconduct" which precludes benefits under Unemployment Compensation Act to discharged employees, 146 ALR 243.

One who uses his own truck as an independent contractor or an employee of concern for which he transports goods, within Social Security or Unemployment Compensation Act, 151 ALR 1331.

Circumstances of leaving employment, availability for work, or nature of excuse for refusing re-employment, as affecting right to social security or unemployment compensation, 158 ALR 396; 165 ALR 1382.

Musicians or other entertainers as employees of establishment in which they perform, within meaning of Workmen's Compensation, Social Security, and Unemployment Compensation Acts, 172 ALR 325.

Unemployment compensation benefits and incidence of tax upon employer where, during the base year, employee worked in different states for same employer, 9 ALR2d 646.

Unemployment compensation as affected by employee's or employer's removal from place of employment, 13 ALR2d 874; 21 ALR4th 317.

Salesman on commission as within unem-

ployment compensation or social security acts, 29 ALR2d 751.

Right to unemployment compensation as affected by vacation or holiday or payment in lieu thereof, 30 ALR2d 366; 3 ALR4th 557; 14 ALR4th 1175.

Right to unemployment compensation or social security benefits of one working on his own projects or activities, 65 ALR2d 1182.

Harassment or garnishment by employee's creditor as constituting misconduct connected with employment so as to disqualify employee for unemployment compensation, 86 ALR2d 1013.

Termination of employment as a result of union action or pursuant to union contract as "voluntary" for purposes of unemployment compensation benefits, 90 ALR2d 835.

Effect on right to state unemployment compensation benefits of receipt of payments under private supplemental unemployment benefit plans, 91 ALR2d 1211.

Severance payments as affecting right to unemployment compensation, 93 ALR2d 1319.

Application for, or receipt of, unemployment compensation benefits as affecting claim for workmen's compensation, 96 ALR2d 941.

Social Security Acts: requisite of employment as affected by family relationship between alleged employer and employee, 8 ALR3d 696.

Unemployment compensation: eligibility as affected by claimant's refusal to work at particular times or on particular shifts, 35 ALR3d 1129; 12 ALR4th 611.

Insurance agents or salesmen as within coverage of social security or unemployment compensation acts, 39 ALR3d 872.

Unemployment compensation: eligibility of employee laid off according to employer's mandatory retirement plan, 50 ALR3d 880.

Termination of employment because of pregnancy as affecting right to unemployment compensation, 51 ALR3d 254.

Right to unemployment compensation as affected by receipt of pension, 56 ALR3d 520.

Eligibility of strikers to obtain public assistance, 57 ALR3d 1303.

Discharge for absenteeism or tardiness as affecting right to unemployment compensation, 58 ALR3d 674.

Unemployment compensation: eligibility of participants in sympathy strike or slowdown, 61 ALR3d 746.

Unemployment compensation: labor dispute disqualification as applicable to striking employee who is laid off subsequent employment during strike period, 61 ALR3d 766.

General principles pertaining to statutory disqualification for unemployment compensation benefits because of strike or labor dispute, 63 ALR3d 88.

Unemployment compensation: harassment or other mistreatment by employer or supervisor as "Good Cause" justifying abandonment of employment, 76 ALR3d 1089.

Alien's right to unemployment compensation benefits, 87 ALR3d 694.

Unemployment compensation: eligibility as affected by claimant's refusal to comply with requirements as to dress, grooming, or hygiene, 88 ALR3d 150.

Unemployment compensation: eligibility as affected by claimant's insistence upon conditions not common or customary to particular employment, 88 ALR3d 1353.

Repayment of unemployment compensation benefits erroneously paid, 90 ALR3d 987.

Unemployment compensation: eligibility as affected by claimant's refusal to accept employment at compensation less than that of previous job, 94 ALR3d 63.

Unemployment compensation: eligibility as affected by claimant's refusal to work at reduced compensation, 95 ALR3d 449.

Part-time or intermittent workers as covered by or as eligible for benefits under State Unemployment Compensation Act, 95 ALR3d 891.

Unemployment compensation: eligibility as affected by mental, nervous, or psychological disorder, 1 ALR4th 802.

Right to unemployment compensation as affected by claimant's receipt of holiday pay, 3 ALR4th 557.

Leaving or refusing employment for religious reasons as barring unemployment compensation, 12 ALR4th 611.

Leaving or refusing employment because of allergic reaction as affecting right to unemployment compensation, 12 ALR4th 629.

Unemployment compensation as affected by vacation or payment in lieu thereof, 14 ALR4th 1175.

Eligibility for unemployment compensation as affected by voluntary resignation because of change of location of residence, 21 ALR4th 317.

Discharge from employment on ground of political views or conduct as affecting right to unemployment compensation, 29 ALR4th 287.

Eligibility for unemployment compensation benefits of employee who attempts to withdraw resignation before leaving employment, 36 ALR4th 395.

Unemployment compensation: harassment or other mistreatment by co-worker as "good cause" justifying abandonment of employment, 40 ALR4th 304.

Unemployment compensation: burden of proof as to voluntariness of separation, 73 ALR4th 1093.

Private employee's loss of employment because of refusal to submit to drug test as affecting right to unemployment compensation, 86 ALR4th 309.

Unemployment compensation: eligibility as affected by claimant's refusal to work at particular times or on particular shifts for domestic or family reasons, 2 ALR5th 475.

Unemployment compensation claimant's eligibility as affected by loss of, or failure to obtain, license, certificate, or similar qualification for continued employment, 15 ALR5th 653.

Employee's control or ownership of corporation as precluding receipt of benefits under state unemployment compensation provisions, 23 ALR5th 176.

Unemployment compensation: leaving employment to become self-employed or to go into business for oneself as affecting right to unemployment compensation, 45 ALR5th 715.

Unemployment compensation: leaving

employment in pursuit of other employment as affecting right to unemployment compensation, 46 ALR5th 659.

Unemployment compensation: leaving employment in pursuit of education or to attend training as affecting right to unemployment compensation, 47 ALR5th 775.

Leaving employment or unavailability for particular job or duties because of sickness or disability, as affecting right to unemployment compensation, 68 ALR5th 13.

Eligibility for unemployment compensa-

tion of employee who retires voluntarily, 75 ALR5th 339.

Conduct or activities of employees during off-duty hours as misconduct barring unemployment compensation benefits, 18 ALR6th 195.

When does vacation pay constitute employee welfare benefit plan for purposes of Employee Retirement Income Security Act (ERISA) (29 U.S.C.S. § 1001 et seq.), 140 ALR Fed 601.

34-8-196. Determination of eligibility for benefits of persons performing certain services; eligibility for benefits of aliens performing services.

(a) *Benefits based on service in educational institutions.* Benefits based on service in employment as defined in subsections (h) and (i) of Code Section 34-8-35 shall be payable in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other services subject to this chapter, except as otherwise provided in this Code section:

(1) With respect to services performed in an instructional, research, or principal administrative capacity for any educational institution, including those operated by the United States government or any of its instrumentalities, divisions, or agencies, benefits shall not be paid during periods of unemployment if services were performed in the prior year, term, or vacation period and there is a contract or a reasonable assurance of returning to work for an educational institution immediately following the period of unemployment. Such periods of unemployment include those occurring:

(A) Between two successive academic terms or years;

(B) During an established and customary vacation period or holiday recess;

(C) During the time period covered by an agreement that provides instead for a similar period between two regular but not successive terms; or

(D) During a period of paid sabbatical leave provided for in the individual's contract; and

(2) With respect to services performed in any other capacity with any educational institution, including those operated by the United States government or any of its instrumentalities, divisions, or agencies, benefits shall not be paid during periods of unemployment if services were performed in the prior year, term, or vacation period and there is a

reasonable assurance of returning to work for an educational institution immediately following the period of unemployment. If compensation is denied pursuant to this paragraph to an individual, however, and that individual is not offered an opportunity to perform services for the educational institution following the unemployed period, such individual shall be entitled to retroactive payment for each week during that period of unemployment a timely claim was filed and benefits were denied solely by reason of this paragraph. Such periods of unemployment include those occurring:

(A) Between two successive academic years or terms; or

(B) During an established and customary vacation period or holiday recess; and

(3) Benefits shall not be paid as specified in paragraphs (1) and (2) of this subsection to any individual for any week of unemployment if the individual performs such services in an educational institution while in the employ of an educational service agency. For the purposes of this paragraph, the term “educational service agency” means a governmental agency or governmental entity that is established and operated exclusively for the purpose of providing such services to one or more educational institutions.

(b) *Benefits based on services in professional sports.* Benefits shall not be paid to an individual on the basis of any services substantially all of which consist of participating in professional sports or athletic events or of training or preparing to so participate for any week which begins during the period between two successive sport seasons or similar periods if such individual performed such services in the first of such seasons or similar periods and there is a reasonable assurance that such individual will perform such services in the later of such seasons or similar periods.

(c) *Benefits based on services performed by aliens.* (1) Benefits shall not be paid to an individual based on services performed by an alien unless such alien was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed.

(2) Any data or information required of individuals applying for benefits to determine whether benefits are payable because of their alien status shall be uniformly required from all applicants for benefits.

(3) In the case of an individual whose application for benefits would otherwise be approved, no determination that benefits to such individual are not payable because of the individual’s alien status shall be made except upon a preponderance of the evidence.

(d) As used in this Code section, the term “reasonable assurance” means a written, verbal, or implied agreement between an employer and its

employee that such employee will be returned to employment following the period of unemployment. (Code 1981, § 34-8-196, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 776, § 4.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 and former Code Section 34-8-152, which was repealed by Ga. L. 1991, p. 139, § 1, effective January 1, 1992, are

included in the annotations for this Code section.

Cited in *Caldwell v. Carswell*, 158 Ga. App. 353, 280 S.E.2d 171 (1981); *Hollis v. Tanner*, 177 Ga. App. 759, 341 S.E.2d 290 (1986).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes — In light of the similarity of the provisions, opinions decided under former Code Section 34-8-152, which was repealed by Ga. L. 1991, p. 139, § 1, are included in the annotations for this Code section.

Amendment of final decisions by agency. — Neither the Department of Labor nor the

Board of Review would have the authority to amend or correct any decision on eligibility made by the department once the decision has become final and the time for appealing has expired without one of the parties to the claim filing an appeal. 1985 Op. Att'y Gen. No. 85-30 (decided under former § 34-8-152).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, § 29 et seq.

C.J.S. — 81 C.J.S., Social Security and Public Welfare, §§ 290, 380 et seq.

ALR. — Who is an independent contractor rather than an employee within social security acts or unemployment compensation acts, 124 ALR 682.

Salesman on commission as within unemployment compensation or social security acts, 138 ALR 1413; 29 ALR2d 751.

Circumstances of leaving employment, availability for work, or nature of excuse for refusing re-employment, as affecting right to social security or unemployment compensation, 158 ALR 396; 165 ALR 1382.

Musicians or other entertainers as employees of establishment in which they perform, within meaning of workmen's compensation, social security, and unemployment insurance acts, 158 ALR 915; 172 ALR 325.

Unemployment compensation benefits and incidence of tax upon employer where, during the base year, employee worked in different states for same employer, 9 ALR2d 646.

Effect on right to state unemployment compensation benefits of receipt of pay-

ments under private supplemental unemployment benefit plans, 91 ALR2d 1211.

Application for, or receipt of, unemployment compensation benefits as affecting claim for workmen's compensation, 96 ALR2d 941.

Social Security Acts: requisite of employment as affected by family relationship between alleged employer and employee, 8 ALR3d 696.

Insurance agents or salesmen as within coverage of social security or unemployment compensation acts, 39 ALR3d 872.

Unemployment compensation: eligibility of employee laid off according to employer's mandatory retirement plan, 50 ALR3d 880.

Eligibility of strikers to obtain public assistance, 57 ALR3d 1303.

General principles pertaining to statutory disqualification for unemployment compensation benefits because of strike or labor dispute, 63 ALR3d 88.

Alien's right to unemployment compensation benefits, 87 ALR3d 694.

Repayment of unemployment compensation benefits erroneously paid, 90 ALR3d 987.

Part-time or intermittent workers as covered by or as eligible for benefits under State

Unemployment Compensation Act, 95 ALR3d 891.

Leaving or refusing employment for religious reasons as barring unemployment compensation, 12 ALR4th 611.

Leaving or refusing employment because of allergic reaction as affecting right to unemployment compensation, 12 ALR4th 629.

34-8-197. Eligibility requirements for extended benefits.

(a) *Definitions.* As used in this Code section, the term:

(1) "Eligibility period" of an individual means the period consisting of the weeks in his or her benefit year which begin in an extended benefit period and, if his or her benefit year ends within such extended benefit period, any weeks thereafter which begin in such period.

(2) "Exhaustee" means an individual who, with respect to any week of unemployment in his or her eligibility period:

(A) Has received, prior to such week, all of the regular benefits that were available to him or her under this chapter or any other state law, including dependents' allowances and benefits payable to federal civilian employees and ex-service personnel under 5 U.S.C. Chapter 85, in his or her current benefit year that includes such week, provided that for the purposes of this subparagraph an individual shall be deemed to have received all of the regular benefits that were available to him or her, although, as a result of a pending appeal with respect to wages that were not considered in the original monetary determination in his or her benefit year, he or she may subsequently be determined to be entitled to added regular benefits;

(B) His or her benefit year having expired prior to such week, has no or insufficient wages on the basis of which he or she could establish a new benefit year that would include such week; and

(C)(i) Has no right to unemployment benefits or allowances under the Railroad Unemployment Insurance Act and such other federal laws as are specified in regulations issued by the United States secretary of labor.

(ii) Has not received and is not seeking unemployment benefits under the unemployment compensation law of Canada; but if he or she is seeking such benefits and the appropriate agency finally determines that he or she is not entitled to benefits under such law, he or she is considered an exhaustee.

(3) "Extended benefit period" means a period which:

(A) Begins with the third week after a week for which there is a state "on" indicator; and

(B) Ends with either of the following weeks, whichever occurs later:

- (i) The third week after the first week for which there is a state "off" indicator; or
- (ii) The thirteenth consecutive week of such period.

However, no extended benefit period may begin by reason of a state "on" indicator before the fourteenth week following the end of a prior extended benefit period which was in effect with respect to this state. There is a state "on" indicator for a week if, for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment under the state law for the period equaled or exceeded 120 percent of the average of such rates for the corresponding 13 week period ending in each of the preceding two calendar years and equaled or exceeded 5 percent. There is a state "off" indicator for a week if, for the period consisting of such week and the immediately preceding 12 weeks, either of the above provisions is not satisfied.

(4) "Rate of insured unemployment," for purposes of paragraph (3) of this subsection, means the percentage derived by dividing:

(A) The average weekly number of individuals filing claims in this state, not including individuals filing claims for extended benefits or regular benefits claimed by federal civilian employees and ex-service personnel, for weeks of unemployment with respect to the most recent 13 consecutive week period, as determined by the Commissioner on the basis of the Commissioner's reports to the United States secretary of labor; by

(B) The average monthly employment covered under this chapter for the first four of the most recent six completed calendar quarters ending before the end of such 13 week period.

(5) "Regular benefits" means benefits payable to an individual under this chapter or under any other state law, including benefits payable to federal civilian employees and to ex-service personnel pursuant to 5 U.S.C. Chapter 85, other than extended benefits.

(6) "State law" means the unemployment insurance law of any state approved by the United States secretary of labor under Section 3304 of the Internal Revenue Code.

(7) "Suitable work" means, with respect to any individual, any work which is within such individual's capabilities, provided that, if the individual furnishes evidence satisfactory to the Commissioner that such individual's prospects for obtaining work in the customary occupation of such individual within a reasonably short period are good, the determination of whether any work is suitable work with respect to such individual shall be made in accordance with this chapter.

(b) *Applicability of provisions as to regular benefits to claims for and payment of extended benefits.* Except when the result would be inconsistent with the other

provisions of this Code section, as provided in the regulations of the Commissioner, the provisions of this chapter which apply to claims for, or the payment of, regular benefits shall apply to claims for, and the payment of, extended benefits. To establish entitlement to extended benefits, an individual must have been paid in at least two quarters of the base period and total wages in the base period must equal or exceed 150 percent of the highest quarter base period wages. The alternative computation for entitlement as required by Code Section 34-8-193 shall not apply to extended benefits.

(c) *Eligibility requirements for extended benefits.* An individual shall be eligible to receive extended benefits with respect to any week of unemployment in the eligibility period of the individual only if the Commissioner finds that with respect to such week:

(1) He or she is an “exhaustee” as defined in paragraph (2) of subsection (a) of this Code section; and

(2) He or she has satisfied the requirements of this chapter for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits; provided, however, that the total extended benefits otherwise payable to an individual who has filed an interstate claim under the interstate benefit payment plan shall not exceed two weeks whenever an extended benefit period is not in effect for such week in the state where the claim is filed; provided, further, if an individual has been disqualified in his or her most recent benefit year or on his or her extended benefit claim, only those who are required to return to work and to earn additional insured wages in employment in order to terminate this disqualification and who satisfy this requirement shall be eligible to receive extended benefits; provided, further, if the benefit year of a claimant ends within an extended benefit period, the number of weeks of extended benefits that such claimant would be entitled to in that extended benefit period, but for this subsection, shall be reduced, but not below zero, by the number of weeks for which the claimant was entitled to trade readjustment allowances during such benefit year. For purposes of this subsection, the terms “benefit year” and “extended benefit period” shall have the same respective meanings.

(d) *Weekly extended benefit amount.* The weekly extended benefit amount payable to an individual for a week of total unemployment in the eligibility period of such individual shall be an amount equal to the weekly benefit amount payable to him or her during his or her applicable benefit year.

(e) *Total extended benefit amount.* The total extended benefit amount payable to any eligible individual with respect to his or her applicable benefit year shall be the least of the following amounts:

(1) Fifty percent of the total amount of regular benefits which were payable to him or her under this chapter in his or her applicable benefit year;

(2) Thirteen times his or her weekly benefit amount which was payable to him or her under this chapter for a week of total unemployment in the applicable benefit year; or

(3) Thirty-nine times the individual's weekly benefit amount which was payable to the individual under this chapter for a week of total unemployment in the applicable benefit year, reduced by the total amount of regular benefits which were paid or deemed paid to him or her under this chapter with respect to the benefit year.

(f) *Notice as to beginning and termination of extended benefit period.* Whenever an extended benefit period is to become effective in this state as a result of the state "on" indicator or whenever an extended benefit period is to be terminated in this state as a result of the state "off" indicator, the Commissioner shall make an appropriate announcement.

(g) *Computations.* Computations required by paragraph (4) of subsection (a) of this Code section shall be made by the Commissioner in accordance with regulations prescribed by the United States secretary of labor.

(h) *Nonpayment of extended benefits for failure to seek or accept work.* Notwithstanding other provisions of this Code section, payment of extended benefits under this Code section shall not be made to any individual for any week of unemployment in his or her eligibility period during which he or she fails:

(1) To accept any offer of suitable work or fails to apply for any suitable work to which he or she was referred by the State Employment Service; or

(2) To engage actively in seeking work. For the purposes of this paragraph, an individual shall be treated as actively engaged in seeking work during any week if:

(A) The individual has engaged in a systematic and sustained effort to obtain work during such week; and

(B) The individual provides tangible evidence to the satisfaction of the Commissioner that he or she has engaged in such an effort during such week.

(i) *Period of nonpayment for extended benefits.* If any individual is ineligible for extended benefits for any week by reason of a failure described in paragraph (1) or (2) of subsection (h) of this Code section, the individual shall be ineligible to receive extended benefits for any week which begins during a period which:

(1) Begins with the week following the week in which such failure occurs; and

(2) Does not end until such individual has been employed during at least four weeks which begin after such failure and for which the total of the remuneration in insured wages for services in employment earned by the individual for being so employed is not less than the product of four multiplied by the individual's weekly benefit amount for his or her benefit year.

(j) *Exceptions to subsection (h) of this Code section.* No individual shall be denied extended benefits under paragraph (1) of subsection (h) of this Code section for any week by reason of a failure to accept an offer of or apply for suitable work:

(1) If the gross average weekly remuneration payable to such individual for the position does not exceed the sum of:

(A) The individual's weekly benefit amount for such individual's benefit year; and

(B) The amount, if any, of supplemental unemployment compensation benefits, as defined in Code Section 34-8-45, payable to such individual for such week;

(2) If the position was not offered to such individual in writing and was not listed with the State Employment Service;

(3) If such failure would not result in a denial of benefits under this chapter to the extent that such provisions are not inconsistent with paragraph (7) of subsection (a) of this Code section and the provisions of subsection (h) of this Code section which relate to individuals actively engaged in seeking work; or

(4) If the position pays wages less than the higher of:

(A) The minimum wage provided by Section 6(a)(1) of the Fair Labor Standards Act of 1938, without regard to any exemption; or

(B) The Georgia minimum wage.

(k) *Referral of claimants to suitable work.* A claimant for extended benefits shall be referred to any suitable work as provided for in paragraph (7) of subsection (a) of this Code section which is not excluded by subsection (j) of this Code section. (Code 1981, § 34-8-197, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1992, p. 6, § 34; Ga. L. 1992, p. 776, § 5.)

U.S. Code. — Section 3304 of the federal Internal Revenue Code, referred to in paragraph (a)(6), is codified at 26 U.S.C. § 3304; the federal Railroad Unemployment Insurance Act, referred to in subparagraph

(a)(2)(c)(i), is codified at 45 U.S.C. §§ 351-369; Section 6(a)(1) of the federal Fair Labor Standards Act of 1938, referred to in subparagraph (j)(4)(A), is codified at 29 U.S.C. § 206 (a)(1).

34-8-198. Payment of child support obligation from benefits.

(a) Each claimant shall disclose to the department whether or not such claimant owes child support obligations which are being enforced pursuant to a plan described in Section 454 of the federal Social Security Act.

(b) The department shall notify the state or local child support enforcement agency that such individual owes child support obligations and is eligible for unemployment compensation.

(c) The department shall cause to be deducted and withheld from any unemployment compensation otherwise payable to such claimant:

(1) The amount specified by the claimant to be deducted and withheld if neither paragraph (2) nor (3) of this subsection is applicable;

(2) The amount determined pursuant to an agreement submitted to the department by the state or local child support enforcement agency under Section 454 of the federal Social Security Act, 42 U.S.C. Section 654; or

(3) Any amount otherwise required to be so deducted and withheld from such unemployment compensation which has been determined through legal process as that term is defined in Section 459 of the federal Social Security Act, 42 U.S.C. Section 659.

(d) Any amount so deducted and withheld pursuant to paragraph (1), (2), or (3) of subsection (c) of this Code section shall be paid to the appropriate state or local child support enforcement agency.

(e) Any amount deducted and withheld pursuant to this Code section shall for all purposes be treated as if it were paid to the claimant as unemployment compensation and then paid by such claimant to the state or local child support enforcement agency in satisfaction of the claimant's child support obligations.

(f) Each state or local child support enforcement agency shall reimburse the department for the administrative costs incurred by the department which are attributable to such child support obligations being enforced by the state or local child support enforcement agency. (Code 1981, § 34-8-198, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1998, p. 1501, § 7.)

Cross references. — Denial or suspension of license for noncompliance with child support order, § 40-5-54.1.

federal Social Security Act, referred to throughout this section, are codified at 42 U.S.C. §§ 654 and 659, respectively.

U.S. Code. — Sections 454 and 459 of the

34-8-199. Definitions; disclosure; withholding uncollected overissuance.

(a) As used in this Code section, the term:

(1) “Uncollected overissuance” has the same meaning as provided in 7 U.S.C. Section 2022(c)(1).

(2) “Unemployment compensation” means any compensation payable under this chapter including amounts payable by the Commissioner pursuant to an agreement under any federal law providing for compensation, assistance, or allowances with respect to unemployment.

(b) An individual filing a new claim for unemployment compensation shall, at the time of filing such claim, disclose whether or not he or she owes an uncollected overissuance of food stamp coupons. The Commissioner shall notify the Department of Human Resources or the successor state food stamp agency enforcing such obligation of any individual who discloses that he or she owes such uncollected overissuance and who is determined to be eligible for unemployment compensation.

(c) The Commissioner shall deduct and withhold from any unemployment compensation payable to an individual who owes an uncollected overissuance:

(1) The amount specified by the individual to the Commissioner to be deducted and withheld as provided by this Code section;

(2) The amount, if any, determined pursuant to an agreement submitted to the Department of Human Resources or the successor state food stamp agency under 7 U.S.C. Section 2022(c)(3)(A); or

(3) Any amount otherwise required to be deducted and withheld from unemployment compensation pursuant to 7 U.S.C. Section 2022(c)(3)(B).

(d) Any amount deducted and withheld pursuant to this Code section shall be paid by the Commissioner to the Department of Human Resources or the successor state food stamp agency.

(e) Any amount deducted and withheld under subsection (d) of this Code section shall for all purposes be treated as if it were paid to the individual as unemployment compensation and paid by such individual to the Department of Human Resources or the successor state food stamp agency as repayment of the individual’s uncollected issuance.

(f) This Code section applies only if arrangements have been made for reimbursement by the Department of Human Resources or the successor state food stamp agency for the administrative costs incurred by the Commissioner under this Code section which are attributable to the repayment of uncollected overissuances to the Department of Human Resources or the successor state food stamp agency. (Code 1981, § 34-8-199, enacted by Ga. L. 1997, p. 888, § 2.)

U.S. Code. — The disposition of claims, waiver, offset and overpayment under the Food Stamp Program, referred to in para-

graphs (a)(1), (c)(2), and (c)(3) of this Code section, is found at 7 U.S.C. § 2022.

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, § 223.

C.J.S. — 81A C.J.S., Social Security and Public Welfare, § 508 et seq.

ARTICLE 8

APPEALS

34-8-220. Appointment of hearing officers to hear and decide appealed decisions.

(a) The Commissioner shall appoint one or more impartial hearing officers to hear and decide appealed decisions. Each hearing officer shall be selected in accordance with Code Section 34-8-74. No person shall participate on behalf of the Commissioner in any case in which he or she is an interested party.

(b) Unless an appeal is withdrawn, an administrative hearing officer, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and initial determination or shall make a decision after hearing on issues referred by the Commissioner pursuant to subsection (b) of Code Section 34-8-192. The parties shall be duly notified of such decision, together with the reasons therefor, which shall be deemed to be the final decision of the Commissioner, unless within 15 days after the date of notification or mailing of such decision further appeal is initiated pursuant to subsection (a) of Code Section 34-8-221. (Code 1981, § 34-8-220, enacted by Ga. L. 1991, p. 139, § 1.)

Law reviews. — For note discussing administrative records and reports of public employment agencies with emphasis on the critical role of the employer, and advocating

a qualified, rather than absolute, privilege placed on confidential employer reports, see 11 Mercer L. Rev. 345 (1960).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 and former Code Section 34-8-172, which was repealed by Ga. L. 1991, p. 139, § 1, effective January 1, 1992, are included in the annotations for this Code section.

Timeliness of appeal. — In a determination of when the decision of a hearing officer becomes final, and the circumstances under which an appeal of such decision can

be maintained, former § 34-8-173 and subsection (b) of former § 34-8-172 (see O.C.G.A. § 34-8-220), being in *pari materia*, must be construed together. *Holstein v. North Chem. Co.*, 194 Ga. App. 546, 390 S.E.2d 910 (1990) (decided under former § 34-8-172).

Assuming *arguendo*, appellant's appeal was not timely within the meaning of former § 34-8-173, the action of the Board of Review in accepting the appeal on its merits,

being done within a reasonable time, was clearly within its express statutory powers. *Holstein v. North Chem. Co.*, 194 Ga. App. 546, 390 S.E.2d 910 (1990) (decided under former § 34-8-172).

Cited in *Dalton Brick & Tile Co. v. Huiet*, 102 Ga. App. 221, 115 S.E.2d 748 (1960); *Horton v. Huiet*, 113 Ga. App. 166, 147

S.E.2d 669 (1966); *Epps Air Serv., Inc. v. Lampkin*, 125 Ga. App. 779, 189 S.E.2d 127 (1972); *Phillips v. Caldwell*, 144 Ga. App. 376, 241 S.E.2d 278 (1977); *Caldwell v. Hospital Auth.*, 248 Ga. 887, 287 S.E.2d 15 (1982); *Shields v. BellSouth Adver. & Publ'g Co.*, 228 F.3d 1284 (11th Cir. 2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Administrative Law, § 508 et seq. 76 Am. Jur. 2d, Unemployment Compensation, § 88 et seq.

C.J.S. — 73A C.J.S., Public Administrative

Law and Procedure, § 305 et seq. 81A C.J.S., Social Security and Public Welfare, § 490 et seq.

34-8-221. Review of decision of hearing officer by board of review.

(a) The board of review may on its own motion affirm, modify, or set aside any decision of an administrative hearing officer on the basis of the evidence previously submitted in such case or direct the taking of additional evidence or may permit any of the parties to such decision to initiate further appeals before the board of review. The board of review shall promptly notify the parties to any proceedings of its findings and decision. The decision of the board shall be final.

(b) The board of review may, in its discretion and on its own motion, reconsider its final decision at any time within 15 days of the release of the final decision of the board. The board shall notify all concerned parties of its intent to reconsider a final decision. Such notice shall stay the process of judicial review until a final decision is released by the board.

(c) The quorum for the board of review shall be two members. No meeting of the board shall be scheduled when it is anticipated that less than two members will be present, and no hearing shall be held nor decision released by the board in which less than two members participated.

(d) In the event only two members are able to vote on a case and one member votes to affirm the decision of the administrative hearing officer but the other member votes to reverse the decision or remand the case for another hearing, the decision of the administrative hearing officer shall stand affirmed.

(e) The Commissioner shall provide the board of review and the office of administrative appeals with proper facilities and assistants for the execution of their functions. (Code 1981, § 34-8-221, enacted by Ga. L. 1991, p. 139, § 1.)

JUDICIAL DECISIONS

Cited in *Shields v. BellSouth Adver. & Publ'g Co.*, 228 F.3d 1284 (11th Cir. 2000).

34-8-222. Procedure for appeal of claims to board of review; record of proceedings.

The manner in which appealed claims shall be presented and the conduct of hearings and appeals shall be in accordance with regulations prescribed by the Commissioner for determining the rights of the parties. It is not required that such regulations conform to common law or statutory rules of evidence and other technical rules of procedure. A full and complete record shall be kept of all proceedings in connection with an appealed claim. All testimony at any hearing upon a claim before the administrative hearing officer shall be mechanically recorded but need not be transcribed unless the disputed claim is further appealed. The board of review, in its sole discretion, shall have the power to determine the necessity for transcription of any record to be considered by it. However, no provision of this Code section shall preclude the Commissioner from making the original documents, papers, and transcripts available for inspection upon written request by any party to the proceedings. Documents, papers, and transcripts shall be available for inspection during normal working hours at the office of the department in Atlanta or at the local office of the department where the original claim for benefits under this law was filed. Due to the confidential nature of the proceedings, only agency personnel or the board of review shall be permitted to make a recording of any type whatsoever of any hearing involving a claim for benefits or an appeal therefrom. The hearing may be recorded by one or both of the interested parties, provided prior written consent is received by the office of administrative appeals from all interested parties. (Code 1981, § 34-8-222, enacted by Ga. L. 1991, p. 139, § 1.)

Law reviews. — For note discussing administrative records and reports of public employment agencies with emphasis on the critical role of the employer, and advocating

a qualified, rather than absolute, privilege placed on confidential employer reports, see 11 Mercer L. Rev. 345 (1960).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 are included in the annotations for this Code section.

Evidence in statutory proceedings. — Workers' compensation law spoke of evidence, witnesses, oaths of witnesses, depositions, and the like; and the Supreme Court found nothing that would lead to the view

that what was wholly without probative value in other proceedings may be taken as evidence in a proceeding under this statute. *Huiet v. Schwob Mfg. Co.*, 196 Ga. 855, 27 S.E.2d 743 (1943) (decided under Ga. L. 1937, p. 806).

Procedural rules. — What section 6 of the unemployment compensation act means, and all that it means, is that the Department

of Labor need not observe the niceties of pleading, or follow the technical rules as to method of producing and hearing evidence or the examination of witnesses. *Huiet v. Schwob Mfg. Co.*, 196 Ga. 855, 27 S.E.2d 743 (1943) (decided under Ga. L. 1937, p. 806).

Required determinations of Board of Review. — In a case where unemployment benefits were denied to an employee who was discharged for striking a co-worker and where the Department of Labor Board of Review failed to make a critical factual deter-

mination as to provocation pursuant to department rules, it was error for the superior court to make new factual determinations on the issue, but, rather, the case should have been remanded to the department for determining provocation. *TNS Mills v. Russell*, 213 Ga. App. 14, 443 S.E.2d 658 (1994).

Cited in *Epps Air Serv., Inc. v. Lampkin*, 125 Ga. App. 779, 189 S.E.2d 127 (1972); *Miller Brewing Co. v. Carlson*, 162 Ga. App. 94, 290 S.E.2d 200 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Administrative Law, § 511 et seq. 76 Am. Jur. 2d, Unemployment Compensation, §§ 89, 90.

C.J.S. — 73A C.J.S., Public Administrative

Law and Procedure, § 305 et seq. 81A C.J.S., Social Security and Public Welfare, § 490 et seq.

34-8-223. Procedure for judicial review of final decisions of board of review.

(a) Any decision of the board of review, in the absence of a reconsideration as provided in subsection (d) of Code Section 34-8-192, shall become final 15 days after the date of notification or mailing. Judicial review shall be permitted only after any party claiming to be aggrieved thereby has exhausted his or her administrative remedies as provided by this chapter. The Commissioner shall be deemed to be a party to any judicial action involving any such decision and shall be represented in any such judicial action by the Attorney General.

(b) Within 15 days after the decision of the board of review has become final, any party aggrieved thereby may secure judicial review by filing a petition against the Commissioner in the superior court of the county where the employee was last employed. In the event the individual was last employed in another state, such appeal shall be filed in Fulton County, Georgia. Any other party to the proceeding before the board of review shall be made a respondent. The petition, which need not be verified but which shall state specifically the grounds upon which a review is sought, shall be served upon the Commissioner or upon such person as the Commissioner may designate, and such service shall be deemed completed service on all parties, but there shall be left with the party so served as many copies of the petition as there are respondents. The Commissioner shall mail one such copy to each such respondent. Within 30 days after the service of the petition, the Commissioner shall certify and file with the superior court all documents and papers and a transcript of all testimony taken in the matter, together with the board of review's findings of fact and decision therein. The Commissioner shall not be required to furnish any person with a copy of the aforementioned documents, papers, or transcripts or the original of

these items prior to the Commissioner's filing these items with the court. The Commissioner may also, in his or her discretion, certify to such court questions of law involved in any decision. As a guide for future interpretation of the law, when the Commissioner is aggrieved by any decision of the board of review or deems such decision contrary to the law and no other party enters an appeal therefrom, the Commissioner may, within 20 days after such decision has become final, appeal and certify to the superior court questions of law therein involved. The court shall consider and determine the same and enter a decree accordingly, which shall be subject to further appeal by the Commissioner. In any judicial proceeding under this Code section, the findings of the board of review as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. Such actions and the questions so certified shall be heard in a summary manner and shall be given precedence over all other civil cases except cases to which the state is a material party and cases arising under Chapter 9 of this title. An appeal may be taken from the decision of the superior court to the Court of Appeals in the same manner as is provided in civil cases but not inconsistent with this chapter. No bond shall be required for entering an appeal. (Code 1981, § 34-8-223, enacted by Ga. L. 1991, p. 139, § 1.)

Law reviews. — For note discussing administrative records and reports of public employment agencies with emphasis on the critical role of the employer, and advocating

a qualified, rather than absolute, privilege placed on confidential employer reports, see 11 Mercer L. Rev. 345 (1960).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 and former Code Section 34-8-176, which was repealed by Ga. L. 1991, p. 139, § 1, effective January 1, 1992, are included in the annotations for this Code section.

Statutory construction. — Ga. L. 1937, p. 806 and the Administrative Procedure Act are in derogation of the common law and must be strictly construed. *Caldwell v. Corbin*, 152 Ga. App. 153, 262 S.E.2d 516 (1979) (decided under Ga. L. 1937, p. 806).

Board of review's findings. — In a judicial proceeding, the findings of the board of review as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. *Caldwell v. Corbin*, 152 Ga. App. 153, 262 S.E.2d 516 (1979) (decided under Ga. L. 1937, p. 806; see O.C.G.A. § 34-8-223). *TNS*

Mills v. Russell, 213 Ga. App. 14, 443 S.E.2d 658 (1994).

If there is any evidence to support a finding of the Board of Review, it will be approved. *Caldwell v. Charlton County Bd. of Educ.*, 157 Ga. App. 395, 277 S.E.2d 764 (1981); *Brown v. Caldwell*, 165 Ga. App. 743, 302 S.E.2d 359 (1983); *Green v. Tanner*, 186 Ga. App. 715, 368 S.E.2d 162 (1988) (decided under Ga. L. 1937, p. 806 and former § 34-8-176).

The Superior Court is not authorized to weigh the evidence and substitute its factfindings for those of the administrative trier of fact. *McGahee v. Yamaha Motor Mfg. Corp.*, 214 Ga. App. 473, 448 S.E.2d 249 (1994).

Failure to exhaust administrative remedies. — Because a discharged at-will city employee filed an administrative appeal from the denial of the employee's request for unemployment compensation benefits,

the employee had not yet exhausted the administrative remedies and the matter was not ripe for judicial review, pursuant to O.C.G.A. § 34-8-223(a). *Reid v. City of Albany*, 276 Ga. App. 171, 622 S.E.2d 875 (2005).

Failure to discharge duties. — The factfinder is best suited to determine whether a failure to discharge duties within the meaning of the law occurred where the employer considered a certain level of achievement or proficiency to be the requisite standard, and the employee failed to attain the necessary proficiency and the evidence did not demand a finding of failure through fault or conscious neglect. *Caldwell v. Corbin*, 152 Ga. App. 153, 262 S.E.2d 516 (1979) (decided under Ga. L. 1937, p. 806).

Additional evidence. — Where the claimant did not agree that the superior court could consider additional evidence, such as personnel records, and thereby waived the requirement of Ga. L. 1964, p. 338, § 20 (see O.C.G.A. § 50-13-19(f)) as to an application made to the court for leave to present additional evidence and where counsel for the commissioner did not waive the requirement of the law but specifically pointed out that

the case should be remanded to the Board of Review for purposes of introduction of such additional evidence, including personnel records, there has been no waiver of the requirement of those provisions, and the presentation of additional evidence constitutes reversible error. *Caldwell v. Corbin*, 152 Ga. App. 153, 262 S.E.2d 516 (1979) (decided under Ga. L. 1937, p. 806).

Cited in *Zachos v. Huiet*, 195 Ga. 780, 25 S.E.2d 806 (1943); *Dalton Brick & Tile Co. v. Huiet*, 102 Ga. App. 221, 115 S.E.2d 748 (1960); *Huiet v. Wallace*, 108 Ga. App. 208, 132 S.E.2d 523 (1963); *Banks v. Huiet*, 111 Ga. App. 607, 142 S.E.2d 421 (1965); *Epps Air Serv., Inc. v. Lampkin*, 125 Ga. App. 779, 189 S.E.2d 127 (1972); *Smith v. Caldwell*, 142 Ga. App. 130, 235 S.E.2d 547 (1977); *Johnson v. Caldwell*, 148 Ga. App. 617, 251 S.E.2d 837 (1979); *Caldwell v. Atlanta Bd. of Educ.*, 152 Ga. App. 291, 262 S.E.2d 573 (1979); *Bulloch Academy v. Cornett*, 184 Ga. App. 42, 360 S.E.2d 615 (1987); *Holstein v. North Chem. Co.*, 194 Ga. App. 546, 390 S.E.2d 910 (1990); *Barron v. Poythress*, 219 Ga. App. 775, 466 S.E.2d 665 (1996); *Shields v. BellSouth Adver. & Publ'g Co.*, 228 F.3d 1284 (11th Cir. 2000).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the provisions, opinions decided under Ga. L. 1937, p. 806 and former Code Section 34-8-176, which was repealed by Ga. L. 1991, p. 139, § 1, effective January 1, 1992, are included in the annotations for this Code section.

Notification of determinations. — The State Department of Labor Board of Review cannot require that notification of claimants of determinations as to payment be by registered mail. 1972 Op. Att'y Gen. No. U72-57 (decided under Ga. L. 1937, p. 806).

Representation of Department of La-

bor. — The Attorney General is to represent the Department of Labor. See 1984 Op. Att'y Gen. No. 84-48 (decided under former § 34-8-176).

Amendment of final decisions by agency. — Neither the Department of Labor nor the Board of Review would have the authority to amend or correct any decision on eligibility made by the department once the decision has become final and the time for appealing has expired without one of the parties to the claim filing an appeal. 1985 Op. Att'y Gen. No. 85-30 (decided under former § 34-8-176).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Administrative Law, § 524. 76 Am. Jur. 2d, Unemployment Compensation, § 89 et seq.

C.J.S. — 73A C.J.S., Public Administrative Law and Procedures, § 313 et seq. 81A

C.J.S., Social Security and Public Welfare, § 493 et seq.

ALR. — Unemployment compensation: eligibility as affected by claimant's refusal to work at particular times or on particular

shifts, 35 ALR3d 1129; 12 ALR4th 611.

Unemployment compensation: eligibility as affected by claimant's refusal to work at

particular times or on particular shifts for domestic or family reasons, 2 ALR5th 475.

34-8-224. Fee for witnesses subpoenaed under article.

Witnesses subpoenaed pursuant to this article shall be allowed fees at a rate fixed by the Commissioner. Such fees shall be deemed a part of the expense of administering this chapter. (Code 1981, § 34-8-224, enacted by Ga. L. 1991, p. 139, § 1.)

Law reviews. — For note discussing administrative records and reports of public employment agencies with emphasis on the critical role of the employer, and advocating

a qualified, rather than absolute, privilege placed on confidential employer reports, see 11 Mercer L. Rev. 345 (1960).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 are included in the annotations for this Code section.

Cited in Epps Air Serv., Inc. v. Lampkin, 125 Ga. App. 779, 189 S.E.2d 127 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Administrative Law, § 339.

C.J.S. — 73A C.J.S., Public Administrative Law and Procedure, §§ 247, 248.

ARTICLE 9

PROHIBITED AND VOID ACTS; OVERPAYMENTS

34-8-250. Prohibited agreements and activities; penalty.

Any agreement by an individual to waive, release, or commute his or her rights to benefits or any other rights under this chapter shall be void. Any agreement by any individual in the employ of any person or concern to pay all or any portion of an employer's contributions or payments in lieu of contributions required under this chapter from such employer shall be void. No employer shall directly or indirectly make, require, or accept any deduction from the wages of any individual in his or her employ to finance the employer's contributions or payments in lieu of required contributions or require or accept any waiver of any right under this chapter by any such individual. Any employer or agent of an employer who violates any provision of this Code section shall, for each offense and upon conviction, be guilty of a misdemeanor. (Code 1981, § 34-8-250, enacted by Ga. L. 1991, p. 139, § 1.)

Cross references. — Punishment for misdemeanors generally, § 17-10-3.

34-8-251. Fees for claiming benefits prohibited; attorney's fees; penalty.

No individual claiming benefits shall be charged fees of any kind in any proceeding under this chapter by the Commissioner, the board of review, or representatives of the Commissioner or the board of review, or by any court or any officer thereof. Any individual claiming benefits in any proceeding before a court, the Commissioner, the board of review, or representatives of the Commissioner or the board of review may be represented by counsel or other duly authorized agent; but no such counsel or agents shall either charge or receive for such services more than an amount approved by the board of review. Any person who violates any provision of this Code section shall upon conviction be guilty of a misdemeanor. (Code 1981, § 34-8-251, enacted by Ga. L. 1991, p. 139, § 1.)

Cross references. — Punishment for misdemeanors generally, § 17-10-3.

34-8-252. Assignment, pledge, or encumbrance of right to benefits void; benefits exempt; waiver of exemption void.

Any assignment, pledge, or encumbrance of any right to benefits which are or may become due or payable under this chapter shall be void. Such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debt except child support obligations as described in Code Section 34-8-198 and overpayment for benefits as described in Code Section 34-8-254; and benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts except debts incurred for necessities furnished to such individual or his or her spouse or dependents during the time when such individual was unemployed. No waiver of any exemption provided for in this Code section shall be valid. (Code 1981, § 34-8-252, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-253. Obedience to subpoena required; self-incrimination.

No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, and other records before the Commissioner, the board of review, an administrative hearing officer, or any duly authorized representative of any of them or in obedience to the subpoena of any of them in any cause or proceeding before the Commissioner, the board of review, or an administrative hearing officer on the ground that the testimony or evidence, documentary or otherwise, required of him or her may tend to incriminate him or her or

subject him or her to a penalty or forfeiture. However, no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which the individual is compelled, after having claimed the privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual testifying shall not be exempt from prosecution and punishment for perjury committed in testifying. (Code 1981, § 34-8-253, enacted by Ga. L. 1991, p. 139, § 1.)

34-8-254. Overpayments.

(a) Any person who has received any sum as benefits under this chapter while any conditions for the receipt of benefits imposed by this chapter were not fulfilled or while the person was disqualified from receiving benefits shall, in the discretion of the Commissioner, either be liable to have such sums deducted from any future benefits payable to such person under this chapter, no single deduction to exceed 50 percent of the amount of the payment from which such deduction is made, or shall be liable to repay the Commissioner for the Unemployment Compensation Fund a sum equal to the amount so received by him. Such sum shall be collectable in the manner provided by law for the collection of debts or any other method of collection specifically authorized by this chapter.

(b) For the purpose of collecting overpaid benefits when the individual who owes the payment resides or is employed outside the State of Georgia, the Commissioner may enter into an agreement with one or more private persons, companies, associations, or corporations providing debt collection services; provided, however, the Commissioner shall retain legal responsibility and authority for the collection of overpayments of benefits and any debt collection agency shall function merely as an agent of the Commissioner for this purpose. The agreement may provide, at the discretion of the Commissioner, the rate of payment and the manner in which compensation for services shall be paid. The Commissioner shall provide the necessary information for the contractor to fulfill its obligations under the agreement. Any funds recovered shall be transmitted promptly to the Commissioner for deposit into the Unemployment Trust Fund.

(c) The Commissioner may waive the repayment of an overpayment of benefits if the Commissioner determines such repayment to be inequitable. If any person receives such overpayment because of false representations or willful failure to disclose a material fact by such individual, inequity shall not be a consideration and the person shall be required to repay the entire overpayment; provided, however, that penalty and interest accrued on the overpayment are subject to waiver if the Commissioner determines such waiver to be in the best interest of the state.

(d) Any person who has received any sum as benefits under this chapter and is subsequently awarded or receives back wages from any employer for

all or any portion of the same period of time for which such person has received such benefits shall be liable to repay a sum equal to the benefits paid during the period for which such back wages were awarded, as follows:

(1) An employer shall be authorized to deduct from an award of back wages the amount of unemployment benefits received by such person under this chapter with respect to the same period of time. The employer shall remit the amount deducted to the Commissioner for the Unemployment Compensation Fund. Upon receipt of such payment the Commissioner shall then make appropriate adjustments in the unemployment contributions experience rating account of the employer as otherwise provided in this chapter; and

(2) If the employer is a governmental entity or nonprofit organization that has elected to make payments in lieu of contributions in accordance with Code Section 34-8-158 and the employee is subsequently awarded or otherwise receives payment of back wages for any period of time for which the employee received benefits under this chapter, said employer shall be entitled to a setoff against the award of back wages in an amount equal to all benefits paid to the employee during the period for which such back wages are awarded or received. (Code 1981, § 34-8-254, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1994, p. 640, § 5; Ga. L. 1994, p. 779, § 1.)

JUDICIAL DECISIONS

Cited in *Powell v. Dougherty Christian Academy, Inc.*, 215 Ga. App. 551, 451 S.E.2d 465 (1994).

OPINIONS OF THE ATTORNEY GENERAL

Community service instead of restitution not authorized. — O.C.G.A. Ch. 8, T. 34 does not authorize the imposition of a criminal sentence for unemployment fraud that per-

mits community service in lieu of restitution of overpaid benefits to the Department of Labor. 1993 Op. Att'y Gen. No. 93-15.

34-8-255. Effect of false statements and misrepresentations made to obtain or increase benefits.

Any person who knowingly makes a false statement or misrepresentation as to a material fact or who knowingly fails to disclose a material fact to obtain or increase benefits under this chapter, either for himself or herself or for any other person, or who knowingly accepts benefits under this chapter to which such person is not entitled shall, upon an appropriate finding by the Commissioner, cease to be eligible for such benefits and an overpayment of benefits shall be computed without the application of deductible earnings as otherwise provided in Code Section 34-8-193. A penalty of 10 percent may be added to the overpayment and become part

of the overpayment. Interest shall accrue on the unpaid portion of such overpayment at a rate of 1 percent per month until repaid to the Commissioner for the Unemployment Compensation Fund. Further, such person shall forfeit all unpaid benefits for any weeks of unemployment subsequent to the date of the determination issued by the Commissioner covering said act or omission. The ineligibility shall include any unpaid benefits to which the person would otherwise be entitled during the remainder of any incomplete calendar quarter in which said determination is made and the next four complete calendar quarters immediately following the date of said determination; provided, however, such person shall be required to repay benefits received for any week as specified in said determination. No determination may be made by the Commissioner more than four years after such occurrence, act, or omission. Any such determination by the Commissioner may be appealed in the same manner as provided for the appeal from an initial determination in Article 8 of this chapter. The provisions of this Code section shall be in addition to, and not in lieu of, any provision contained in any of the other Code sections in this chapter. (Code 1981, § 34-8-255, enacted by Ga. L. 1991, p. 139, § 1; Ga. L. 1994, p. 640, § 6.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1937, p. 806 are included in the annotations for this Code section.

Cited in Epps Air Serv., Inc. v. Lampkin, 229 Ga. 792, 194 S.E.2d 437 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Unemployment Compensation, §§ 9, 34.

C.J.S. — 81A C.J.S., Social Security and Public Welfare, §§ 509, 512.

ALR. — Repayment of unemployment

compensation benefits erroneously paid, 90 ALR3d 987.

Right to unemployment compensation as affected by misrepresentation in original employment application, 23 ALR4th 1272.

34-8-256. Penalties for false representation or fraudulent claims.

(a) Any person who knowingly makes a false representation or knowingly fails to disclose a material fact to obtain or increase any benefit or payment under this chapter or under an employment insurance act of any other state or government, either for himself or herself or for any other person, whether such benefit or payment is actually received or not, shall upon conviction be guilty of a misdemeanor. Each such act shall constitute a separate offense. However, if a false representation or failure to disclose a material fact occurs with respect to more than one claim, which claim was made in more than one benefit year, or if the benefits received under this chapter which were the subject of a false representation or failure to disclose a material fact exceed \$4,000.00, any such person shall upon

conviction be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years or fined not less than \$1,000.00 or shall be subject to both such fine and imprisonment.

(b) Any employing unit or any officer or agent of an employing unit or any other person who knowingly makes a false statement or representation or who knowingly fails to disclose a material fact in order to prevent or reduce the payment of benefits to any individual entitled thereto or to avoid becoming or remaining subject to this chapter or to avoid or reduce any contribution or other payment required from an employing unit under this chapter or who willfully fails or refuses to make any such contributions or other payment or to furnish any reports required under this chapter or to produce or permit the inspection or copying of records as required under this chapter shall upon conviction be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or fined not more than \$1,000.00 or shall be subject to both such fine and imprisonment. Each such act shall constitute a separate offense.

(c) Any person who establishes a fictitious employing unit for the purpose of enabling such person or another person to receive benefits under this chapter to which such person is not entitled shall upon conviction be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years or fined not less than \$1,000.00 or shall be subject to both such fine and imprisonment.

(d) Any person who removes, deposits, or conceals or aids in removing, depositing, or concealing any property upon which a levy is authorized under any Code section of this chapter with intent to evade or defeat the assessment collection of any debt may be fined not more than \$5,000.00 or imprisoned for not more than three years or shall be subject to both such fine and imprisonment and shall be liable to the state for the costs of prosecution.

(e) Any person who willfully violates any provision of this chapter or any order, rule, or regulation under this chapter, the violation of which is made unlawful or the observance of which is required under the terms of this chapter and for which a penalty is neither prescribed in this chapter nor provided by any other applicable provision of this Code section, shall upon conviction be guilty of a misdemeanor; and each day such violation continues shall be deemed to be a separate offense. (Code 1981, § 34-8-256, enacted by Ga. L. 1991, p. 139, § 1.)

Cross references. — Punishment for misdemeanors generally, § 17-10-3.

JUDICIAL DECISIONS

Default of debtor and bankruptcy. — (Department) filed a state criminal action Where the Georgia Department of Labor against a debtor pursuant to O.C.G.A.

§ 34-8-256(a) after the debtor defaulted on an agreement to repay excess unemployment benefits that were fraudulently obtained in lieu of prosecution, the bankruptcy court declined to enjoin the criminal action, and granted the Department's motion for summary judgment, because any interference with the debtor's discharge was a distant and speculative event, rather than a great and immediate threat; the debtor had not been convicted and the bankruptcy court had not entered the discharge order. *Smith v. Goode (In re Smith)*, 301 B.R. 96 (Bankr. M.D. Ga. 2003).

Employer's false statements do not support at-will employee's wrongful discharge claim. — Although a discharged at-will city employee's claims that the employer falsified the separation notice and conspired to deceive the Department of Labor for purposes of denying the employee unemployment compensation benefits could possibly have implicated the criminal provisions of O.C.G.A. §§ 34-2-13(b) and 34-8-256(b), there was nothing in those statutes that authorized a wrongful discharge claim on that basis. *Reid v. City of Albany*, 276 Ga. App. 171, 622 S.E.2d 875 (2005).

OPINIONS OF THE ATTORNEY GENERAL

Community service instead of restitution not authorized. — O.C.G.A. Ch. 8, T. 34 does not authorize the imposition of a criminal sentence for unemployment fraud that per-

mits community service in lieu of restitution of overpaid benefits to the Department of Labor. 1993 Op. Att'y Gen. No. 93-15.

ARTICLE 10

UNEMPLOYMENT TAX AMNESTY

34-8-270. Short title.

This article shall be known and may be cited as the "Unemployment Tax Amnesty Program." (Code 1981, § 34-8-270, enacted by Ga. L. 1994, p. 837, § 1.)

34-8-271. Legislative findings, declarations, and intent.

The General Assembly finds and declares that a public purpose is served by the waiver of interest on unemployment tax, penalties, and criminal prosecution in return for the immediate reporting and payment of previously underreported, unreported, or unpaid unemployment contributions liabilities. The General Assembly further finds and declares that the benefits gained through this program include, among other things, increased collection of certain currently owed unemployment contributions, permanently bringing into the unemployment insurance system employers who have been evading payment of unemployment contributions and providing an opportunity for such employers to satisfy unemployment contributions obligations before stepped-up unemployment tax enforcement programs take effect. It is the intention of the General Assembly in enacting this article that the unemployment tax amnesty program provided under this article be a one-time occurrence which shall not be repeated in the future because employers' expectations of any future amnesty programs could

have a counterproductive effect on compliance under this article. (Code 1981, § 34-8-271, enacted by Ga. L. 1994, p. 837, § 1.)

34-8-272. Definitions.

As used in this article, the term:

(1) “Accounts receivable” means an amount of unemployment contribution, tax, administrative assessment, reimbursement in lieu of contributions, penalty, or interest which has been recorded as due and entered in the account records or any ledger maintained in the department, or which an employer should reasonably expect to become due as a direct or indirect result of any pending or completed audit or investigation, which an employer knows is being conducted by any federal, state, or local taxing authority.

(2) “Employer” means any individual, partnership, joint venture, association, limited liability company, corporation, receiver, trustee, guardian, executor, administrator, fiduciary, or any other entity of any kind subject to any unemployment tax, contribution, or reimbursement in lieu of contributions, or any person required to collect any such unemployment tax, contribution, or reimbursement in lieu of contributions under this chapter, and as further defined in Code Section 34-8-33. The term shall also include any individual who has been deemed personally liable for the debt under the authority of Code Section 34-8-167.

(3) “Final, due, and owing” means an assessment of unemployment contributions which has become final and is owed to the state due to either the expiration of the employer’s appeal rights or, in the case of an assessment which has been appealed, either pursuant to Chapter 13 of Title 50, the “Georgia Administrative Procedure Act,” or pursuant to Code Section 34-8-220, the rendition of the final order by the Commissioner or by any court of this state. Assessments that have been appealed shall be final, due, and owing 15 days after the last unappealed or unappealable order sustaining the assessment or any part thereof has become final. Assessments that have not been appealed shall be final, due, and owing 15 days after service of notice of assessment pursuant to Code Section 34-8-170.

(4) “Unemployment tax” shall include any unemployment tax or contribution, administrative assessment, or reimbursement in lieu of contributions or recording costs incurred thereon. (Code 1981, § 34-8-272, enacted by Ga. L. 1994, p. 837, § 1.)

34-8-273. Development and administration of program; applicability and time period of program.

(a) The Commissioner shall develop and administer a one-time unemployment tax amnesty program as provided in this article. The Commis-

sioner shall, upon the voluntary return and remission of unemployment taxes and interest owed by any employer, waive all penalties that are assessed or subject to being assessed for outstanding liabilities for taxable periods ending or transactions occurring on or before December 31, 1994. The Commissioner shall provide by regulation as necessary for the administration of this amnesty program and shall further provide for necessary forms for the filing of amnesty applications and returns.

(b) Notwithstanding the provisions of any other law to the contrary, the unemployment tax amnesty program shall begin by October 1, 1994, and shall be completed no later than December 31, 1994, and shall apply to all employers owing unemployment taxes, penalties, or interest administered by the Commissioner under the provisions of this chapter. The program shall apply to unemployment tax liabilities for taxable periods ending or transactions occurring on or before December 31, 1994. Amnesty unemployment tax return forms shall be in a form prescribed by the Commissioner. (Code 1981, § 34-8-273, enacted by Ga. L. 1994, p. 837, § 1.)

34-8-274. Application for amnesty; conditions of participation in program; installment payments; penalties or criminal action.

(a) The provisions of this article shall apply to any eligible employer who files an application for amnesty within the time prescribed by the Commissioner and does the following:

(1) Files such returns as may be required by the Commissioner for all years or tax reporting periods as stated on the application for which returns have not previously been filed and files such returns as may be required by the Commissioner for all years or tax reporting periods for which returns were filed but the tax liability was underreported;

(2) Pays in full within the unemployment tax amnesty period the unemployment taxes that are final, due, and owing for the respective tax periods, the unemployment taxes for which application is made under the amnesty unemployment tax program or for which amnesty unemployment tax returns are filed during the amnesty time period, pays with the unemployment taxes the amount of interest due, and pays the amount of any additional unemployment tax and interest which is owed as may be determined by the Commissioner, such additional payment to be made within 30 days of notification to the employer by the Commissioner that such additional unemployment tax and interest is owed; provided, however, that the failure to pay such additional tax and interest within 30 days of such notification shall invalidate any amnesty granted pursuant to this article; and

(3) The Commissioner may, in his or her discretion, impose by regulation, the further condition that, in addition to the requirements set forth in paragraphs (1) and (2) of this subsection, the requirement that

any eligible employer also pay in full within the amnesty period all unemployment taxes previously assessed by the Commissioner that are final, due, and owing at the time the application or amnesty unemployment tax returns are filed, pays with the unemployment taxes the amount of interest due, and pays within 30 days of notification by the Commissioner the amount of any additional interest owed.

(b) An eligible employer may participate in the amnesty program whether or not the employer is under audit, notwithstanding the fact that the amount due is included in a proposed assessment or an assessment, bill, notice, or demand for payment issued by the Commissioner, and without regard to whether the amount due is subject to a pending administrative or judicial proceeding. An eligible employer may participate in the amnesty program to the extent of the uncontested portion of any assessed liability. However, participation in the program shall be conditioned upon the employer's agreement that the right to protest or initiate an administrative or judicial proceeding or to claim any refund of moneys paid under the program is barred with respect to the amounts paid with the application or amnesty return.

(c) The Commissioner may enter into an installment payment agreement in cases of severe hardship in lieu of the complete payment required under subsection (a) of this Code section. In such cases, 25 percent of the amount due shall be paid with the application or amnesty return with the balance to be paid in monthly installments of not less than 25 percent of the original amount nor to exceed three months following the expiration of the amnesty period. Failure of the employer to make timely payments shall void the terms of the amnesty program. All such agreements and payments shall include interest due and accruing during the installment agreement.

(d) If, following the termination of the unemployment tax amnesty period, the Commissioner issues a deficiency assessment based upon information independent of that shown on a return filed pursuant to subsection (a) of this Code section, the Commissioner shall have the authority to impose penalties and criminal action may be brought where authorized by law only with respect to the difference between the amount shown on the amnesty unemployment tax return and the correct amount of unemployment tax due. The imposition of penalties or criminal action shall not invalidate any waiver granted under Code Section 34-8-275. (Code 1981, § 34-8-274, enacted by Ga. L. 1994, p. 837, § 1.)

34-8-275. Amnesty granted to employers meeting requirements; exceptions.

(a) Amnesty shall be granted for any employer who meets the requirements of Code Section 34-8-274 in accordance with the following:

(1) For unemployment taxes which are owed as a result of the nonreporting or underreporting of unemployment tax liabilities or the

nonpayment of any accounts receivable owed by an eligible employer, the state shall waive criminal prosecution and all civil penalties which may be assessed under any provision of this chapter for the taxable years or periods for which unemployment tax amnesty is requested; and

(2) With the exception of instances in which the employer and Commissioner enter into an installment payment agreement authorized under subsection (c) of Code Section 34-8-274, the failure to pay all unemployment taxes and interest as shown on the employer's amnesty unemployment tax return shall invalidate any amnesty granted pursuant to this article.

(b) This article shall not apply to any employer who is on notice, written or otherwise, of a criminal investigation being conducted by an agency of the state or any political subdivision thereof or the United States, nor shall this article apply to any employer who is the subject of any criminal litigation which is pending on the date of the employer's application in any court of this state or the United States for nonpayment, delinquency, evasion, or fraud in relation to any federal taxes or to any of the unemployment taxes to which this amnesty program is applicable.

(c) No refund or credit shall be granted for any interest or penalty paid prior to the time the employer requests amnesty pursuant to Code Section 34-8-274.

(d) Unless the Commissioner in his or her own discretion redetermines the amount of unemployment taxes and interest due, no refund or credit shall be granted for any unemployment taxes or interest paid under the amnesty program.

(e) Notwithstanding any provision of this article to the contrary, the Commissioner shall have the right to waive any portion of the interest due on an account receivable when it is demonstrated to the satisfaction of the Commissioner that any deficiency of the employer was not due to negligence, intentional disregard of administrative rules and regulations, or fraud and the collection of the interest by the Commissioner would be contrary to equity and good conscience. (Code 1981, § 34-8-275, enacted by Ga. L. 1994, p. 837, § 1.)

34-8-276. Interest on installment agreements.

All installment agreements authorized under subsection (c) of Code Section 34-8-274 shall bear interest on the outstanding amount of unemployment tax due at the rate prescribed under Code Section 34-8-166. (Code 1981, § 34-8-276, enacted by Ga. L. 1994, p. 837, § 1.)

34-8-277. Administrative regulations, forms, and instructions; publicizing program.

The Commissioner shall promulgate administrative regulations as necessary, issue forms and instructions, and take all actions necessary to

implement the provisions of this article. The Commissioner shall publicize the unemployment tax amnesty program in order to maximize the public awareness of and participation in the program. The Commissioner may, for the purpose of publicizing the unemployment tax amnesty program, contract with any advertising agency within or outside this state. (Code 1981, § 34-8-277, enacted by Ga. L. 1994, p. 837, § 1.)

34-8-278. Accounting procedures; disposition of collections.

For purposes of accounting for the unemployment contributions received pursuant to this chapter, the Commissioner shall maintain an accounting and reporting of funds collected under the amnesty program. All contributions or reimbursements in lieu of contributions nested shall be remitted to the Unemployment Compensation Fund created pursuant to Code Section 34-8-83. (Code 1981, § 34-8-278, enacted by Ga. L. 1994, p. 837, § 1.)

34-8-279. Collection fees.

(a) In addition to all other penalties provided under this chapter or any other law, the Commissioner may by regulation impose after the expiration of the unemployment tax amnesty period a cost of collection fee of 20 percent of any deficiency assessed for any taxable period ending or transactions occurring after December 31, 1994. This fee shall be in addition to all other applicable penalties, fees, or costs. The Commissioner shall have the right to waive any collection fee when it is demonstrated that any deficiency of the employer was not due to negligence, intentional disregard of administrative rules and regulations, or fraud.

(b) In addition to all other penalties provided under this chapter or any other law, the Commissioner may by regulation impose after the expiration of the unemployment tax amnesty period a cost of collection fee of 50 percent of any deficiency for taxable periods ending or transactions occurring on or before December 31, 1994, regardless of when due. This fee shall be in addition to all other applicable penalties, fees, or costs. The Commissioner shall have the right to waive any collection fee when it is demonstrated that any deficiency of the employer was not due to negligence, intentional disregard of administrative rules and regulations, or fraud.

(c) The provisions of subsections (a) and (b) of this Code section shall not apply to any account or accounts receivable which has been protested pursuant to Code Section 34-8-167 or 34-8-170 as of the expiration of the unemployment tax amnesty period or to any account or accounts receivable on which the employer is remitting timely payments under a payment agreement negotiated with the Commissioner prior to or during the amnesty period.

(d) The fee levied under subsections (a) and (b) of this Code section shall not apply to unemployment taxes paid pursuant to the terms of the amnesty program. (Code 1981, § 34-8-279, enacted by Ga. L. 1994, p. 837, § 1.)

34-8-280. Debt collection services.

The Commissioner may, for the purpose of collecting any delinquent unemployment tax due from an employer, contract with any debt collection agency or attorney doing business within or outside this state for the collection of such delinquent unemployment tax, including penalties and interest and collections thereon. Without limiting any authority otherwise granted to the Commissioner in Code Section 34-8-169, the Commissioner may also pay such agency or attorney from the fees authorized in Code Section 34-8-279. (Code 1981, § 34-8-280, enacted by Ga. L. 1994, p. 837, § 1.)

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Cross references. — Compensation of employees of state institutions who contract tuberculosis or infectious hepatitis, Ch. 29, T. 31. Liability of employers for injuries to employees generally, § 34-7-20 et seq. Additional payments to members of Georgia State Patrol for injuries received in line of duty, § 35-2-9. Additional payments to members of Georgia Bureau of Investigation for injuries received in line of duty, § 35-3-12. Indemnification of law enforcement officers, firefighters, and prison guards for death or disablement in line of duty, § 45-9-80 et seq. Public assistance, Ch. 4, T. 49.

Editor's notes. — Code Sections 34-9-18, 34-9-82, 34-9-100, 34-9-102, 34-9-104, 34-9-108, 34-9-201, 34-9-205, 34-9-221, 34-9-222, 34-9-241, 34-9-243, and 34-9-261 through 34-9-263 were amended by Ga. L. 1978, p. 2220. The provisions of Code Sections 34-9-261 through 34-9-263, and any other provision of the amendment which created a substantive right, shall apply to any accident or injury occurring on or after July 1, 1978. In all other respects, including all

procedural matters, the provisions shall apply to any action taken on or after July 1, 1978, without regard to the date of accident or injury.

Administrative rules and regulations. — Workers' compensation insurance statistical agent, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Commissioner of Insurance, Chapter 120-2-36.

Georgia workers' compensation insurance rate filings, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Commissioner of Insurance, Chapter 120-2-37.

Georgia workers compensation assigned risk insurance plan, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Commissioner of Insurance, Chapter 120-2-38.

Law reviews. — For article surveying history of workers' compensation laws and their application in this state, see 11 Ga. B.J. 413 (1949). For article, "Quasi-Municipal Tort Liability in Georgia," see 6 Mercer L. Rev.

287 (1955). For article, "1955 Amendments to the Georgia Workmen's Compensation Law," see 18 Ga. B.J. 307 (1956). For article, "Actions for Wrongful Death in Georgia: Part One," see 19 Ga. B.J. 277 (1957). For article, "Actions for Wrongful Death in Georgia: Part Two," see 19 Ga. B.J. 439 (1957). For article, "Actions for Wrongful Death in Georgia: Parts Three and Four," see 21 Ga. B.J. 339 (1959). For article arguing for inclusion of the State Board of Workers' Compensation under the Georgia Administrative Procedure Act (Ch. 13, T. 50), see 1 Ga. St. B.J. 269 (1965). For article, "Conflict of Laws in Damage Suits Related to Workmen's Compensation Cases," see 28 Mercer L. Rev. 497 (1977). For article surveying Georgia cases dealing with workers' compensation from June 1, 1976 through May 31, 1978, see 30 Mercer L. Rev. 269 (1978). For article, "Psychological Injury in Workers' Compensation," see 16 Ga. St. B.J. 18 (1979). For article surveying recent legislative and judicial developments regarding Georgia's insurance laws, see 31 Mercer L. Rev. 117 (1979). For article, "Workers' Compensation in Georgia Municipal Law," see 15 Ga. L. Rev. 57 (1980). For article surveying Georgia cases in the area of workers' compensation from June 1979 through May 1980, see 32 Mercer L. Rev. 261 (1980). For survey article on workers' compensation, see 34 Mercer L. Rev. 335 (1982). For annual survey of workers' compensation law, see 35 Mercer L. Rev. 359 (1983). For annual survey of workers' compensation law, see 36 Mercer L. Rev. 393 (1984). For article surveying workers' compensation law in 1984-1985, see 37 Mercer L. Rev. 461 (1985). For annual survey of workers' compensation law, see 39 Mercer L. Rev. 377 (1987). For

article, "On Reintegrating Workers' Compensation and Employers' Liability," see 21 Ga. L. Rev. 843 (1987). For annual survey of law of workers' compensation, see 40 Mercer L. Rev. 487 (1988). For article, "Change in Condition v. New Accident: Old Problems Revisited," see 40 Mercer L. Rev. 961 (1989). For annual survey of workers' compensation law, see 41 Mercer L. Rev. 429 (1989). For annual survey of workers' compensation law, see 42 Mercer L. Rev. 505 (1990). For article, "The Status of the Workers' Compensation System in Georgia and Proposed Changes: Remedies for the Remedy," see 7 Ga. St. U.L. Rev. 25 (1990). For annual survey of workers' compensation law, see 43 Mercer L. Rev. 475 (1991). For annual survey of workers' compensation law, see 44 Mercer L. Rev. 457 (1992). For annual survey article on workers' compensation law, see 45 Mercer L. Rev. 493 (1993). For annual survey article on workers' compensation law, see 50 Mercer L. Rev. 401 (1998). For annual survey article discussing workers' compensation law, see 52 Mercer L. Rev. 505 (2000). For article, "Report of the Governor's Workers' Compensation Review Commission," see 38 Ga. L. Rev. 1241 (2004). For article, "Pandemic Preparation in the Workplace," see 12 Ga. St. B.J. 14 (2006).

For note, "The Worker's Compensation Insurer as a Third Party Tortfeasor in Georgia," see 30 Mercer L. Rev. 339 (1978). For note discussing compensation under this title for original injuries aggravated by subsequent injury, continued employment, or ordinary activity, see 31 Mercer L. Rev. 325 (1979).

For comment on *Ladson Motor Co. v. Croft*, 212 Ga. 275, 92 S.E.2d 103 (1956), see 19 Ga. B.J. 237 (1956).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
CONSTRUCTION OF CHAPTER
PURPOSES OF CHAPTER
RECOVERY
PLEADING AND PRACTICE

General Consideration

Constitutionality of this chapter. — As to the constitutionality of the workers' compen-

sation law, see *Metropolitan Cas. Ins. Co. v. Huhn*, 165 Ga. 667, 142 S.E. 121, 59 A.L.R. 719 (1928); *City of Macon v. Benson*, 175 Ga. 502, 166 S.E. 26 (1932); *Garner v. Owens-*

General Consideration (Cont'd)

Illinois Glass Container, 134 Ga. App. 917, 216 S.E.2d 709 (1975).

Intent to broaden coverage of chapter. — Recent history of this state's workers' compensation laws, especially former Code 1933, §§ 114-101 and 114-102 (see O.C.G.A. § 34-9-1), evidences an unmistakable legislative intent to broaden the coverage of the workers' compensation law by expanding the scope of the word "employer." Gaither v. Fulton-DeKalb Hosp. Auth., 144 Ga. App. 16, 240 S.E.2d 560 (1977), rev'd on other grounds, 241 Ga. 572, 247 S.E.2d 89 (1978).

Public interest in industrial accidents. — The fundamental basis of workers' compensation laws is that there is a large element of public interest in accidents occurring from modern industrial conditions, and that the economic loss caused by such accidents should not necessarily rest upon the public, but that the industry in which an accident occurred shall pay, in the first instance, for the accident. Globe Indem. Co. v. Lankford, 35 Ga. App. 599, 134 S.E. 357 (1926).

Nature of employer's liability. — An employer is liable under the workers' compensation law without regard to fault or negligence. Gay v. Greene, 91 Ga. App. 78, 84 S.E.2d 847 (1954).

Burden of proof. — The obligation of an employer under the workers' compensation law is not that of an absolute insurer, and hence the burden is on the claimant to prove a case to which the law is applicable. Ladson Motor Co. v. Croft, 212 Ga. 275, 92 S.E.2d 103 (1956), for comment, see 19 Ga. B.J. 237 (1956).

Unemployment benefits. — The receipt of unemployment benefits does not estop a claimant from receiving compensation benefits under the workers' compensation law. James v. GMC, 107 Ga. App. 588, 131 S.E.2d 58 (1963).

Code of laws. — Ordinary rules of law do not apply to actions arising under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), as the law itself constitutes a complete code of laws upon the subject. Tillman v. Moody, 181 Ga. 530, 182 S.E. 906 (1935).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) embodies within itself a complete code of laws upon the

subject, and is complete within itself as to its own subject matter. Zachery v. Royal Indem. Co., 80 Ga. App. 659, 56 S.E.2d 812 (1949), overruled on other grounds, Freeman Decorating Co. v. Subsequent Injury Trust Fund, 175 Ga. App. 369, 333 S.E.2d 204 (1985).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) constitutes a complete code of laws upon the subject of the rights and remedies of employers, employees, and their dependents, and the Court of Appeals can neither rewrite this title nor hedge it about with restrictions not included in it. St. Paul Fire & Marine Ins. Co. v. Miniweather, 119 Ga. App. 617, 168 S.E.2d 341 (1969).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) constitutes a complete code of laws upon its administration, and no contract or agreement, whether written, oral, or implied, can in any manner operate to change the law. Fireman's Fund Ins. Co. v. Crowder, 123 Ga. App. 469, 181 S.E.2d 530 (1971).

Applicability of abusive litigation statute. — The abusive litigation statute (O.C.G.A. § 51-7-80 et seq.) does not authorize a claim for abusive litigation in the context of the Workers' Compensation Act, O.C.G.A. Ch. 9, T. 34. Patterson v. Cox Enters., Inc., 201 Ga. App. 222, 411 S.E.2d 85 (1991).

Misrepresentation of the employee's physical condition in an employment application will bar workers' compensation benefits if: (1) the employee has knowingly and wilfully made a false representation as to the employee's physical condition; (2) the employer has relied upon the false representation and such reliance was a substantial factor in the hiring; and (3) there was a causal connection between the false representation and the injury. Georgia Elec. Co. v. Rycroft, 259 Ga. 155, 378 S.E.2d 111 (1989).

A representation made during an employment intake process, but before the employee begins actual work, may constitute a "substantial factor in the hiring" within the meaning of Georgia Elec. Co. v. Rycroft, 259 Ga. 155, 378 S.E.2d 111 (1989). Fort Howard Corp. v. Devoe, 212 Ga. App. 602, 442 S.E.2d 474 (1994).

False representation defense. — The decision in Georgia Elec. Co. v. Rycroft, 259 Ga. 155, 378 S.E.2d 111 (1989), adopting the

false representation defense, is not inconsistent with provisions of the Americans with Disabilities Act, title 42 of the United States Code. *Caldwell v. Aarlin/Holcombe Armature Co.*, 267 Ga. 613, 481 S.E.2d 196 (1997).

Misrepresentations of an employee's resident status did not bar the employee from entitlement to workers' compensation benefits where there was no showing of a causal connection between the misrepresentation and the injury the employee suffered. *Dynasty Sample Co. v. Beltran*, 224 Ga. App. 90, 479 S.E.2d 773 (1996).

Enforceability of out-of-state policy. — In the case of a workers' compensation policy which was executed in Tennessee, a clear limitation in the policy to Tennessee benefits did not violate public policy and was enforceable in Georgia. *Travelers Ins. Co. v. McNabb*, 201 Ga. App. 297, 410 S.E.2d 788, cert. denied, 201 Ga. App. 904, 410 S.E.2d 788 (1991), overruled on other grounds, *Yoho v. Ringier of Am., Inc.*, 263 Ga. 338, 434 S.E.2d 57 (1993).

Sexual harassment. — A female employee's common-law tort claim of assault against her supervisor and their employer is not barred by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), where the supervisor's alleged acts were not in furtherance of the employer's business but independent of the relation of master and servant and the theory of recovery against the employer sounds in common-law tort, i.e., the employer's negligence in allowing the supervisor to remain in a supervisory position with notice of the supervisor's proclivity to engage in sexually offensive conduct directed against female employees. *Cox v. Brazo*, 165 Ga. App. 888, 303 S.E.2d 71, aff'd, 251 Ga. 491, 307 S.E.2d 474 (1983).

Injuries in navigable waters. — A fatal injury which occurred while the deceased was strictly engaged in the deceased's duty as a fisherman in navigable waters fell under maritime law and was within the exclusive jurisdiction of the federal courts. *Maryland Cas. Co. v. Grant*, 169 Ga. 325, 150 S.E. 424 (1929), appeal dismissed, 281 U.S. 690, 50 S. Ct. 240, 74 L. Ed. 1120 (1930).

Where the claimant was employed to go out in a boat into navigable waters and catch fish, and while in a navigable stream, after getting the boat back into it after it had become stuck in mud, the claimant was

injured by the claimant's coat being caught in the windlass and the claimant's arm pulled into the machine, the matter was one involving exclusive admiralty and maritime jurisdiction, and the injury was therefore not compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Saleens v. Travelers' Ins. Co.*, 47 Ga. App. 532, 171 S.E. 159 (1933).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), rather than general maritime law, applied in the case of a land-based electrician's suit against an employer for injuries sustained in a boating accident which occurred within state waters while the electrician was being transported to the work site. *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523 (11th Cir. 1990), cert. denied, 498 U.S. 1026, 111 S. Ct. 676, 112 L. Ed. 2d 668 (1991).

Concurrent jurisdiction exists under the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., and the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., for injuries sustained by a stevedore on navigable waters. *Allsouth Stevedoring Co. v. Wilson*, 220 Ga. App. 205, 469 S.E.2d 348 (1996).

Effect of statutory amendments. — As to the effect of amendments to the Workmen's Compensation Act, O.C.G.A. § 34-9-1 et seq., on existing and terminated employment relationships, see *Venable v. John P. King Mfg. Co.*, 174 Ga. App. 800, 331 S.E.2d 638 (1985).

Cited in *Fulton Bakery, Inc. v. Williams*, 35 Ga. App. 681, 134 S.E. 621 (1926); *McCoy v. Southern Lumber Co.*, 38 Ga. App. 251, 143 S.E. 611 (1928); *United States Cas. Co. v. Burton-Pitt Lumber Co.*, 41 Ga. App. 405, 152 S.E. 919 (1930); *Donaldson v. Central of Ga. Ry.*, 43 Ga. App. 480, 159 S.E. 738 (1931); *Threatt v. American Mut. Liab. Ins. Co.*, 173 Ga. 350, 160 S.E. 379 (1931); *Smith v. John T. Ragan & Co.*, 44 Ga. App. 111, 160 S.E. 538 (1931); *Murphy v. Constitution Indem. Co.*, 174 Ga. 243, 162 S.E. 629 (1932); *Smith v. Standard Oil Co.*, 178 Ga. 651, 173 S.E. 379 (1934); *Bentley v. Jones*, 48 Ga. App. 587, 173 S.E. 737 (1934); *Swift & Co. v. Alston*, 48 Ga. App. 649, 173 S.E. 741 (1934); *DeKalb County v. Grice*, 179 Ga. 458, 175 S.E. 804 (1934); *Zurich Gen. Accident & Liab. Co. v. Stein & Co.*, 50 Ga. App. 503, 179 S.E. 142 (1935); *Ocean Accident & Guarant-*

General Consideration (Cont'd)

tee Corp. v. Farr, 51 Ga. App. 147, 179 S.E. 841 (1935); Travelers Ins. Co. v. Reid, 54 Ga. App. 13, 186 S.E. 887 (1936); Hunter v. Employers Liab. Assurance Corp., 54 Ga. App. 197, 187 S.E. 209 (1936); Martin v. State Hwy. Bd., 54 Ga. App. 856, 189 S.E. 614 (1936); Travelers Ins. Co. v. Anderson, 185 Ga. 105, 194 S.E. 193 (1937); American Sur. Co. v. Castleberry, 57 Ga. App. 402, 195 S.E. 590 (1938); Ingram v. Parrish, 58 Ga. App. 463, 198 S.E. 842 (1938); Adams v. Glens Falls Indem. Co., 58 Ga. App. 663, 199 S.E. 783 (1938); U.S. Fid. & Guar. Co. v. Neal, 60 Ga. App. 179, 3 S.E.2d 211 (1939); American Mut. Liab. Ins. Co. v. Sims, 62 Ga. App. 424, 8 S.E.2d 408 (1940); Hartford Accident & Indem. Co. v. Cox, 63 Ga. App. 763, 12 S.E.2d 110 (1940); Ocean Accident & Guarantee Corp. v. Lane, 64 Ga. App. 149, 12 S.E.2d 413 (1940); Bituminous Cas. Corp. v. Wilbanks, 64 Ga. App. 232, 12 S.E.2d 479 (1940); Richie & Co. v. Cohen, 65 Ga. App. 30, 14 S.E.2d 603 (1941); Travelers Ins. Co. v. Lester, 73 Ga. App. 465, 36 S.E.2d 880 (1946); Beasley v. Burt, 201 Ga. 144, 39 S.E.2d 51 (1946); Bituminous Cas. Corp. v. Southwell, 78 Ga. App. 609, 51 S.E.2d 729 (1949); Holtzendorf v. Glynn, 79 Ga. App. 44, 52 S.E.2d 671 (1949); Free v. McEver, 79 Ga. App. 831, 54 S.E.2d 372 (1949); Maryland Cas. Co. v. Mitchell, 82 Ga. App. 439, 61 S.E.2d 506 (1950); Mayo v. McClung, 83 Ga. App. 548, 64 S.E.2d 330 (1951); Massachusetts Bonding & Ins. Co. v. Turk, 84 Ga. App. 547, 66 S.E.2d 364 (1951); Miller v. Independent Life & Accident Ins. Co., 86 Ga. App. 538, 71 S.E.2d 705 (1952); Fidelity & Cas. Co. v. Landers, 89 Ga. App. 100, 78 S.E.2d 878 (1953); Smith v. Globe Indem. Co., 89 Ga. App. 498, 80 S.E.2d 57 (1954); Combs v. Carolina Cas. Ins. Co., 90 Ga. App. 90, 82 S.E.2d 32 (1954); Taylor v. Smith, 211 Ga. 5, 83 S.E.2d 602 (1954); Great Am. Indem. Co. v. Overton, 92 Ga. App. 238, 88 S.E.2d 498 (1955); Creech v. Sirkin, 92 Ga. App. 509, 88 S.E.2d 697 (1955); Johnson v. United States Fid. & Guar. Co., 93 Ga. App. 336, 91 S.E.2d 779 (1956); Board of Rd. & Revenue Comm'r v. Collins, 94 Ga. App. 562, 95 S.E.2d 758 (1956); DeKalb County v. Brown, 97 Ga. App. 572, 103 S.E.2d 600 (1958); Morgan County v. Craig, 97 Ga. App. 571, 103 S.E.2d 756 (1958); West End Cab Co. v. Stovall, 98 Ga. App. 724, 106 S.E.2d 810 (1958); United States Fid. & Guar. Co. v. Giddens, 102 Ga. App. 576, 116 S.E.2d 883 (1960); Hopkins v. Employers Mut. Liab. Ins. Co., 103 Ga. App. 579, 120 S.E.2d 321 (1961); Ocean Accident & Guarantee Corp. v. Bates, 104 Ga. App. 621, 122 S.E.2d 305 (1961); Alexander v. Globe Indem. Co., 105 Ga. App. 212, 124 S.E.2d 428 (1962); Georgia Power Co. v. Carter, 110 Ga. App. 233, 138 S.E.2d 182 (1964); Carpenter v. Newcomb Devilbiss Co., 111 Ga. App. 472, 142 S.E.2d 381 (1965); Pittsburgh Plate Glass Co. v. Bailey, 111 Ga. App. 609, 142 S.E.2d 388 (1965); Argonaut Ins. Co. v. Wilson, 119 Ga. App. 121, 166 S.E.2d 641 (1969); State Farm Mut. Auto. Ins. Co. v. Board of Regents of Univ. Sys., 226 Ga. 310, 174 S.E.2d 920 (1970); Mull v. Aetna Cas. & Sur. Co., 226 Ga. 462, 175 S.E.2d 552 (1970); Department of Transp. v. Livaditis, 129 Ga. App. 358, 199 S.E.2d 573 (1973); Fox v. Hartford Accident & Indem. Co., 130 Ga. App. 104, 202 S.E.2d 568 (1973); Woods v. Piggly Wiggly S., Inc., 133 Ga. App. 719, 213 S.E.2d 22 (1975); Employers Ins. v. Nolen, 137 Ga. App. 205, 223 S.E.2d 250 (1976); Moone v. Liberty Mut. Ins. Co., 145 Ga. App. 629, 244 S.E.2d 148 (1978); Bituminous Cas. Corp. v. Ashbaugh, 147 Ga. App. 392, 249 S.E.2d 96 (1978); University Cab, Inc. v. Fagan, 150 Ga. App. 404, 258 S.E.2d 21 (1979); Samuel v. Baitcher, 154 Ga. App. 602, 269 S.E.2d 96 (1980); Mansfield Enters., Inc. v. Warren, 154 Ga. App. 863, 270 S.E.2d 72 (1980); Helton v. Interstate Brands Corp., 155 Ga. App. 607, 271 S.E.2d 739 (1980); Spencer v. Moore Bus. Forms, Inc., 87 F.R.D. 118 (N.D. Ga. 1980); Lowe v. Chemical Sealing Corp., 535 F. Supp. 1280 (N.D. Ga. 1982); Atkins v. Tri-Cities Steel, Inc., 166 Ga. App. 349, 304 S.E.2d 409 (1983); Mattison v. Travelers Indem. Co., 167 Ga. App. 521, 307 S.E.2d 39 (1983); General Am. Life Ins. Co. v. Barth, 167 Ga. App. 605, 307 S.E.2d 113 (1983); Southern Fried Chicken v. Thermo-King Corp., 172 Ga. App. 454, 323 S.E.2d 291 (1984); Jackson v. Southern Bell Tel. & Tel. Co., 178 Ga. App. 673, 344 S.E.2d 495 (1986).

Construction of Chapter

Liberal construction. — Although the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is in derogation of the

common law, due to its beneficent purposes it should, when construction is necessary, be given a liberal construction. *Brown v. Lumbermen's Mut. Cas. Co.*, 49 Ga. App. 99, 174 S.E. 359 (1934).

Liberal construction must be given to the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) to effectuate the humane purposes for which it was enacted. *Davis v. Bibb Mfg. Co.*, 75 Ga. App. 515, 43 S.E.2d 780 (1947); *Coulter v. Royal Indem. Co.*, 95 Ga. App. 124, 97 S.E.2d 358, rev'd on other grounds, 213 Ga. 277, 98 S.E.2d 899 (1957); *Schwartz v. Greenbaum*, 236 Ga. 476, 224 S.E.2d 38 (1976).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) should be liberally construed. *Fidelity & Cas. Co. v. Windham*, 87 Ga. App. 198, 73 S.E.2d 517 (1952), rev'd on other grounds, 209 Ga. 592, 74 S.E.2d 835 (1953); *Hartford Accident & Indem. Co. v. Souther*, 110 Ga. App. 84, 137 S.E.2d 705 (1964); *Insurance Co. of N. Am. v. Cooley*, 118 Ga. App. 46, 162 S.E.2d 821 (1968).

Ordinary acceptance of chapter's terms. — Where its language is such as to render judicial construction necessary, nevertheless a reasonable and logical application of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) should be had according to the ordinary acceptance and significance of its terms. *Harden v. United States Cas. Co.*, 49 Ga. App. 340, 175 S.E. 404 (1934).

A reasonable and logical application of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) should be had according to the ordinary and usual acceptance and significance of its terms. *Wilson v. Maryland Cas. Co.*, 71 Ga. App. 184, 30 S.E.2d 420 (1944).

Prevention of miscarriage of compensation purposes. — A compensation act will be reasonably construed so as to prevent, if possible, miscarriage of the objects and benefits for which it is designed. *United States Fid. & Guar. Co. v. Maddox*, 52 Ga. App. 416, 183 S.E. 570 (1935).

Interpretation in favor of claimants. — In order to accomplish its beneficent purposes, the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is to be interpreted liberally in favor of those claiming compensation. *GMC, Fisher Body Div. v. Bowman*, 107 Ga. App. 335, 130 S.E.2d 163 (1963); *GMC v. Hargis*, 114 Ga. App. 143,

150 S.E.2d 303 (1966).

Necessary meaning of terms. — While the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is to be given a liberal construction when necessary to effectuate its beneficent purposes, this rule does not authorize a construction beyond what appears to be the necessary meaning of its terms. *United States-Fid. & Guar. Co. v. Neal*, 188 Ga. 105, 3 S.E.2d 80 (1939).

Intent of legislature. — The liberal construction of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) can only be had where judicial interpretation is necessary, and the law should not be so liberally construed as to defeat the purposes and intents of the legislation. *Southern Cotton Oil Co. v. McLain*, 49 Ga. App. 177, 174 S.E. 726 (1934).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) should be liberally construed so as to effect the purposes intended by the legislature in its enactment. *Ware v. Swift & Co.*, 59 Ga. App. 836, 2 S.E.2d 128 (1939); *Bethlehem Steel Co. v. Dempsey*, 94 Ga. App. 408, 94 S.E.2d 749 (1956).

Remedial purposes. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is a remedial statute and must be given a liberal construction. *Southern Cotton Oil Co. v. McLain*, 49 Ga. App. 177, 174 S.E. 726 (1934).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is remedial and has a beneficent purpose, and it should be accorded a liberal and broad construction or interpretation in order to promote or effectuate its purposes. *Continental Cas. Co. v. Haynie*, 51 Ga. App. 650, 181 S.E. 126 (1935), aff'd, 182 Ga. 608, 186 S.E. 683 (1936).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is to be interpreted liberally to effectuate its remedial purposes. *Travelers Ins. Co. v. Gaither*, 148 Ga. App. 251, 251 S.E.2d 66 (1978).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), although in derogation of the common law, is highly remedial in character and should be liberally and broadly construed to effect its beneficent purposes. *London Guarantee & Accident Co. v. Cox*, 41 Ga. App. 329, 153 S.E. 227 (1930); *Harden v. United States Cas. Co.*, 49 Ga. App. 340, 175 S.E. 404 (1934); *Western*

Construction of Chapter (Cont'd)

Union Tel. Co. v. Smith, 50 Ga. App. 585, 178 S.E. 472 (1935); United States Fid. & Guar. Co. v. Maddox, 52 Ga. App. 416, 183 S.E. 570 (1935); Glens Falls Indem. Co. v. Sockwell, 58 Ga. App. 111, 197 S.E. 647 (1938); Wilson v. Maryland Cas. Co., 71 Ga. App. 184, 30 S.E.2d 420 (1944); Zachery v. Royal Indem. Co., 80 Ga. App. 659, 56 S.E.2d 812 (1949); Coulter v. Royal Indem. Co., 95 Ga. App. 124, 97 S.E.2d 358, rev'd on other grounds, 213 Ga. 277, 98 S.E.2d 899 (1957); McElreath v. McElreath, 155 Ga. App. 826, 273 S.E.2d 205 (1980).

Humanitarian purpose. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is a humanitarian measure providing relief to injured employees and protecting employers from excessive damage awards, and should be liberally interpreted to carry out this purpose. Samuel v. Baitcher, 247 Ga. 71, 274 S.E.2d 327 (1981).

Beneficent purposes. — While the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is in derogation of the common law, yet, in view of its beneficent purpose and remedial character, it should be so liberally and broadly construed as to effect its general purpose in every instance in which its language is such as to render judicial interpretation necessary. New Amsterdam Cas. Co. v. Sumrell, 30 Ga. App. 682, 118 S.E. 786 (1923); Van Treeck v. Travelers Ins. Co., 157 Ga. 204, 121 S.E. 215 (1924); Austin Bros. Bridge Co. v. Whitmire, 31 Ga. App. 560, 121 S.E. 345 (1924).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is to be construed reasonably and liberally, with a view of applying its beneficent provisions so as to effectuate its purposes, and to extend them to every class of workman and employee that can fairly be brought within its provisions. Gaither v. Fulton-DeKalb Hosp. Auth., 144 Ga. App. 16, 240 S.E.2d 560 (1977), rev'd on other grounds, 241 Ga. 572, 247 S.E.2d 89 (1978); Gulf Am. Fire & Cas. Co. v. Taylor, 150 Ga. App. 179, 257 S.E.2d 44 (1979).

Purposes of Chapter

Public demand. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) arose from public demand and attempts to solve certain pressing problems which have

arisen out of the changed industrial conditions of our time. Brown v. Lumbermen's Mut. Cas. Co., 49 Ga. App. 99, 174 S.E. 359 (1934).

Protection from economic hazards. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) was enacted to protect the worker in some measure from economic hazards consequent upon the worker's exposure to today's manifold industrial hazards to life and health. Utica Mut. Ins. Co. v. Pioda, 90 Ga. App. 593, 83 S.E.2d 627 (1954).

Insurance against personal injuries. — The purpose of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is to insure the workman against personal injuries not expected or designed by the workman personally, provided such injury arises out of and in the course of employment. Scott v. Travelers' Ins. Co., 49 Ga. App. 157, 174 S.E. 629 (1934).

Injuries resulting from employer's negligence. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) was intended to include injuries resulting from the negligence of the employer in every particular, whether arising under common law or statutory duties, and the pain and suffering incident to such injuries. Reid v. Lummus Cotton Gin Co., 58 Ga. App. 184, 197 S.E. 904 (1938).

Protection from want. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) was adopted to protect working individuals and their dependents from want in case of injury, on the theory that contributory negligence, the doctrine of fellow servant negligence, and assumption of risk are inapplicable. Brown v. Lumbermen's Mut. Cas. Co., 49 Ga. App. 99, 174 S.E. 359 (1934).

Alleviation of human suffering. — The purpose of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is to alleviate human suffering and to contribute to human need when accidental injury is suffered in the manner prescribed thereby. Lumbermens Mut. Cas. Co. v. Griggs, 190 Ga. 277, 9 S.E.2d 84 (1940).

Immediate financial assistance. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) attempts to provide immediate financial assistance for injured employees, without regard to whether or not the

injury resulted from the fault of the employer, the single and only requirement being that the injury resulted from an accident arising out of and in the course of the employment. *Slaten v. Travelers Ins. Co.*, 197 Ga. 1, 28 S.E.2d 280, answer conformed to, 70 Ga. App. 665, 29 S.E.2d 98 (1943), cert. dismissed, 197 Ga. 856, 30 S.E.2d 822 (1944).

Scheduled and limited rate of compensation. — One of the main objects of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) was to enable an injured employee to recover from an employer according to a scheduled and limited rate of compensation, regardless of assumption of risk or of whose negligence caused the injury, thus assuring the employee of some compensation for the injury and assuring the employer that the employer's liability will be limited. *Critchfield v. Aikin*, 33 Ga. App. 668, 127 S.E. 816 (1925); *Horn v. Planters' Prods. Co.*, 40 Ga. App. 787, 151 S.E. 552 (1930).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is intended to establish rates of compensation for personal injuries or death sustained by employees in the course of employment. *Ocean Accident & Guarantee Corp. v. Farr*, 180 Ga. 266, 178 S.E. 728 (1935).

Replacement of common law rules. — The purpose of workers' compensation legislation was to do away with common law rules governing actions by employees under the law of master and servant, and to replace such an antique system with one that provided absolute liability of the employer and fixed compensation for accidental injury or death. *Sands v. Union Camp Corp.*, 559 F.2d 1345 (5th Cir. 1977).

Method of settling disputes. — The obvious intent of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) was to substitute its procedure for the former methods of settling disputes arising between those occupying the strict relationship of master and servant or employer and employee. *Denis Aerial Ag-Plicators, Inc. v. Swift*, 154 Ga. App. 742, 269 S.E.2d 890 (1980).

The design of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is to furnish speedy, inexpensive, and final settlement of the claims of injured employees. *Continental Cas. Co. v. Caldwell*, 55 Ga. App. 17, 189 S.E. 408 (1936).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) abhors and shuns protracted and complicated litigation over the facts of any case. *Continental Cas. Co. v. Caldwell*, 55 Ga. App. 17, 189 S.E. 408 (1936).

Health and accident insurance. — Purpose of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) was to substitute a method of accident insurance in place of common law rights and liabilities for substantially all employees. *Slaten v. Travelers Ins. Co.*, 197 Ga. 1, 28 S.E.2d 280, answer conformed to, 70 Ga. App. 665, 29 S.E.2d 98 (1943), cert. dismissed, 197 Ga. 856, 30 S.E.2d 822 (1944).

Workers' compensation is in the nature of health and accident insurance against injuries which arise out of and in the course of the worker's employment. *Utica Mut. Ins. Co. v. Pioda*, 90 Ga. App. 593, 83 S.E.2d 627 (1954).

Workers' statutory compensation is not in the nature of damages awarded for injury, and is not intended to give full satisfaction for an injury; it is more like benefits provided ex contractu under a policy of insurance. *Gay v. Greene*, 91 Ga. App. 78, 84 S.E.2d 847 (1954).

Life insurance. — Workers' compensation has never been like life insurance. *Insurance Co. of N. Am. v. Russell*, 246 Ga. 269, 271 S.E.2d 178 (1980).

Means of escape from personal injury litigation. — The legislature has endeavored by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) to provide a means by which an employer and employee may, if they so choose, escape entirely from that very troublesome factor known as "personal injury litigation," through a system by which every employee not guilty of willful misconduct may obtain at once a reasonable recompense for injuries accidentally received in employment, without lawsuit and without friction. *Brown v. Lumbermen's Mut. Cas. Co.*, 49 Ga. App. 99, 174 S.E. 359 (1934).

Bearing of financial losses caused by injury. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is founded on the basic principle that industry should be made to bear the financial losses sustained through personal injuries by the workmen engaged therein, and its purpose is to fur-

Purposes of Chapter (Cont'd)

nish a remedy that will reach every injury sustained by a workman engaged in that industry; thus, compensation is awarded without reference to the fault of the employer or the care of the employee. *Brown v. Lumbermen's Mut. Cas. Co.*, 49 Ga. App. 99, 174 S.E. 359 (1934).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is based on the broad economic theory that workers' compensation is properly chargeable as a part of the costs of industrial activity and production. *Brown v. Lumbermen's Mut. Cas. Co.*, 49 Ga. App. 99, 174 S.E. 359 (1934).

Benefit of both employers and employees.

— While the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) severely limits the maximum amount of recovery in a strong case of serious injury, and is in this respect beneficial to the employer, it was the manifest purpose of the legislature to distribute a portion of such savings to the unfortunate employee whose case is weak but who is injured nevertheless. *Lumbermens Mut. Cas. Co. v. Griggs*, 190 Ga. 277, 9 S.E.2d 84 (1940).

Recovery

Pro rata reduction of social security benefits. — A reduction in existing social security benefits so as to reflect workers' compensation payments to a beneficiary has a rational legislative basis and does not violate the due process clause. *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668 (S.D. Ga. 1973).

Limitations on right of recovery. — A court is not at liberty to impose any limitations or exceptions upon an employee's statutory right to recover compensation in the absence of a clear legislative intent. *GMC v. Hargis*, 114 Ga. App. 143, 150 S.E.2d 303 (1966).

Maximum recovery established. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) fixes the maximum that can

be recovered by any employee, and thus protects employers against excessive recoveries of damages. *Slaten v. Travelers Ins. Co.*, 197 Ga. 1, 28 S.E.2d 280, answer conformed to, 70 Ga. App. 665, 29 S.E.2d 98 (1943), cert. dismissed, 197 Ga. 856, 30 S.E.2d 822 (1944).

Accidents outside employment. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) does not provide for general insurance or for general accident insurance, and covers neither accidents sustained nor diseases contracted by an employee outside of employment. *Carroll v. Hartford Accident & Indem. Co.*, 73 Ga. App. 799, 38 S.E.2d 185 (1946).

Pleading and Practice

Cause of action. — In order to have a cause of action under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), a claimant need not have a cause of action under the laws applicable where workers' compensation is not involved; to hold otherwise would defeat the very object of the chapter. *Critchfield v. Aikin*, 33 Ga. App. 668, 127 S.E. 816 (1925).

Pleading and procedure. — The technical niceties of pleading and procedure are not required in the administration of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Southern Cotton Oil Co. v. McLain*, 49 Ga. App. 177, 174 S.E. 726 (1934).

Common-law claims. — Constructions of the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., proffered to the courts, which would, if accepted, operate in derogation of a party's common-law right of action, must be rejected. *George v. Ashland-Warren, Inc.*, 254 Ga. 95, 326 S.E.2d 744 (1985).

Renewal statute inapplicable. — Former Code 1933, § 3-808 (see O.C.G.A. § 9-2-61), prescribing that where an action was dismissed a renewal may be had within six months, had no application under the workers' compensation law. *Southern Cotton Oil Co. v. McLain*, 49 Ga. App. 177, 174 S.E. 726 (1934).

OPINIONS OF THE ATTORNEY GENERAL

Medical services for work release inmates. — The Department of Offender Rehabilitation (now Department of Corrections) is

ultimately responsible for the payment of medical services for work release inmates. O.C.G.A. Ch. 9, T. 34, when applicable,

provides the primary statutory remedy for payment of medical services when such services are provided to a work release inmate who sustains work-related injuries, but, upon default by the employer under that chapter,

the Department of Offender Rehabilitation is ultimately responsible for paying the provider of those medical services. 1981 Op. Att'y Gen. No. 81-27.

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Workmen's compensation: power of commission to make award against self-insurer, 13 ALR 1385.

Workmen's compensation: constitutionality and construction of provisions directed against noninsuring or self-insuring employers, 18 ALR 267.

Workmen's compensation: rights and remedies where employee was injured by third person's negligence, 19 ALR 766; 27 ALR 493; 37 ALR 838; 67 ALR 249; 88 ALR 665; 106 ALR 1040.

Workmen's compensation: injury received while doing prohibited act, 26 ALR 166; 58 ALR 197; 83 ALR 1211; 119 ALR 1409.

Judgment in an action for death as a bar to another action for the same death in another jurisdiction or under another statute, 26 ALR 984; 53 ALR 1275.

Workmen's compensation: extent of power of legislature to define hazardous employment, 28 ALR 1222.

Workmen's Compensation Act: one working out road tax as within act, 31 ALR 1286.

Applicability of state statutes and rules of law to actions under Federal Employers' Liability Act, 36 ALR 917; 89 ALR 693.

Submission of rejected claim under Workmen's Compensation Act as affecting independent action for death or injury, 36 ALR 1293.

Accident and disability insurance: when insured deemed to be totally and continuously unable to transact all business duties, 37 ALR 151; 41 ALR 1376; 51 ALR 1048; 79 ALR 857; 98 ALR 789; 39 ALR3d 1026.

Workmen's compensation: injury from assault, 40 ALR 1122; 72 ALR 110; 112 ALR 1258.

Retroactive effort of provision for reduction or increase of award under Workmen's Compensation Act, 40 ALR 1473.

Workmen's compensation: injury to employee on his way to or from work on premises of employer's customer, 40 ALR 1477.

Recovery under Workmen's Compensation Act for service rendered by one spouse to another, 44 ALR 697.

Injury after closing of lumber camp or other isolated place of work as within Workmen's Compensation or Employers' Liability Act, 45 ALR 823.

Insurance under Workmen's Compensation Act as coextensive with the insured's

liability under act, 45 ALR 1329; 108 ALR 812.

Workmen's compensation: street risks incurred in course of employment, 51 ALR 509; 80 ALR 126.

Survival of right to compensation under Workmen's Compensation Act upon the death of the person entitled to the award, 51 ALR 1446.

Workmen's compensation: injury to employee who is resting during working hours as arising out of and in the course of his employment, 55 ALR 981.

Workmen's compensation: death or injury while traveling as arising out of and in the course of employment, 63 ALR 469; 100 ALR 1053.

Who are within provisions of workmen's compensation acts relating to hazardous employments or occupations, 83 ALR 1018.

Workmen's compensation: when prescriptive period begins to run in case of occupational or industrial disease, 86 ALR 572.

Workmen's compensation: injuries incident to performance of employer's work in whole or part at employee's home, 92 ALR 1036.

What is "seasonal" employment within provisions of Workmen's Compensation Act, 93 ALR 308.

Duty of receiver of self-insurer employer to continue payments under award made under workmen's compensation act prior to receivership, 94 ALR 863.

Workmen's compensation: claim or action against one as third party as precluding action or claim against him as employer, or vice versa, 98 ALR 416.

Action by employee for injury as claim, or notice of claim, under Workmen's Compensation Act, 98 ALR 529.

Settlement of claim or recovery against physician or surgeon or one responsible for his malpractice on account of aggravation of injury as affecting right to compensation under Workmen's Compensation Act, 98 ALR 1392.

Workmen's Compensation Act as precluding common-law action by husband or wife of the injured employee, 104 ALR 346.

State Workmen's Compensation Act as precluding action based on noncompliance with Federal Safety Appliance Act to recover for death or injury to railroad employee while engaged in intrastate commerce, 104 ALR 839.

Workmen's compensation: termination of employment before occurrence of disability or disease attributable to employment as affecting right to compensation, 104 ALR 1210.

Construction and application of provisions of workmen's compensation acts regarding allowance for aggravation of injury from same accident after time limited for filing claim, 105 ALR 971.

Construction and application of term "business" as used in provisions of workmen's compensation acts, 106 ALR 1502.

National bank or receiver thereof as within state Workmen's Compensation Act, 113 ALR 1454.

Construction, application, and effect of provision of workmen's compensation and employers' liability policy as regards employees not within operation of compensation acts, 117 ALR 1299.

Workmen's compensation: presumption or inference that accidental death of employee arose out of and in course of employment, 120 ALR 683.

Attachment or garnishment with respect to award (or judgment thereon) under Workmen's Compensation Act, 126 ALR 150.

Injury to employee in course of employment but away from employer's place of business, due to a cause or risk to which others are also subject, as arising out of the employment, within Workmen's Compensation Act, 139 ALR 1472.

What amounts to withdrawal or termination of election by employer to come within Workmen's Compensation Act, 145 ALR 921.

Liability of insurance carrier under Workmen's Compensation Act in respect of personal injury to or death of employee where because of relationship between employee and employer recovery would inure in whole or in part to employer, 147 ALR 115.

Workmen's compensation: leaving state or locality of employment after the injury as affecting right to compensation, 162 ALR 1462.

Workmen's Compensation Act: voluntary payment of compensation under statute of one state as bar to claim on ground for

reduction of claim of compensation under statute of another state, 8 ALR2d 628.

Declaratory relief with respect to unemployment compensation, 14 ALR2d 826.

Matters concluded, in action at law to recover for the same injury, by decision or finding made in workmen's compensation proceeding, 84 ALR2d 1036.

Necessity and sufficiency of showing that "substantial and gainful activity" is available to disability claimant under Federal Social Security Act, 22 ALR3d 440.

Validity and construction of accident insurance policy provision making benefits conditional on disability occurring immediately, or at once, or within specified time of accident, 39 ALR3d 1026.

Master and servant: employer's liability for injury caused by food or drink purchased by employee in plant facilities, 50 ALR3d 505.

Liability for injury or death of participant in theatrical performance or spectacle, 67 ALR3d 451.

Modern status of effect of state Workmen's Compensation Act on right of third-person tortfeasor to contribution or indemnity from employer of injured or killed workman, 100 ALR3d 350.

Cancer as compensable under workers' compensation acts, 19 ALR4th 639.

Workmen's compensation: recovery for discharge in retaliation for filing claim, 32 ALR4th 1221.

Right of health or accident insurer to intervene in workers' compensation proceeding to recover benefits previously paid to claimant or beneficiary, 38 ALR4th 355.

Workers' compensation: sexual assaults as compensable, 52 ALR4th 731.

Workers' Compensation Act as precluding tort action for injury to or death of employee's unborn child, 55 ALR4th 792.

Workers' Compensation: injuries incurred during labor activity, 61 ALR4th 196.

Workers' compensation: injuries incurred while traveling to or from work with employer's receipts, 63 ALR4th 253.

Workers' Compensation: recovery for home service provided by spouse, 67 ALR4th 765.

Divorce and separation: workers' compensation benefits as marital property subject to distribution, 30 ALR5th 139.

ARTICLE 1

GENERAL PROVISIONS

Law reviews. — For note on 1995 amendments and enactments of Code sections in

this article, see 12 Ga. St. U.L. Rev. 271, 276, and 280 (1995).

RESEARCH REFERENCES

ALR. — Recovery for discharge from employment in retaliation for filing workers' compensation claim, 32 ALR4th 1221.

Right to workers' compensation for phys-

ical injury or illness suffered by claimant as result of sudden mental stimuli — compensability of particular injuries and illnesses, 20 ALR6th 641.

34-9-1. Definitions.

As used in this chapter, the term:

(1) "Board" means the State Board of Workers' Compensation.

(2) "Employee" means every person in the service of another under any contract of hire or apprenticeship, written or implied, except a person whose employment is not in the usual course of the trade, business, occupation, or profession of the employer; and, except as otherwise provided in this chapter, minors are included even though working in violation of any child labor law or other similar statute; provided, however, that nothing contained in this chapter shall be construed as repealing or altering any such law or statute. Any reference to any employee who has been injured shall, if the employee dies, include such employee's legal representatives, dependents, and other persons to whom compensation may be payable pursuant to this chapter. All firefighters, law enforcement personnel, and personnel of emergency management or civil defense agencies, emergency medical services, and rescue organizations whose compensation is paid by the state or any county or municipality, regardless of the method of appointment, and all full-time county employees and employees of elected salaried county officials are specifically included in this definition. There shall also be included within such term any volunteer firefighter of any county or municipality of this state, but only for services rendered in such capacity which are not prohibited by Code Section 38-3-36 and only if the governing authority of the county or municipality for which such services are rendered shall provide by appropriate resolution for inclusion of such volunteer firefighters; any volunteer law enforcement personnel of any county or municipality of this state who are certified by the Georgia Peace Officer Standards and Training Council, for volunteer law enforcement services rendered in such capacity which are not prohibited by Code Section 38-3-36 and only if the governing authority of the county or municipality for which such services are rendered shall provide by appropriate resolution for inclusion of such volunteer law enforcement

personnel; any person who is a volunteer member or worker of an emergency management or civil defense organization, emergency medical service, or rescue organization, whether governmental or not, of any county or municipality of this state for volunteer services, which are not prohibited by Code Section 38-3-36, rendered in such capacity and only if the governing authority of the county or municipality for which such services are rendered shall provide by appropriate resolution for inclusion of such volunteer members or workers; and any person certified by the Department of Human Resources or the Composite State Board of Medical Examiners and registered with any county or municipality of this state as a medical first responder for any volunteer first responder services rendered in such capacity, which are not prohibited by Code Section 38-3-36 and only if the governing authority of the county or municipality for which such services are rendered shall provide by appropriate resolution for inclusion of such responders. The various elected county officers and elected members of the governing authority of an individual county shall also be included in this definition, if the governing authority of said county shall provide therefor by appropriate resolution. For the purposes of workers' compensation coverage, employees of county and district health agencies established under Chapter 3 of Title 31 are deemed and shall be considered employees of the State of Georgia and employees of community service boards established under Chapter 2 of Title 37 shall be considered to be employees of the state. For the purpose of workers' compensation coverage, members of the Georgia National Guard and the State Defense Force serving on state active duty pursuant to an order by the Governor are deemed and shall be considered to be employees of this state. A person shall be an independent contractor and not an employee if such person has a written contract as an independent contractor and if such person buys a product and resells it, receiving no other compensation, or provides an agricultural service or such person otherwise qualifies as an independent contractor. Notwithstanding the foregoing provisions of this paragraph, any officer of a corporation may elect to be exempt from coverage under this chapter by filing written certification of such election with the insurer or, if there is no insurer, the State Board of Workers' Compensation as provided in Code Section 34-9-2.1. For purposes of this chapter, an owner-operator as such term is defined in Code Section 40-2-87 shall be deemed to be an independent contractor. Inmates or persons participating in a work release program, community service program, or similar program as part of the punishment for violation of a municipal ordinance pursuant to Code Section 36-32-5 or a county ordinance or a state law shall not be deemed to be an employee while participating in work or training or while going to and from the work site or training site, unless such inmate or person is employed for private gain in violation of Code Section 42-1-5 or Code Section 42-8-70 or unless the municipality or county had voluntarily established a policy, on or before January 1, 1993, to provide workers' compensation benefits to such individuals.

(3) "Employer" shall include the State of Georgia and all departments, instrumentalities, and authorities thereof; each county within the state, including its school district; each independent public school district; any municipal corporation within the state and any political division thereof; any individual, firm, association, or public or private corporation engaged in any business, except as otherwise provided in this chapter, and the receiver or trustee thereof; any electric membership corporation organized under Article 4 of Chapter 3 of Title 46 or other cooperative corporation engaged in rural electrification, including electric refrigeration cooperatives; any telephone cooperative organized under Part 3 of Article 2 of Chapter 5 of Title 46 or other cooperative or nonprofit corporation engaged in furnishing telephone service; the legal representative of a deceased employer using the service of another for pay; and any person who, pursuant to a contract or agreement with an employer, provides workers' compensation benefits to an injured employee, notwithstanding the fact that no common-law master-servant relationship or contract of employment exists between the injured employee and the person providing the benefits. If the employer is insured, this term shall include his insurer as far as applicable.

(4) "Injury" or "personal injury" means only injury by accident arising out of and in the course of the employment and shall not, except as provided in this chapter, include a disease in any form except where it results naturally and unavoidably from the accident. Except as otherwise provided in this chapter, "injury" and "personal injury" shall include the aggravation of a preexisting condition by accident arising out of and in the course of employment, but only for so long as the aggravation of the preexisting condition continues to be the cause of the disability; the preexisting condition shall no longer meet this criteria when the aggravation ceases to be the cause of the disability. "Injury" and "personal injury" shall not include injury caused by the willful act of a third person directed against an employee for reasons personal to such employee, nor shall "injury" and "personal injury" include heart disease, heart attack, the failure or occlusion of any of the coronary blood vessels, stroke, or thrombosis unless it is shown by a preponderance of competent and credible evidence, which shall include medical evidence, that any of such conditions were attributable to the performance of the usual work of employment. Alcoholism and disabilities attributable thereto shall not be deemed to be "injury" or "personal injury" by accident arising out of and in the course of employment. Drug addiction or disabilities resulting therefrom shall not be deemed to be "injury" or "personal injury" by accident arising out of and in the course of employment except when such addiction or disability resulted from the use of drugs or medicines prescribed for the treatment of the initial injury by an authorized physician. Notwithstanding any other provision of this chapter, and solely for members of the Georgia National Guard and State Defense Force, an

injury arising in the course of employment shall include any injury incurred by a member of the Georgia National Guard or State Defense Force while serving on state active duty or when traveling to and from state active duty. (Ga. L. 1920, p. 167, §§ 2, 45; Ga. L. 1922, p. 185, § 1; Code 1933, §§ 114-101, 114-102; Ga. L. 1943, p. 401, § 1; Ga. L. 1946, p. 103; Ga. L. 1950, p. 324, § 1; Ga. L. 1950, p. 404, § 1; Ga. L. 1952, p. 167, § 1; Ga. L. 1953, Jan.-Feb. Sess., p. 526, § 1; Ga. L. 1958, p. 183, § 1; Ga. L. 1963, p. 141, § 1; Ga. L. 1964, p. 675, § 1; Ga. L. 1967, p. 633, § 1; Ga. L. 1968, p. 1163, § 1; Ga. L. 1970, p. 196, § 1; Ga. L. 1970, p. 235, § 1; Ga. L. 1973, p. 232, § 1; Ga. L. 1975, p. 190, § 1; Ga. L. 1975, p. 1231, § 1; Ga. L. 1978, p. 2220, § 1; Ga. L. 1980, p. 1145, § 1; Ga. L. 1981, p. 842, § 1; Ga. L. 1981, p. 1585, § 1; Ga. L. 1982, p. 2360, §§ 1, 3; Ga. L. 1982, p. 2485, §§ 0.5, 5.5; Ga. L. 1983, p. 3, § 25; Ga. L. 1984, p. 816, § 1; Ga. L. 1987, p. 1038, § 1; Ga. L. 1987, p. 1110, § 1; Ga. L. 1988, p. 1679, § 0.5; Ga. L. 1990, p. 1501, § 1; Ga. L. 1991, p. 94, § 34; Ga. L. 1991, p. 677, § 1; Ga. L. 1991, p. 1850, § 1; Ga. L. 1992, p. 1942, § 1; Ga. L. 1993, p. 491, § 1; Ga. L. 1994, p. 97, § 34; Ga. L. 1994, p. 887, § 1; Ga. L. 1994, p. 1717, § 2; Ga. L. 1996, p. 1291, § 1; Ga. L. 2000, p. 794, § 1.)

Cross references. — Exemption of corporate officer from coverage, § 34-9-2.1. Compensation for permanent partial disability, § 34-9-263. Compensation schedules, Art. 7, Ch. 9, T. 34. State defense force, § 38-2-50 et seq.

Law reviews. — For article discussing term “arising out of and in the course of employment,” see 14 Ga. St. B.J. 92 (1977). For article discussing injury as a result of aggravation, see 14 Ga. St. B.J. 135 (1978). For article surveying 1978 amendments to workers’ compensation law, see 15 Ga. St. B.J. 35 (1978). For article surveying developments in Georgia local government law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 187 (1981). For article surveying developments in Georgia workers’ compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981). For survey article on workers’ compensation, see 34 Mercer L. Rev. 335 (1982). For annual survey of workers’ compensation, see 38 Mercer L. Rev. 431 (1986). For article, “Sexual Harassment Claims Under Georgia Law,” see 6 Ga. St. B.J. 16 (2000). For article, “Workers’ Compensation,” see 53 Mercer L. Rev. 521 (2001). For survey article on workers’ compensation law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For article, “Post-Creation Checklist for Georgia Business Entities,” see 9 Ga. St. B.J. 24 (2004).

For annual survey of law of worker’s compensation, see 56 Mercer L. Rev. 479 (2004). For annual survey of local government law, see 57 Mercer L. Rev. 289 (2005). For annual survey of workers’ compensation law, see 57 Mercer L. Rev. 419 (2005).

For note discussing compensation under this chapter for original injuries aggravated by subsequent injury, continued employment, or ordinary activity, see 31 Mercer L. Rev. 325 (1979). For note on 1991 amendment of this Code section, see 8 Ga. St. U.L. Rev. 109 (1992). For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992). For note on 1993 amendment of this article, see 10 Ga. St. U.L. Rev. 152 (1993). For review of 1996 workers’ compensation legislation, see 13 Ga. St. U. L. Rev. 233 (1996).

For comment on United States Fid. & Guar. Co. v. Stapleton, 37 Ga. App. 707, 141 S.E. 506 (1928), see 1 Ga. B.J. 53 (1927). For comment on United States Cas. Co. v. Richardson, 75 Ga. App. 496, 43 S.E.2d 793 (1947), see 10 Ga. B.J. 374 (1948). For comment on American Mut. Liab. Ins. Co. v. Benford, 77 Ga. App. 93, 47 S.E.2d 673 (1948), see 11 Ga. B.J. 79 (1948). For comment on McKinney v. Reynolds & Manley Lumber Co., 79 Ga. App. 826, 54 S.E.2d 471 (1949), see 12 Ga. B.J. 208 (1949). For comment on Bibb Mfg. Co. v. Cowan, 85 Ga. App. 816, 70 S.E.2d 386 (1952), see 4 Mercer

L. Rev. 216 (1952). For comment on *Hanson v. Globe Indem. Co.*, 85 Ga. App. 179, 68 S.E.2d 179 (1951), see 14 Ga. B.J. 484 (1952). For comment on *City of Brunswick v. Edenfield*, 87 Ga. App. 434, 74 S.E.2d 133 (1953), see 15 Ga. B.J. 499 (1953). For comment on *Lockheed Aircraft Corp. v. Marks*, 88 Ga. App. 167, 76 S.E.2d 507 (1953), see 16 Ga. B.J. 215 (1953). For comment on *Traveler's Ins. Co. v. Smith*, 91 Ga. App. 305, 85 S.E.2d 484 (1954), see 17 Ga. B.J. 516 (1955). For comment on *Delta C. & S. Airlines v. Perry*, 94 Ga. App. 107, 93 S.E.2d 771 (1956), see 19 Ga. B.J. 235 (1956). For comment on *Ladson Motor Co. v. Croft*, 212 Ga. 275, 92 S.E.2d 103 (1956), see 19 Ga. B.J. 237 (1956). For comment on *Commissioners of Rds. & Revenue v. Davis*, 213 Ga. 792, 102 S.E.2d 180 (1958), see 20 Ga. B.J. 540 (1958). For comment on *Chandler v. General Accident Fire & Life Assurance Corp.*, 101 Ga. App. 597, 114 S.E.2d 438 (1960), see 23 Ga. B.J. 565 (1961). For comment on *Thomas v. United States Cas. Co.*, 218 Ga. 493, 128 S.E.2d 749 (1962), see 26 Ga. B.J. 126 (1963). For comment criticizing *Pike v. Maryland Cas. Co.*, 107 Ga. App. 49, 129 S.E.2d 78 (1962), see 26 Ga. B.J.

131 (1963). For comment on *Employers Ins. Co. v. Wright*, 108 Ga. App. 380, 133 S.E.2d 39 (1963), see 1 Ga. St. B.J. 123 (1964). For comment on *Commercial Constr. Co. v. Caldwell*, 111 Ga. App. 1, 140 S.E.2d 298 (1965), see 2 Ga. St. B.J. 135 (1965). For comment criticizing *Brady v. Royal Mfg. Co.*, 117 Ga. App. 312, 160 S.E.2d 424 (1968), see 20 Mercer L. Rev. 473 (1969). For comment on *Golosh v. Cherokee Cab Co.*, 226 Ga. 636, 176 S.E.2d 925 (1970), see 22 Mercer L. Rev. 497 (1971). For comment on *General Fire & Cas. Co. v. Bellflower*, 123 Ga. App. 864, 182 S.E.2d 678 (1971), see 23 Mercer L. Rev. 449 (1972). For comment criticizing *Wilkie v. Travelers Ins. Co.*, 124 Ga. App. 714, 185 S.E.2d 783 (1971), see 23 Mercer L. Rev. 703 (1972). For comment, "The Rights of the Lent Servant Against the General or Special Employer," in light of *Forrester v. Scott*, 125 Ga. App. 245, 187 S.E.2d 323 (1972), and *United States Fid. & Guar. Co. v. Forrester*, 126 Ga. App. 762, 191 S.E.2d 787 (1972), see 9 Ga. St. B.J. 556 (1973). For comment, "Georgia's Mental Block in Workers' Compensation," see 36 Mercer L. Rev. 971 (1985).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

EMPLOYER AND EMPLOYEE RELATIONSHIP

1. IN GENERAL
2. INDEPENDENT CONTRACTOR
3. USUAL COURSE OF BUSINESS
4. TERMINATION OF EMPLOYMENT
5. EMPLOYEES' SUBSTITUTES OR HELPERS
6. BORROWED SERVANTS
7. PARTICULAR WORKERS
8. EMPLOYERS
9. INSURANCE

INJURY BY ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT

1. IN GENERAL
2. ARISING OUT OF EMPLOYMENT
3. ARISING IN COURSE OF EMPLOYMENT
4. ACCIDENTS HELD TO ARISE OUT OF AND IN COURSE OF EMPLOYMENT
5. ACCIDENTS HELD NOT TO ARISE OUT OF AND IN COURSE OF EMPLOYMENT
6. ENTERING AND LEAVING PREMISES AND PREPARING FOR WORK
7. LUNCH AND REST BREAKS
8. TRAVELING TO AND FROM WORK
9. DEVIATION FROM EMPLOYMENT
10. HORSEPLAY
11. TRAVELING SALESMEN AND EMPLOYEES

12. DISEASE RESULTING FROM ACCIDENT
13. WILLFUL ACTS OF THIRD PERSONS
14. INJURY DUE TO EXERTION OR AGGRAVATION OF CONDITION
 - A. IN GENERAL
 - B. HEART ATTACKS
 - C. CEREBRAL HEMORRHAGES
 - D. OTHER ILLNESSES

General Consideration

Constitutionality. — As to the constitutionality of the 1922 amendment, see *Athens Ry. & Elec. Co. v. Kinney*, 160 Ga. 1, 127 S.E. 290 (1925).

As to the unconstitutionality under the former Constitution of 1877 of the definition of employers to include counties, on the grounds that the permitted uses of county taxes at that time did not include workers' compensation (which use is now constitutionally permitted), see *Floyd County v. Scoggins*, 164 Ga. 485, 139 S.E. 11, 53 A.L.R. 1286 (1927); *Perdue v. Maryland Cas. Co.*, 43 Ga. App. 853, 160 S.E. 720 (1931); *Morgan County v. Craig*, 213 Ga. 742, 101 S.E.2d 714 (1958); *Commissioners of Rds. & Revenues v. Davis*, 213 Ga. 792, 102 S.E.2d 180 (1958), for comment, see 20 Ga. B.J. 540 (1958); *Fortson v. Clarke County*, 97 Ga. App. 410, 103 S.E.2d 597 (1958).

The provision of this section that the term "employers" shall include any municipal corporation within the state and any political division thereof does not violate the constitutional prohibition against granting any donation or gratuity in favor of any person, corporation, or association. *City of Macon v. Benson*, 175 Ga. 502, 166 S.E. 26 (1932) (see O.C.G.A. § 34-9-1).

The provision making this state and the various departments thereof "employers" within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), and therefore subject to its provisions, is not unconstitutional insofar as the State Highway Department (now Department of Transportation) is concerned, as failing to provide sufficient procedural machinery for notice and service to make the state or its departments subject thereto. *State Hwy. Dep't v. Turner*, 198 Ga. 795, 32 S.E.2d 805 (1945).

Intent of legislature. — The legislature, in enacting the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), did not intend to enforce compensation for injury out of

one's own business and property. *Denis Aerial Ag-Plicators, Inc. v. Swift*, 154 Ga. App. 742, 269 S.E.2d 890 (1980).

Purpose of chapter. — The purpose of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is a humanitarian measure providing relief to the injured employee and protecting employers from excessive damage awards; this law should be liberally interpreted by the court to carry out this purpose. *Atha v. Jackson Atlanta, Inc.*, 159 Ga. App. 433, 283 S.E.2d 654 (1981).

Purpose of the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., is to alleviate the suffering of injured workers and their families by providing immediate and certain financial assistance, regardless of whether the injury resulted from the fault of the employer, as long as the injury arose out of and in the course of employment. *Travelers Ins. Co. v. Southern Elec., Inc.*, 209 Ga. App. 718, 434 S.E.2d 507 (1993).

Construction. — The words of this section must be construed reasonably and liberally with a view of applying the beneficent provisions of the workers' compensation law so as to effectuate its purposes, and to extend them to every class of workman and employee that can fairly be brought within the provisions of the law. *Lee v. Claxton*, 70 Ga. App. 226, 28 S.E.2d 87 (1943) (see O.C.G.A. § 34-9-1).

This section must be liberally construed in order that its humane objectives may be effectuated. *United States Asbestos v. Hammock*, 140 Ga. App. 378, 231 S.E.2d 792 (1976) (see O.C.G.A. § 34-9-1).

This section contemplates two persons standing in opposed relation, and not the anomaly of one person occupying the dual relation of master and servant, employer and employee, plaintiff and defendant. *Denis Aerial Ag-Plicators, Inc. v. Swift*, 154 Ga. App. 742, 269 S.E.2d 890 (1980) (see O.C.G.A. § 34-9-1).

Scope of chapter. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.)

General Consideration (Cont'd)

includes all employments and services which can reasonably be said to come under its provisions, though a forced construction of the wording thereof to accomplish this will not be indulged in. *Continental Cas. Co. v. Haynie*, 51 Ga. App. 650, 181 S.E. 126 (1935), *aff'd*, 182 Ga. 608, 186 S.E. 683 (1936).

Insurer's argument that there should be an exception to the rule making declaratory judgments unavailable where there was no future act to which such a judgment could be applied had to be rejected; the premise for the exception was that the state board of workers' compensation (board) lacked subject matter jurisdiction to resolve the underlying coverage issue, but, in fact, the board had the authority to resolve ancillary issues such as workers' compensation insurance coverage. *Builders Ins. Group, Inc. v. Ker-Wil Enters.*, 274 Ga. App. 522, 618 S.E.2d 160 (2005).

When jurisdiction attaches. — Under Georgia law, jurisdiction in the broad sense attaches when an employee sustains an accidental injury in this state, and nothing prohibits such jurisdiction because of residence or contract in another state. *Security Ins. Group v. Plank*, 133 Ga. App. 815, 212 S.E.2d 471 (1975).

Jurisdiction. — The fact that an accident happened in South Carolina while a Georgia employee was at work did not affect the applicability of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), nor did the fact that an employee was a minor take the case outside the provisions of the law. *Hockmuth v. Perkins*, 55 Ga. App. 649, 191 S.E. 156 (1937).

The legislature knew that Georgia industries and businesses extend the field of their operations beyond state lines, and hence understood the plain meaning of the words "arising out of and in the course of the employment"; they therefore intended that compensation cover the entire field of operations, without regard to state lines. *Slaten v. Travelers Ins. Co.*, 197 Ga. 1, 28 S.E.2d 280, answer conformed to, 70 Ga. App. 665, 29 S.E.2d 98 (1943), *cert. dismissed*, 197 Ga. 856, 30 S.E.2d 822 (1944).

The board of workers' compensation had jurisdiction to award compensation where a

Georgia employer employed a Georgia resident in Ohio, through an agent of the Georgia employer, to drive a truck loaded with freight from Ohio to Georgia, and the employee was killed in the course of employment while en route to Georgia. *Martin v. Bituminous Cas. Corp.*, 215 Ga. 476, 111 S.E.2d 53 (1959).

Two-year statute of limitation tolled by workers' compensation proceeding. — Where an employee instituted a proceeding pursuant to the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., for injuries sustained when a forklift turned over on the employee, and the employee's claim for workers' compensation benefits was successful initially and on appeal, but was reversed by the Court of Appeals, the two-year statute of limitation on the employee's personal injury action against the former employer was tolled for the period during which the employee pursued the employee's workers' compensation remedy. *Butler v. Glen Oak's Turf, Inc.*, 196 Ga. App. 98, 395 S.E.2d 277, *cert. denied*, 196 Ga. App. 907, 395 S.E.2d 277 (1990).

"Disability" defined. — "Disability" under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) means impairment of earning capacity. *St. Paul Fire & Marine Ins. Co. v. Harris*, 118 Ga. App. 352, 163 S.E.2d 833 (1968).

Accidents covered. — The compensation provided under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is not for all accidental injuries which may be sustained by employees in the course of their employment, but only for such as also arise out of the employment. *Scott v. Travelers' Ins. Co.*, 49 Ga. App. 157, 174 S.E. 629 (1934).

"New accident" doctrine. — When former insurance company covered employee when the employee first developed carpal tunnel syndrome but the employee did not become unable to work because of the syndrome until the employee's present insurance company covered the employee, there was a "new accident" and injury and the present insurance company was liable for the claim. *Guarantee Mut. Ins. Co. v. Wade Invs.*, 232 Ga. App. 328, 499 S.E.2d 925 (1998).

Prerequisites to recovery under chapter. — To authorize compensation under the workers' compensation law (see O.C.G.A.

§ 34-9-1 et seq.), it must appear that an employee's injury arose out of and in the course of employment, and that the accident was within the purview of this law; all three of these elements must concur and be proved before a recovery is authorized. *Givens v. Travelers Ins. Co.*, 71 Ga. App. 50, 30 S.E.2d 115 (1944); *Bibb Mfg. Co. v. Cowan*, 85 Ga. App. 816, 70 S.E.2d 386 (1952), for comment, see 4 Mercer L. Rev. 216 (1952).

A claimant seeking compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) carries the burden of showing not only that the accident arose out of and in the course of the employment, but that the person injured, for whose injury compensation is claimed, was at the time a servant of the employer against whom compensation is claimed. *Banks v. Ellijay Lumber Co.*, 59 Ga. App. 270, 200 S.E. 480 (1938).

Payment of money. — The payment of money may be corroborative of other facts indicating employment at a given time, but is not of itself conclusive. *Travelers Ins. Co. v. Clark*, 58 Ga. App. 115, 197 S.E. 650 (1938).

The payment of wages is not necessary to bring one within the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Yellow Cab Co. v. Worrell*, 155 Ga. App. 41, 273 S.E.2d 410 (1980), distinguishing, *Fidelity & Cas. Co. v. Windham*, 209 Ga. 592, 74 S.E.2d 835 (1953), which held to the contrary, on grounds of the lack of regulatory ordinance therein.

Mode of payment. — The mode of payment, while it may be a circumstance tending to indicate the nature of the relationship between the parties, is by no means the controlling or decisive factor to be considered in determining whether the employer-employee relation exists. *Golosh v. Cherokee Cab Co.*, 226 Ga. 636, 176 S.E.2d 925 (1970), for comment, see 22 Mercer L. Rev. 497 (1971).

Questions of fact. — Except in plain and indisputable cases, the question of whether one is an employee within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1), and whether an injury received by such person was received in the course of the employment, are questions of fact for decision by the board. *Employers Ins. Co. v. Bass*, 81 Ga. App. 306, 58 S.E.2d 516 (1950).

"Injury by accident" defined. — "Injury by accident," as used in former Code 1933,

§ 114-412 (see O.C.G.A. § 34-9-266), relating to compensation for a hernia, has the same meaning as in former Code 1933, §§ 114-101 and 114-102 (see O.C.G.A. § 34-9-1 et seq.). *Hardware Mut. Cas. Co. v. Sprayberry*, 69 Ga. App. 196, 25 S.E.2d 74 (1943).

Bankruptcy of employer. — Because a willful and malicious injury could not be established as a matter of law where plaintiff's fall while working was not substantially certain to result from the employer's decision not to obtain proper insurance, employer's debt to plaintiff was dischargeable in bankruptcy. *Herndon v. Brock*, 186 Bankr. 293 (Bankr. N.D. Ga. 1995).

Action for personal property damage allowed. — Because the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., does not provide a remedy for damage to personal property, the act does not bar an action for damages to personal property, such as an employee's clothing. To hold otherwise would deny an employee the constitutional right to due process and equal protection of the law. *Superb Carpet Mills, Inc. v. Thomason*, 183 Ga. App. 554, 359 S.E.2d 370, cert. denied, 183 Ga. App. 907, 359 S.E.2d 370 (1987).

Positional risk doctrine reexamined. — The "positional risk doctrine" is a corollary of the general principles defining what constitutes an accidental injury arising out of the employment; and, under it, an accidental injury arises out of the employment when the employee proves that the employee's work has brought the employee within range of the danger by requiring the employee's presence in the locale when the peril struck, even though any other person present would have also been injured irrespective of that person's employment. Any cases holding contrary to the positional risk doctrine that the danger must be peculiar to the work and not common to the neighborhood for injuries to arise out of the employment have been overruled. *Chaparral Boats, Inc. v. Heath*, 269 Ga. App. 339, 606 S.E.2d 567 (2004).

Positional risk doctrine did not make a workers' compensation claimant's injuries compensable where the worker was injured in a crosswalk leading to the place of employment as the employee was not on the employer's premises and the parking lot excep-

General Consideration (Cont'd)

tion did not apply. *Collie Concessions, Inc. v. Bruce*, 272 Ga. App. 578, 612 S.E.2d 900 (2005).

Positional risk doctrine does not make compensable an injury which occurs while an employee is going to or from work, unless the injury occurs on the premises or within the parking lot exception, even when the employer designates a particular time to come to work and a particular route or portal to use. *Collie Concessions, Inc. v. Bruce*, 272 Ga. App. 578, 612 S.E.2d 900 (2005).

Cited in *Marlow v. Mayor of Savannah*, 28 Ga. App. 368, 110 S.E. 923 (1922); *New Amsterdam Cas. Co. v. Sumrell*, 30 Ga. App. 682, 118 S.E. 786 (1923); *Atlantic Ice & Coal Corp. v. Wishard*, 30 Ga. App. 730, 119 S.E. 429 (1923); *Travelers Ins. Co. v. Bacon*, 30 Ga. App. 728, 119 S.E. 458 (1923); *United States Fid. & Guar. Co. v. Corbett*, 31 Ga. App. 7, 119 S.E. 921 (1923); *Atlanta v. Hatcher*, 31 Ga. App. 633, 121 S.E. 864 (1924); *Georgia Cas. Co. v. Martin*, 157 Ga. 909, 122 S.E. 881 (1924); *Holliday v. Merchants & Miners Transp. Co.*, 32 Ga. App. 567, 124 S.E. 89 (1924); *Hotel Equip. Co. v. Liddell*, 32 Ga. App. 590, 124 S.E. 92 (1924); *Athens Ry. & Elec. Co. v. Kinney*, 160 Ga. 1, 127 S.E. 290 (1925); *Rome Ry. & Light Co. v. Jones*, 33 Ga. App. 617, 127 S.E. 786 (1925); *Keen v. New Amsterdam Cas. Co.*, 34 Ga. App. 257, 129 S.E. 174 (1925); *Georgia Ry. & Power Co. v. Clore*, 34 Ga. App. 409, 129 S.E. 799 (1925); *United States Cas. Co. v. Smith*, 34 Ga. App. 363, 129 S.E. 880 (1925); *Goss v. Gordon County*, 35 Ga. App. 325, 133 S.E. 68 (1926); *United States Fid. & Guar. Co. v. Watts*, 35 Ga. App. 447, 133 S.E. 476 (1926); *Western & Atl. R.R. v. Henderson*, 35 Ga. App. 353, 133 S.E. 645 (1926); *Ocean Accident & Guarantee Corp. v. Martin*, 35 Ga. App. 504, 134 S.E. 174 (1926); *London Guarantee & Accident Corp. v. Wallace*, 35 Ga. App. 571, 134 S.E. 334 (1926); *Atlantic Ref. Co. v. Sheffield*, 162 Ga. 656, 134 S.E. 761 (1926); *Norwich Union Indem. Co. v. Johnson*, 36 Ga. App. 186, 136 S.E. 335 (1926); *Maryland Cas. Co. v. Peek*, 36 Ga. App. 557, 137 S.E. 121 (1927); *United States Fid. & Guar. Co. v. Stapleton*, 37 Ga. App. 707, 141 S.E. 506 (1928); *Employers Liab. Assurance Corp. v. Treadwell*, 37 Ga. App.

759, 142 S.E. 182 (1928); *Montgomery v. Maryland Cas. Co.*, 39 Ga. App. 210, 146 S.E. 504 (1929); *Branch & Howard v. Georgia Cas. Co.*, 39 Ga. App. 319, 147 S.E. 144 (1929); *Blanchard v. Savannah River Lumber Co.*, 40 Ga. App. 416, 149 S.E. 793 (1929); *Love Lumber Co. v. Thigpen*, 42 Ga. App. 83, 155 S.E. 77 (1930); *City of Macon v. Whittington*, 171 Ga. 643, 156 S.E. 674 (1930); *Simmons v. Etowah Monument Co.*, 42 Ga. App. 633, 157 S.E. 260 (1931); *Parker v. Travelers' Ins. Co.*, 174 Ga. 525, 163 S.E. 159 (1932); *Porter v. Liberty Mut. Ins. Co.*, 46 Ga. App. 86, 166 S.E. 675 (1932); *Payton v. Fidelity & Cas. Co.*, 47 Ga. App. 747, 171 S.E. 392 (1933); *Joiner v. Sinclair Ref. Co.*, 48 Ga. App. 365, 172 S.E. 754 (1934); *American Mut. Liab. Ins. Co. v. Wigley*, 179 Ga. 764, 177 S.E. 568 (1934); *City Council v. Reynolds*, 50 Ga. App. 842, 178 S.E. 485 (1935); *Continental Cas. Co. v. Payne*, 56 Ga. App. 873, 194 S.E. 428 (1937); *Reid v. Lummus Cotton Gin Co.*, 58 Ga. App. 184, 197 S.E. 904 (1938); *Wicker v. Fidelity & Cas. Co.*, 59 Ga. App. 521, 1 S.E.2d 464 (1939); *Aetna Cas. & Sur. Co. v. Prather*, 59 Ga. App. 797, 2 S.E.2d 115 (1939); *Pollard v. Balon*, 61 Ga. App. 406, 6 S.E.2d 400 (1939); *Hall v. Georgia Milk Producers Confederation*, 61 Ga. App. 676, 7 S.E.2d 330 (1940); *Kendrick v. State Hwy. Bd.*, 62 Ga. App. 570, 8 S.E.2d 793 (1940); *Fidelity & Cas. Co. v. Wicker*, 63 Ga. App. 435, 11 S.E.2d 365 (1940); *Travelers Ins. Co. v. Faulkner*, 63 Ga. App. 438, 11 S.E.2d 367 (1940); *Conoly v. Imperial Tobacco Co.*, 63 Ga. App. 880, 12 S.E.2d 398 (1940); *Merritt v. Continental Cas. Ins. Co.*, 65 Ga. App. 826, 16 S.E.2d 612 (1941); *De Loach v. Firemen's Fund Indem. Co.*, 70 Ga. App. 195, 27 S.E.2d 895 (1943); *State Hwy. Dep't v. Bass*, 197 Ga. 356, 29 S.E.2d 161 (1944); *Kelley v. Newton County*, 198 Ga. 483, 32 S.E.2d 99 (1944); *Liberty Mut. Ins. Co. v. Scoggins*, 72 Ga. App. 263, 33 S.E.2d 534 (1945); *McWaters v. Employers Liab. Assurance Corp.*, 73 Ga. App. 586, 37 S.E.2d 430 (1946); *Lumbermen's Mut. Cas. Co. v. Allen*, 74 Ga. App. 133, 38 S.E.2d 841 (1946); *Travelers Ins. Co. v. Young*, 77 Ga. App. 512, 48 S.E.2d 748 (1948); *Flint Elec. Membership Corp. v. Posey*, 78 Ga. App. 597, 51 S.E.2d 869 (1949); *Liberty Mut. Ins. Co. v. Fricks*, 81 Ga. App. 727, 59 S.E.2d 671 (1950); *Ray v. United States*, 228 F.2d 574 (5th Cir. 1955); *Walker v. Wilcox County*, 95

Ga. App. 185, 97 S.E.2d 583 (1957); *Royal Indem. Co. v. Coulter*, 213 Ga. 277, 98 S.E.2d 899 (1957); *Mosley v. George A. Fuller Co.*, 250 F.2d 686 (5th Cir. 1957); *Commissioners of Rds. & Revenues v. Davis*, 213 Ga. 792, 102 S.E.2d 180 (1958); *Polk County v. Lincoln Nat'l Life Ins. Co.*, 262 F.2d 486 (5th Cir. 1959); *Shelton v. Fireman's Fund Indem. Co.*, 101 Ga. App. 466, 114 S.E.2d 288 (1960); *City of Dalton v. United States Fid. & Guar. Co.*, 216 Ga. 602, 118 S.E.2d 475 (1961); *Smith v. Rich's, Inc.*, 104 Ga. App. 883, 123 S.E.2d 316 (1961); *Oconee County v. Rowland*, 107 Ga. App. 108, 129 S.E.2d 373 (1962); *Elberfeld v. Employers Mut. Liab. Ins. Co.*, 109 Ga. App. 39, 134 S.E.2d 869 (1964); *Jones v. City of Pembroke*, 220 Ga. 213, 138 S.E.2d 276 (1964); *Travelers Ins. Co. v. Ross*, 110 Ga. App. 312, 138 S.E.2d 474 (1964); *Richmond County Hosp. Auth. v. McClain*, 221 Ga. 60, 143 S.E.2d 165 (1965); *Sears, Roebuck & Co. v. Poole*, 112 Ga. App. 527, 145 S.E.2d 615 (1965); *Benefield v. Harriett & Henderson Cotton Mills, Inc.*, 113 Ga. App. 556, 149 S.E.2d 196 (1966); *Mull v. Aetna Cas. & Sur. Co.*, 120 Ga. App. 791, 172 S.E.2d 147 (1969); *Mull v. Aetna Cas. & Sur. Co.*, 226 Ga. 462, 175 S.E.2d 552 (1970); *Bituminous Cas. Co. v. Sharpe*, 128 Ga. App. 695, 197 S.E.2d 741 (1973); *American Motorists Ins. Co. v. Brown*, 128 Ga. App. 813, 198 S.E.2d 348 (1973); *Aetna Cas. & Sur. Co. v. Barber*, 128 Ga. App. 894, 198 S.E.2d 162 (1973); *Yancey v. Green*, 129 Ga. App. 705, 201 S.E.2d 162 (1973); *Kaiser v. Great Am. Ins. Co.*, 130 Ga. App. 629, 204 S.E.2d 375 (1974); *Sims v. American Cas. Co.*, 131 Ga. App. 461, 206 S.E.2d 121 (1974); *United States Fid. & Guar. Co. v. Hammock*, 133 Ga. App. 839, 212 S.E.2d 484 (1975); *Allstate Ins. Co. v. Dotson*, 135 Ga. App. 128, 217 S.E.2d 329 (1975); *Georgia Dep't of Human Resources v. Demory*, 138 Ga. App. 888, 227 S.E.2d 788 (1976); *Commercial Union Ass'n Co. v. Couch*, 143 Ga. App. 64, 237 S.E.2d 528 (1977); *Zitzman v. Seaboard Fire & Marine Ins. Co.*, 143 Ga. App. 298, 238 S.E.2d 282 (1977); *Dixie-Cole Transf. Trucking Co. v. Fudge*, 147 Ga. App. 306, 248 S.E.2d 694 (1978); *Bituminous Cas. Corp. v. Ashbaugh*, 147 Ga. App. 392, 249 S.E.2d 96 (1978); *Steinberg v. Star Expansion Co.*, 148 Ga. App. 309, 251 S.E.2d 160 (1978); *Helton v. Interstate Brands Corp.*,

155 Ga. App. 607, 271 S.E.2d 739 (1980); *Board of Trustees v. Christy*, 246 Ga. 553, 272 S.E.2d 288 (1980); *Mimms v. Sisk Decorating Co.*, 156 Ga. App. 572, 275 S.E.2d 148 (1980); *Swafford v. Transit Cas. Co.*, 486 F. Supp. 175 (N.D. Ga. 1980); *Union Carbide Corp. v. Coffman*, 158 Ga. App. 360, 280 S.E.2d 140 (1981); *Walsh Constr. Co. v. Frawley*, 248 Ga. 151, 284 S.E.2d 434 (1981); *Continental Cas. Co. v. Parker*, 161 Ga. App. 614, 288 S.E.2d 776 (1982); *Johnson v. Hensel Phelps Constr. Co.*, 250 Ga. 83, 295 S.E.2d 841 (1982); *Long v. Marvin M. Black Co.*, 250 Ga. 621, 300 S.E.2d 150 (1983); *Fountain v. Shoney's Big Boy, Inc.*, 168 Ga. App. 489, 309 S.E.2d 671 (1983); *Cummings v. Walsh Constr. Co.*, 561 F. Supp. 872 (S.D. Ga. 1983); *Fulton-DeKalb Hosp. Auth. v. Dean*, 169 Ga. App. 277, 312 S.E.2d 156 (1983); *Greene v. Transport Ins. Co.*, 169 Ga. App. 504, 313 S.E.2d 761 (1984); *Bradshaw v. Glass*, 252 Ga. 429, 314 S.E.2d 233 (1984); *GMC v. Summerous*, 170 Ga. App. 338, 317 S.E.2d 318 (1984); *Georgia Power Co. v. Safford*, 171 Ga. App. 387, 319 S.E.2d 537 (1984); *Bright v. Nimmo*, 253 Ga. 378, 320 S.E.2d 365 (1984); *Lawrence v. Atlanta Door Co.*, 171 Ga. App. 741, 320 S.E.2d 627 (1984); *Colonial Stores, Inc. v. Hambrick*, 176 Ga. App. 544, 336 S.E.2d 617 (1985); *City of Atlanta v. Shaw*, 179 Ga. App. 148, 345 S.E.2d 642 (1986); *Insurance Co. of N. Am. v. United States*, 643 F. Supp. 465 (M.D. Ga. 1986); *G & M Quality Bldrs., Inc. v. Dennison*, 256 Ga. 617, 351 S.E.2d 622 (1987); *Hinkley v. Building Material Merchants Ass'n*, 187 Ga. App. 345, 370 S.E.2d 201 (1988); *Department of Pub. Safety v. Boatright*, 188 Ga. App. 612, 373 S.E.2d 770 (1988); *Brown v. Advantage Eng'g, Inc.*, 732 F. Supp. 1163 (N.D. Ga. 1990); *Byrd's Elec. & Plumbing, Inc. v. Johnson*, 199 Ga. App. 621, 405 S.E.2d 548 (1991); *Williams v. Atlanta Family Restaurants, Inc.*, 204 Ga. App. 343, 419 S.E.2d 328 (1992); *Rothrock v. Jeter*, 212 Ga. App. 85, 441 S.E.2d 88 (1994); *Zaytzeff v. Safety-Kleen Corp.*, 222 Ga. App. 48, 473 S.E.2d 565 (1996); *Hallum v. Provident Life & Accident Ins. Co.*, 257 F. Supp. 2d 1373 (N.D. Ga. 2001); *Cieplinski v. Caldwell Elec. Contrs., Inc.*, 280 Ga. App. 267, 633 S.E.2d 646 (2006); *MARTA v. Reid*, 282 Ga. App. 877, 640 S.E.2d 300 (2006); *Coker v. Great Am. Ins. Co.*, 290 Ga. App. 342, 659 S.E.2d 625 (2008).

Employer and Employee Relationship

1. In General

Construction. — Any doubt is to be resolved in favor of the existence of an employer-employee relationship rather than the employer-independent contractor relationship; thus, while the claimant is at all times cast with the burden of proof, the evidence offered will, so far as it is genuinely susceptible of construction, be given that construction which is in the claimant's favor in determining whether the claimant has carried that burden by a preponderance of the evidence. *Travelers Ins. Co. v. Moates*, 102 Ga. App. 778, 117 S.E.2d 924 (1960); *Lyons v. Employers Mut. Liab. Ins. Co.*, 127 Ga. App. 268, 193 S.E.2d 244 (1972); *Unigard Mut. Ins. Co. v. Hornsby*, 134 Ga. App. 157, 213 S.E.2d 538 (1975).

Prerequisites for coverage under this chapter. — There is no coverage under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) unless there is a relation of employer and employee. *Hartford Accident & Indem. Co. v. Parsley*, 113 Ga. App. 830, 149 S.E.2d 848 (1966).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is applicable only where the relationship of master and servant obtains, and only an employee whose relationship with the employer is that of a servant to a master is entitled to compensation under that law. *Chandler v. Harris*, 47 Ga. App. 535, 171 S.E. 174 (1933); *Bentley v. Jones*, 48 Ga. App. 587, 173 S.E. 737 (1934); *Alexander v. Bremen*, 53 Ga. App. 676, 187 S.E. 141 (1936).

"Employment" defined. — "Employment" means employment with the party from whom compensation is sought. *House v. Echota Cotton Mills, Inc.*, 129 Ga. App. 350, 199 S.E.2d 585 (1973); *Slattery Assocs. v. Jones, Batson-Cook & Russell*, 161 Ga. App. 389, 288 S.E.2d 654 (1982).

Only "employee" entitled to compensation. — Only employees who are servants fall within the definition of employee entitled to compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Banks v. Ellijay Lumber Co.*, 59 Ga. App. 270, 200 S.E. 480 (1938).

Construction of term "employee." — The definition of the term "employee" in former Code 1933, §§ 114-101 and 114-102 (see

O.C.G.A. § 34-9-1) shall be construed in connection with former Code 1933, §§ 114-107 and 114-108 (see O.C.G.A. § 34-9-2). *Continental Cas. Co. v. Haynie*, 182 Ga. 608, 186 S.E. 683 (1936).

The word "employee" must be liberally construed in favor of the claimant. *Fidelity & Cas. Co. v. Windham*, 87 Ga. App. 198, 73 S.E.2d 517 (1952), rev'd on other grounds, 209 Ga. 592, 74 S.E.2d 835 (1953).

In determining whether the plaintiffs were the defendant's employees, the purpose of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) must be considered, and to that end the law must be given liberal construction. *Malcom v. Sudderth*, 98 Ga. App. 674, 106 S.E.2d 367 (1958).

Test to determine status as employee. — The real test by which to determine whether a person is acting as the servant of another is to ascertain whether at the time when the injury was inflicted the servant was subject to such person's orders and control, and was liable to be discharged by the person for disobedience of orders or misconduct. *Travelers Ins. Co. v. Clark*, 58 Ga. App. 115, 197 S.E. 650 (1938); *Adams v. Johnson*, 88 Ga. App. 94, 76 S.E.2d 135 (1953).

The final test is whose work the servant was doing and under whose control the servant was doing it. *United States Fid. & Guar. Co. v. Hamlin*, 98 Ga. App. 167, 105 S.E.2d 481 (1958).

Question of fact. — The question of whether a person is an employee is one of fact, and where there is any evidence to sustain the board's finding of fact, the court should not interfere. *Goolsby v. Wilson*, 150 Ga. App. 611, 258 S.E.2d 216 (1979).

Individual in training not covered. — Claimant, who applied for a position as a substitute bus driver with county board of education and began a two-and-a-half week training period which included both classroom and on-the-road assignments, failed to meet claimant's burden of establishing claimant was an employee of the county board of education at the time of the injury within the contemplation of the workers' compensation statutes primarily because claimant had not been guaranteed future employment even if claimant successfully completed the training, and because claimant received no compensation from the county during the training. *North v. Floyd*

County Bd. of Educ., 212 Ga. App. 593, 442 S.E.2d 809 (1994).

Servant status, rather than label, controls.

— It matters not what the employee is called, be it a fireman or a laborer; if the employee is hired as a servant and is not a public officer, the workers' compensation law will cover the employee if the employee is otherwise qualified to be covered under the law. *City of Brunswick v. Edenfield*, 87 Ga. App. 434, 74 S.E.2d 133 (1953), for comment, see 15 Ga. B.J. 499 (1953).

Working of regular hours. — The working of regular hours is not necessary to be classified as an employee. *American Auto. Ins. Co. v. Tanner*, 97 Ga. App. 122, 101 S.E.2d 875 (1958); *Barbree v. Shelby Mut. Ins. Co.*, 105 Ga. App. 186, 123 S.E.2d 905 (1962).

Creation of relationship. — When an offer of employment does not contemplate that it be formally accepted, the relationship of employer and employee is created when the person to whom the employment is offered, in good faith, begins to perform the duties expected of the person. *Bituminous Cas. Corp. v. Humphries*, 91 Ga. App. 271, 85 S.E.2d 456 (1954).

Whether or not a contract creates the relationship of employer-employee or employer-independent contractor is a question of law. *Lyons v. Employers Mut. Liab. Ins. Co.*, 127 Ga. App. 268, 193 S.E.2d 244 (1972).

Deduction of compensation insurance. —

The mere fact that a person deducts sums for compensation insurance from payments due under a contract and thus becomes another's "employer" solely for workers' compensation purposes does not alter the common-law relationship between the parties. *Hampton v. McCord*, 141 Ga. App. 97, 232 S.E.2d 582 (1977).

Performance of simple manual function.

— Where the manufacturer of a commodity employs another, whether for a price per hour or by the piece, to perform a comparatively simple manual function in the process of producing the commodity, the person engaged to render such service is usually classed as an employee and not as an independent contractor. *Malcom v. Sudderth*, 98 Ga. App. 674, 106 S.E.2d 367 (1958).

Work authorized by employer for benefit of business. — An employee who does work

that the employer authorizes in carrying out the purpose of employment, which the employer considers beneficial to the business about which the employee is engaged to labor, acts within the scope of the latter's employment. *United States Fid. & Guar. Co. v. Hamlin*, 98 Ga. App. 167, 105 S.E.2d 481 (1958).

Act suggested by employer for benefit of business. — Where a servant is obliged under contract of employment to render whatever service is required of the servant in carrying on the business about which the servant is employed, an act done at the suggestion of the employer for the benefit of the business and to carry out the employer's policy and plan of conducting the business is within the scope of the employee's employment. *United States Fid. & Guar. Co. v. Hamlin*, 98 Ga. App. 167, 105 S.E.2d 481 (1958).

Actions in sudden emergency. — An employee does not, in contemplation of the worker's compensation law (see O.C.G.A. § 34-9-1 et seq.), go outside employment if, when confronted with a sudden emergency, the employee steps beyond the employee's regularly designated duties in an attempt to save oneself from injury, to rescue another employee from danger, or to save the employer's property. *Metropolitan Cas. Ins. Co. v. Dallas*, 39 Ga. App. 38, 146 S.E. 37 (1928).

The fact that an employee was not actually in danger of injury does not change the rule that an employee does not go outside employment where, when confronted with a sudden emergency, the employee steps beyond the employee's regular duties to save oneself from injury, to rescue another employee from danger, or to save the employer's property, if the employee acted as any reasonable man would have acted under the circumstances. *Globe Indem. Co. v. Legien*, 47 Ga. App. 539, 171 S.E. 185 (1933).

Recreational or social activities. — Recreational or social activities are within the course of employment when: (1) they occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) employer, by expressly or impliedly requiring participation or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) employer derives substantial direct benefit from the activity

Employer and Employee

Relationship (Cont'd)

1. In General (Cont'd)

beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life. *Crowe v. Home Indem. Co.*, 145 Ga. App. 873, 245 S.E.2d 75 (1978).

Burden of proof. — The obligation of the employer under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is not that of an absolute insurer, and the burden is upon the claimant to prove that an injury arose in the course of employment and also out of it. *Savannah River Lumber Co. v. Bush*, 37 Ga. App. 539, 140 S.E. 899 (1927).

The burden of proving the relationship of employer and employee is on the claimant. *Indemnity Ins. Co. of N. Am. v. Lamb*, 56 Ga. App. 492, 193 S.E. 76 (1937); *Fidelity & Cas. Co. v. Windham*, 209 Ga. 592, 74 S.E.2d 835 (1953); *Cash v. American Sur. Co.*, 101 Ga. App. 379, 114 S.E.2d 57 (1960).

Application of common law principles. — In determining whether the relationship of master and servant prevails in a compensation case, the same principles that exist under the common law obtain. *Travelers Ins. Co. v. Clark*, 58 Ga. App. 115, 197 S.E. 650 (1938); *Hartford Accident & Indem. Co. v. Parsley*, 113 Ga. App. 830, 149 S.E.2d 848 (1966).

Employer's exercise of control. — The true test as to whether or not the relationship of employer and employee existed is whether or not the alleged employer had the right or exercised any control over the alleged employee. *Brewer v. Pacific Employers Ins. Co.*, 95 Ga. App. 270, 97 S.E.2d 643 (1957).

Trial court erred in granting summary judgment to the landscaper and the business entity on the claim that the estate administrator's wrongful death lawsuit was barred by the exclusive remedy provision of the Workers' Compensation Act, O.C.G.A. § 34-9-11(a); a genuine issue of material fact existed regarding whether the decedent was an employee of the landscaper and the business entity at the time of death as the landscaper was more of a de facto guardian in relation to the decedent, but the landscaper also had some measure of control

over the decedent because decedent was assisting the landscaper on a project even though decedent had never before worked for the landscaper and the business. *Glover v. Ware*, 276 Ga. App. 759, 624 S.E.2d 285 (2005).

Manner, means, and time of work. — The test to be applied in determining whether the relationship of the parties under a contract for performance of labor is that of employer and servant or that of employer and independent contractor lies in whether the contract gives, or the employer assumes, the right to control the time, manner, and method of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract. *Bentley v. Jones*, 48 Ga. App. 587, 173 S.E. 737 (1934); *Bibb Mfg. Co. v. Martin*, 53 Ga. App. 137, 185 S.E. 137 (1936); *Fidelity & Cas. Co. v. Clements*, 53 Ga. App. 622, 186 S.E. 764 (1936); *Scott v. Minor*, 55 Ga. App. 714, 191 S.E. 263 (1937); *Durham Land Co. v. Kilgore*, 56 Ga. App. 785, 194 S.E. 49 (1937); *Lokey & Simpson v. High-tower*, 57 Ga. App. 577, 196 S.E. 210 (1938); *Elliott Addressing Mach. Co. v. Howard*, 59 Ga. App. 62, 200 S.E. 340 (1938); *Mauney v. Collins*, 64 Ga. App. 330, 13 S.E.2d 97 (1941); *Blakely v. United States Fid. & Guar. Co.*, 67 Ga. App. 795, 21 S.E.2d 339 (1942); *Macon Dairies, Inc. v. Duhart*, 69 Ga. App. 91, 24 S.E.2d 732 (1943); *Maryland Cas. Co. v. Stewart*, 74 Ga. App. 839, 41 S.E.2d 658 (1947); *Fidelity & Cas. Co. v. Windham*, 87 Ga. App. 198, 73 S.E.2d 517 (1952), rev'd on other grounds, 209 Ga. 592, 74 S.E.2d 835 (1953); *Federated Mut. Implement & Hdwe. Ins. Co. v. Elliott*, 88 Ga. App. 266, 76 S.E.2d 568 (1953); *Brewer v. Pacific Employers Ins. Co.*, 95 Ga. App. 270, 97 S.E.2d 643 (1957); *Travelers Ins. Co. v. Moates*, 102 Ga. App. 778, 117 S.E.2d 924 (1960); *Employers Mut. Liab. Ins. Co. v. Johnson*, 104 Ga. App. 617, 122 S.E.2d 308 (1961); *Sears Roebuck & Co. v. Poole*, 112 Ga. App. 527, 145 S.E.2d 615 (1965); *Golosh v. Cherokee Cab Co.*, 226 Ga. 636, 176 S.E.2d 925 (1970), for comment, see 22 Mercer L. Rev. 497 (1971); *Lyons v. Employers Mut. Liab. Ins. Co.*, 127 Ga. App. 268, 193 S.E.2d 244 (1972).

If a contract of employment gives an employer the right to control the manner, means, and methods by which the employee performs the duties required of the em-

ployee under the contract, the relationship of master and servant is thereby established between the parties, and where such contract is not afterwards changed by any subsequent agreement, or by any act of one party acquiesced in by the other amounting to a deviation from the terms of the contract, the mere failure of the employer to assert that right under the contract to control the manner, means, and methods by which the employee performs the work, as by not interfering therein, does not change the relationship between the parties. *Joiner v. Sinclair Ref. Co.*, 48 Ga. App. 365, 172 S.E. 754 (1934).

The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done. *Travelers Ins. Co. v. Clark*, 58 Ga. App. 115, 197 S.E. 650 (1938).

The true test of whether a person employed is a servant or an independent contractor is whether the employer, under the contract, whether oral or written, has the right to direct the time, manner, methods, and means of execution of the work, as contradistinguished from the right to insist upon the contractor producing results according to the contract, or whether the contractor in the performance of the work is free from any control by the employer of the time, manner, and method of performance. *Banks v. Ellijay Lumber Co.*, 59 Ga. App. 270, 200 S.E. 480 (1938).

The chief test, though not an all-inclusive one, to be applied in determining the relationship of employer and employee or independent contractor is whether the employer has the right to assume control of the manner, means, and time of the work. *American Auto. Ins. Co. v. Tanner*, 97 Ga. App. 122, 101 S.E.2d 875 (1958); *Cash v. American Sur. Co.*, 101 Ga. App. 379, 114 S.E.2d 57 (1960); *Barbree v. Shelby Mut. Ins. Co.*, 105 Ga. App. 186, 123 S.E.2d 905 (1962).

Right to superintend. — If the employer has or assumes the right under the contract to control and direct how the work shall be done, i.e., has or assumes the right under the contract to control the manner in which the details of the work are to be executed, as distinguished from the mere right to super-

intend it so that the desired results are obtained, the relationship is that of master and servant; if, on the other hand, the employer has or assumes only the right under the contract to superintend the work to the end that the desired results so contracted for are obtained, and does not have or assume the right under the contract to control the manner in which it is done, which right is vested in the contractor, the relationship is that of employer and independent contractor. *Durham Land Co. v. Kilgore*, 56 Ga. App. 785, 194 S.E. 49 (1937); *Lokey & Simpson v. Hightower*, 57 Ga. App. 577, 196 S.E. 210 (1938).

Right rather than fact of control decisive.

— If the right of control in the employer is conclusively shown to exist, then evidence to show the actual exercise of control or the absence of it becomes wholly immaterial; it is the right of control, and not the fact of control, which is decisive. *Fidelity & Cas. Co. v. Windham*, 87 Ga. App. 198, 73 S.E.2d 517 (1952), rev'd on other grounds, 209 Ga. 592, 74 S.E.2d 835 (1953); *American Cas. Co. v. Harris*, 96 Ga. App. 720, 101 S.E.2d 618 (1957).

The test for the employer-employee relationship under this section was not whether the employer in fact controlled and directed the employee in the work, but whether the employer had that right under the employment contract. *Golosh v. Cherokee Cab Co.*, 226 Ga. 636, 176 S.E.2d 925 (1970), for comment, see 22 Mercer L. Rev. 497 (1971); *Moon v. Georgia Power Co.*, 127 Ga. App. 524, 194 S.E.2d 348 (1972) (see O.C.G.A. § 34-9-1).

Inference of employer's right of control.

— Where one is employed generally to perform certain services for another, and there is no specific contract to do a certain piece of work according to specifications for a stipulated sum, it is inferable that the employer has retained the right to control the manner, method, and means of the performance of the contract, and that the employee is not an independent contractor. *Continental Cas. Co. v. Payne*, 56 Ga. App. 873, 194 S.E. 428 (1937); *Malcom v. Sudderth*, 98 Ga. App. 674, 106 S.E.2d 367 (1958); *Travelers Ins. Co. v. Moates*, 102 Ga. App. 778, 117 S.E.2d 924 (1960); *Barbree v. Shelby Mut. Ins. Co.*, 105 Ga. App. 186, 123 S.E.2d 905 (1962); *Golosh v. Cherokee Cab*

Employer and Employee Relationship (Cont'd)

1. In General (Cont'd)

Co., 226 Ga. 636, 176 S.E.2d 925 (1970), for comment, see 22 Mercer L. Rev. 497 (1971); Moon v. Georgia Power Co., 127 Ga. App. 524, 194 S.E.2d 348 (1972).

Employer's insolvency provides no defense to its liability for workers' compensation. Cotton States Mut. Ins. Co. v. Smith, 173 Ga. App. 95, 325 S.E.2d 408 (1984).

Prerequisite for jurisdiction of Board of Workers' Compensation. — The existence of the relation of employer and employee is necessary in order to confer jurisdiction on the Industrial Commission (now Board of Workers' Compensation) to entertain a claim for compensation in any and all cases. Parker v. Travelers' Ins. Co., 174 Ga. 525, 163 S.E. 159 (1932); City Council v. Reynolds, 50 Ga. App. 482, 178 S.E. 485 (1935).

2. Independent Contractor

Characteristics of independent contractor contract. — In order for one to be an independent contractor so as to be outside the protection of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), the contract of employment must itself be one which contemplates a definite beginning, continuance, and ending. Malcom v. Sudderth, 98 Ga. App. 674, 106 S.E.2d 367 (1958); Travelers Ins. Co. v. Moates, 102 Ga. App. 778, 117 S.E.2d 924 (1960).

Contractor/contractee relationship. — Where there is a relationship of independent contractor and contractee, no coverage is afforded under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). Hartford Accident & Indem. Co. v. Parsley, 113 Ga. App. 830, 149 S.E.2d 848 (1966).

Employer was entitled under O.C.G.A. § 34-9-124(b) to bring an independent contractor under its workers' compensation policy so that the contractor's tort action for injuries was barred by the exclusive remedy of workers' compensation under O.C.G.A. § 34-9-1 and was also barred by res judicata and collateral estoppel because of the administrative law judge's findings in the workers' compensation adjudicative process that the employer's workers' compensation policy applied. Apperson v. S. States Coop., F. Supp. 2d _____, 2005 U.S. Dist. LEXIS

21691 (M.D. Ga. Sept. 16, 2005).

Independent contractor test. — The test of whether or not a person is an independent contractor is whether the person employed to perform the work was to be free, under the contract, from the control of the employer as to the manner in which the employee performed the details of the work. Davison-Paxon Co. v. Ferguson, 94 Ga. App. 501, 95 S.E.2d 306 (1956).

Doubts resolved in favor of employee. — Where a doubt exists as to whether a claimant is an employee or an independent contractor, the doubt should be resolved in the employee's favor. Fidelity & Cas. Co. v. Windham, 87 Ga. App. 198, 73 S.E.2d 517 (1952), rev'd on other grounds, 209 Ga. 592, 74 S.E.2d 835 (1953).

The cardinal rule applied in determining who is an independent contractor is whether the employer has the right to control or direct the manner and time in which the work is performed. Malcom v. Sudderth, 98 Ga. App. 674, 106 S.E.2d 367 (1958).

The true test in determining whether one is engaged as a servant or occupies the status of an independent contractor ordinarily lies in whether or not the work is to be done according to the workman's own methods without being subject to the employer's control except as to the results to be obtained. Elliott Addressing Mach. Co. v. Howard, 59 Ga. App. 62, 200 S.E. 340 (1938); Travelers Ins. Co. v. Faulkner, 63 Ga. App. 438, 11 S.E.2d 367 (1940); Employers Mut. Liab. Ins. Co. v. Johnson, 104 Ga. App. 617, 122 S.E.2d 308 (1961).

In claims for compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), where the question is whether the injured person or the person under whom the injured person was working occupied the relation of an employee or of an independent contractor toward the employer, the line of demarcation is often so close that each case must be determined upon its own particular facts. Fidelity & Cas. Co. v. Windham, 87 Ga. App. 198, 73 S.E.2d 517 (1952), rev'd on other grounds, 209 Ga. 592, 74 S.E.2d 835 (1953); Brewer v. Pacific Employers Ins. Co., 95 Ga. App. 270, 97 S.E.2d 643 (1957).

Generally speaking, an independent contractor is one who, in rendering services, exercises an independent employment or

occupation, and represents the employer only as to the results of the contractor's work, and not as to the means whereby it is to be accomplished. *Malcom v. Sudderth*, 98 Ga. App. 674, 106 S.E.2d 367 (1958); *Lyons v. Employers Mut. Liab. Ins. Co.*, 127 Ga. App. 268, 193 S.E.2d 244 (1972).

Designation of employees as independent contractors. — An employer, simply by designating certain employees as independent contractors, is not permitted to bypass the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), even though the employer may bona fide believe that the end referred to may be accomplished in the matter mentioned. *Malcom v. Sudderth*, 98 Ga. App. 674, 106 S.E.2d 367 (1958).

Designation as subcontractor. — Evidence held sufficient to show that purported subcontractors were employees of home construction contractor where the individuals personally performed the work, were hired and paid weekly on a work unit basis and there were no written contracts; indorsement on contractor's check which, when signed, swore that the indorser was a subcontractor was not controlling. *Chandler v. Hancock Bldrs., Inc.*, 205 Ga. App. 303, 422 S.E.2d 206, cert. denied, 205 Ga. App. 899, 422 S.E.2d 206 (1992).

Contract designed to avoid chapter. — Where, notwithstanding the express provisions of a contract, there was evidence from which to infer that the actual understanding of the parties was that the employer was to have and indirectly assume the right to control the manner of doing the work, and that the contract was a device or subterfuge to avoid the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), the deceased employee would be held to be a servant and not an independent contractor. *Durham Land Co. v. Kilgore*, 56 Ga. App. 785, 194 S.E. 49 (1937).

Continuous checking by employer. — Fact that employer continuously checks the work of an independent contractor to see that the work is being done according to the specifications of the job is thoroughly consistent with the relationship of employer and independent contractor and with the mere right of the employer to insist on a certain specific result. *Lyons v. Employers Mut. Liab. Ins. Co.*, 127 Ga. App. 268, 193 S.E.2d 244 (1972).

Owner-operator of a tractor-trailer. — Nothing in federal law contradicts the declaration in O.C.G.A. § 34-9-1 (2) that an owner-operator shall be deemed an independent contractor; therefore, an owner-operator of a tractor-trailer who leased both the owner-operator's truck and services to a transporter was not entitled to workers' compensation coverage. *Upshaw v. Hale Intermodal Transp. Co.*, 224 Ga. App. 239, 480 S.E.2d 277 (1997).

Operation of independent business. — The fact that a workman owns and operates the workman's own independent business does not ipso facto preclude the workman from performing services for another in the pursuit of the workman's trade in the status of an employee rather than an independent contractor; this is simply a circumstance to be considered in determining the actual status of the workman at the time the injury was sustained. *Barbree v. Shelby Mut. Ins. Co.*, 105 Ga. App. 186, 123 S.E.2d 905 (1962).

Piece worker. — The employment of one to do piece work is not conclusive of one's status either as an employee or as an independent contractor. *Malcom v. Sudderth*, 98 Ga. App. 674, 106 S.E.2d 367 (1958).

One of the most significant guides in classing a piece worker as an employee or an independent contractor is whether the person conducts the person's own independent business or merely works in carrying on that of the employer; a contractor is one who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using the contractor's own means and methods, without submitting oneself to their control in respect to all its details. *Lyons v. Employers Mut. Liab. Ins. Co.*, 127 Ga. App. 268, 193 S.E.2d 244 (1972).

Ownership of equipment used by piece worker. — The fact that a piece worker uses an employer's equipment, standing as an isolated or independent fact, is indicative of but not conclusive as to whether, as to the worker's employer, the worker occupies the relationship of an employee; fact that the employee uses the employee's own equipment and motive power in performing services for the employee's master does not give the employee the status of an independent contractor. *Malcom v. Sudderth*, 98 Ga. App.

Employer and Employee**Relationship (Cont'd)****2. Independent Contractor (Cont'd)**

674, 106 S.E.2d 367 (1958).

Specialization. — Specialization alone is not an infallible test in determining whether one is a servant or an independent contractor. *Federated Mut. Implement & Hdwe. Ins. Co. v. Elliott*, 88 Ga. App. 266, 76 S.E.2d 568 (1953).

3. Usual Course of Business

Excluded employees. — Any person whose employment is not in the usual course of the trade, business, profession, or occupation of the person's employer or is not incidental thereto is excluded from the right to compensation under the express provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Continental Cas. Co. v. Haynie*, 51 Ga. App. 650, 181 S.E. 126 (1935), *aff'd*, 182 Ga. 608, 186 S.E. 683 (1936).

The definition of "employee" in former Code 1933, §§ 114-101 and 114-107 (see O.C.G.A. §§ 34-9-1 and 34-9-2) that the workers' compensation law shall not apply to employees whose employment was not in the usual course of trade, business, occupation, or profession of the employer or not incidental thereto must be construed together. *Wender & Roberts, Inc. v. Jones*, 95 Ga. App. 82, 97 S.E.2d 160, *cert. dismissed*, 213 Ga. 375, 99 S.E.2d 142 (1957).

Employment in furtherance of business. — The test of employment is whether the employment is in furtherance of an employer's business, and not in the manner or method adopted in the performance of such employment; moreover, the character of the work being done, and not the contract of employment, is determinative of the question. *Lee v. Claxton*, 70 Ga. App. 226, 28 S.E.2d 87 (1943).

Scope of employment. — The test of the relation of employer and employee is not that the particular work under consideration was done within the period of employment, but whether it was done within the scope of and in the course of the employment. *Blakely v. United States Fid. & Guar. Co.*, 67 Ga. App. 795, 21 S.E.2d 339 (1942).

Service incidental to employment. — In order to constitute employment under this

section, it was sufficient that the service which the employee was performing when injured grew out of and was incidental to employment; it did not matter if the employment was for one of several businesses carried on by the employer. *Lee v. Claxton*, 70 Ga. App. 226, 28 S.E.2d 87 (1943) (see O.C.G.A. § 34-9-1 et seq.).

The mere fact that a particular business is not ordinarily one carried on by a person engaged in the profession of an employer would not result in removing the employment from the usual course of the business of the employer, particularly where such employee was engaged in business clearly related or incidental to the main business of the employer. *Lee v. Claxton*, 70 Ga. App. 226, 28 S.E.2d 87 (1943).

Incidental employment. — A carpenter who is engaged with others to aid in the alteration, repair, and enlargement of the offices of a corporation doing a dairy business, which offices are essential to the successful carrying on of such trade or business in an efficient and modern manner, and who will not be retained after the completion of such carpenter work, is an "employee" in the service of the dairy corporation, whose employment is "incidental" to the usual course of the trade or business of the employer. *Continental Cas. Co. v. Haynie*, 182 Ga. 608, 186 S.E. 683 (1936).

Employment is incidental to the usual course of the trade or business of the employer when it is being performed upon premises and buildings essential to the successful carrying on of such trade or business in an efficient and modern manner, the test being whether employment is in furtherance of the business of the employer, not in the manner or method adopted in the performance, and whether it is in furtherance of the employer's gain or profit and is related or incidental to such employment. *Wender & Roberts, Inc. v. Jones*, 95 Ga. App. 82, 97 S.E.2d 160, *cert. dismissed*, 213 Ga. 375, 99 S.E.2d 142 (1957).

Enlargement of corporate offices. — One who is engaged with others to aid in the alteration, repair, and enlargement of the offices of a corporation doing a dairy business, which offices are essential to the successful carrying on of trade or business in an efficient and modern manner, and who will not be retained after the completion of such

work, comes within the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) as an employee in the usual course of the trade or business of the employer or incidental thereto. *Continental Cas. Co. v. Haynie*, 51 Ga. App. 650, 181 S.E. 126 (1935), aff'd, 182 Ga. 608, 186 S.E. 683 (1936).

Driving third parties. — At the time of an accident which resulted in the death of the claimant's spouse, the deceased was the special employee of others, whom the deceased had undertaken at the deceased's superior's request to drive to Florida with the consent of the defendant, but free from any control or direction of the defendant and not engaged in the furtherance of its business. *Travelers Ins. Co. v. Clark*, 58 Ga. App. 115, 197 S.E. 650 (1938).

4. Termination of Employment

Termination of employment after injury. — The fact that a claimant quits the claimant's job after receiving an injury which disables the claimant does not prevent the claimant from being entitled to compensation benefits. *Continental Ins. Co. v. Lamar*, 147 Ga. App. 487, 249 S.E.2d 304 (1978).

The fact that a claimant quits a job after receiving an injury which disables the claimant will not prevent the claimant from being entitled to compensation, nor would the fact that the claimant was discharged for reasons unrelated to injury prohibit the claimant from receiving compensation if the claimant was disabled as a result of injuries the claimant received on the job. *Utica Mut. Ins. Co. v. Allen*, 147 Ga. App. 539, 249 S.E.2d 345 (1978).

Termination after return to work. — Where an employee, with commendable conscientiousness and determination, has endeavored for a period of some months to carry on in the employee's prior employment, but is prevented from doing so by a previous injury which arose out of and in the course of the employee's employment, the employee should not be held to forfeit any rights under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), nor should the employee be penalized for efforts to continue the employee's previous work. *St. Paul Fire & Marine Ins. Co. v. White*, 103 Ga. App. 607, 120 S.E.2d 144 (1961).

When an employee, following a disabling injury, returns to work and then is dis-

charged for a cause unrelated to the injury, the employee is entitled to compensation as a matter of law. *Continental Ins. Co. v. Lamar*, 147 Ga. App. 487, 249 S.E.2d 304 (1978).

Subsequent disability from noncompensable accident. — Where a claimant is disabled as the result of an accident which arose out of and in the course of employment, the fact that the employee also had some disability resulting from a subsequent noncompensable accident will not deprive the employee of compensation benefits. *Royal Indem. Co. v. Manley*, 115 Ga. App. 259, 154 S.E.2d 278 (1967).

Servant status after work accomplished. — A servant continues to occupy the status of servant after the servant finishes the servant's work and is waiting to be paid. *AMOCO v. McCluskey*, 116 Ga. App. 706, 158 S.E.2d 431 (1967), rev'd on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968).

5. Employees' Substitutes or Helpers

Substitute receiving compensation from employee. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) makes no provision for relief to a mere substitute for an employee, who is receiving compensation from the employee and not from the employer. *Howard v. Georgia Power Co.*, 49 Ga. App. 420, 176 S.E. 69 (1934).

One who merely works for an employee and receives compensation solely from the employee is not an employee of the employer within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Hearing v. Johnson*, 105 Ga. App. 408, 124 S.E.2d 655 (1962).

Where the deceased was hired and employed as a helper by an employee truck driver, the trial court erred in denying the employer's motion for summary judgment seeking immunity from liability in tort. *Capitol Fish Co. v. Tanner*, 192 Ga. App. 251, 384 S.E.2d 394 (1989), cert. denied, 192 Ga. App. 901, 384 S.E.2d 394 (1989).

Assent of employer in hiring of substitute. — A person who is procured by an employee to act as a substitute or to assist the employee in the employee's duties, where the employer assents to the arrangement, occupies the position of an employee, and it does not make any difference that the substitute or

Employer and Employee Relationship (Cont'd)

5. Employees' Substitutes or Helpers (Cont'd)

assistant is promised no compensation for services; moreover, authority to employ substitutes or assistants may be implied from the nature of the work to be performed, and also from a general course of conducting the business of the employer by the employee for so long a time that consent thereto may be inferred. *Minchew v. Huston*, 66 Ga. App. 856, 19 S.E.2d 422 (1942).

If the officers of a company acquiesced in the employment by an employee of a helper, sometimes advanced money to pay for the helper's services, and on one occasion at least issued its check directly to the helper in payment of the helper's wage, it was inferable from the evidence that the helper was essential to the expeditious and proper performance of the duties owed by the employee to the employer and the relationship between the helper and the company constituted employment. *Macon Dairies, Inc. v. Duhart*, 69 Ga. App. 91, 24 S.E.2d 732 (1943).

Knowledge by employer of helper need.

— If an employer hires an individual to perform certain work for the employer as an employee, knowing that the employee cannot perform the work without help from someone else, and the terms of the contract are arranged with this fact in view, the helper so employed is entitled to the same protection against injury while engaged in the master's work as is the original employee. *American Mut. Liab. Ins. Co. v. Harris*, 61 Ga. App. 319, 6 S.E.2d 168 (1939).

6. Borrowed Servants

Criteria for borrowed employee relationship. — In order for an employee to be a borrowed employee, the evidence must show that the special master had complete control and direction of the servant for the occasion, that the general master had no such control, and that the special master had the exclusive right to discharge the servant. *Six Flags Over Ga., Inc. v. Hill*, 247 Ga. 375, 276 S.E.2d 572, *aff'd*, 158 Ga. App. 658, 282 S.E.2d 224 (1981); *Shannon v. Combustion Eng'g, Inc.*, 188 Ga. App. 239, 372 S.E.2d 818 (1988).

The fact that the plaintiff truck driver was under the direction of the defendant warehouse owner's employees with regard to some aspects of the performance of the task of unloading and reloading a truck did not make plaintiff the defendant's borrowed servant. There is a distinction between the act of merely following directions while giving assistance to another's servant and the status of being within the complete control of another's servant. *Food Giant, Inc. v. Davison*, 184 Ga. App. 742, 362 S.E.2d 447 (1987), *cert. denied*, 184 Ga. App. 909, 362 S.E.2d 447 (1988).

If an employer furnishes another the service of its employees, the relationship of master and servant does not exist between the servant and such third person, even though the employee is to carry out certain instructions of such person, if there is no contractual relationship between the employee and the third party. *Georgia Ry. & Power Co. v. Middlebrooks*, 34 Ga. App. 156, 128 S.E. 777, *cert. denied*, 34 Ga. App. 836 (1925).

Treatment of borrowed servant as employee of borrower. — The fact that an employee is the general servant of one employer does not, as a matter of law, prevent the employee from becoming the particular servant of another, who may become liable for the employee's acts; and as a general proposition, when one person lends or hires a servant to another for a particular employment, the servant, as to anything done in such employment, must be dealt with as the servant of the man to whom the servant is lent or hired, although the servant remains the general servant of the person who lent or hired the servant. *Liberty Mut. Ins. Co. v. Neal*, 55 Ga. App. 790, 191 S.E. 393 (1937); *Adams v. Johnson*, 88 Ga. App. 94, 76 S.E.2d 135 (1953).

When one person lends the person's servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom the person is lent, although the servant remains the general servant of the person who lent the servant. *Travelers Ins. Co. v. Clark*, 58 Ga. 115, 197 S.E. 650 (1938); *Blakely v. United States Fid. & Guar. Co.*, 67 Ga. App. 795, 21 S.E.2d 339 (1942).

The fact that an employee is the general

servant of one employer does not, as a matter of law, prevent the employee from becoming the particular servant of another, who may become liable for the employee's acts. *Travelers Ins. Co. v. Clark*, 58 Ga. App. 115, 197 S.E. 650 (1938); *Blakely v. United States Fid. & Guar. Co.*, 67 Ga. App. 795, 21 S.E.2d 339 (1942).

A servant directed or permitted by a master to perform services for another may become the servant of such other in performing the services, and may become the other's servant as to some acts and not as to others. *Six Flags Over Ga., Inc. v. Hill*, 247 Ga. 375, 276 S.E.2d 572 (1981).

Preclusion of suits against special master.

— For a borrowed servant to be precluded from suing a special master in tort, the borrowed servant must have notice and give assent to the special relationship; however, it is not necessary that the borrowed servant be on notice of and give assent to the legal consequences of the special relationship. *Six Flags Over Ga., Inc. v. Hill*, 247 Ga. 375, 276 S.E.2d 572, *aff'd*, 158 Ga. App. 658, 282 S.E.2d 224 (1981).

Notice to employee of change in masters.

— An employee having no notice of a change in employers is entitled to look to the employee's original master and hold the master liable in matters relating to employment; likewise, notice to the employee is necessary before another can claim the employee as that person's servant. *Georgia-Pacific Corp. v. Corbin*, 137 Ga. App. 37, 222 S.E.2d 862 (1975).

Where one corporation furnished to another corporation a project supervisor who was a regular employee of the first corporation, but whose wages would be paid directly or indirectly by the second corporation, the "borrowed servant" could be considered an employee of both corporations for purposes of this section; however, where the borrowed servant is unaware that the servant is effectively working for a corporation other than the servant's own, lack of knowing assent on the servant's part may destroy the contractual relationship which is the essence of the employee-employer relationship, and hence the relationship itself, precluding application of that section. *Georgia-Pacific Corp. v. Corbin*, 137 Ga. App. 37, 222 S.E.2d 862 (1975) (see O.C.G.A. § 34-9-1).

Recovery against special employer. — Recovery from a special employer for the fatal

injury of an employee hauling material for construction of a highway while under the special employer's control and direction was authorized. *United States Fid. & Guar. Co. v. Stapleton*, 37 Ga. App. 707, 141 S.E. 506 (1928), for comment, see 1 Ga. L. Rev. 53 (1927).

Employee at a labor pool, which was in the business of making its employees available to others on a temporary basis, was the borrowed servant of a special master at the time of injury, where the employee was in the exclusive control of the special master, who had the right to discharge the employee from the performance of the employee's duties. *Sheets v. J.H. Health Tree Serv., Inc.*, 193 Ga. App. 278, 387 S.E.2d 155 (1989).

Subcontractor borrowing employee. — Where a general employee of a general contractor is a "borrowed employee" of a subcontractor at the time of an injury, the relationship of employer-employee exists between the subcontractor and the employee, and on the basis of this relationship the employee is entitled to benefits under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), thus precluding a common-law tort action against the subcontractor. *Forrester v. Scott*, 125 Ga. App. 245, 187 S.E.2d 323 (1972).

7. Particular Workers

Working minors as employees. — A minor, though employed and put to work in violation of a child labor law, must be taken to be an employee insofar as necessary to give operation to the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) for and against each of the parties to the employment. *Horn v. Planters' Prods. Co.*, 40 Ga. App. 787, 151 S.E. 552 (1930). See also *Porter v. Liberty Mut. Ins. Co.*, 46 Ga. App. 86, 166 S.E. 675 (1932); *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939).

County employees. — Since a county is declared to be an "employer" under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) and has constitutional authority to raise the funds therefor, the conclusion is demanded that all county employees in all counties are covered by workers' compensation. *Rosser v. Meriwether County*, 125 Ga. App. 239, 186 S.E.2d 788 (1971).

County school board employees are covered by the workers' compensation law (see

Employer and Employee**Relationship (Cont'd)****7. Particular Workers (Cont'd)**

O.C.G.A. § 34-9-1 et seq.). *Rosser v. Meriwether County*, 125 Ga. App. 239, 186 S.E.2d 788 (1971).

Until a board of education in a county with less than 300,000 population elects to become an insured employer, employees of the board of education are county employees for workers' compensation purposes. *Aetna Cas. & Sur. Co. v. Shuman*, 237 Ga. 403, 228 S.E.2d 809 (1976).

Trial court properly determined that a county could not provide workers compensation coverage to Georgia superior court judges, as the judges were not county employees; counties were specifically authorized by Ga. Const. 1983, Art. IX, Sec. IV, Para. 1 and O.C.G.A. § 48-5-220 to provide workers compensation to "county officials," such as a sheriff, pursuant to O.C.G.A. § 34-9-1, but judges were deemed state employees. *Freeman v. Barnes*, 282 Ga. App. 895, 640 S.E.2d 611 (2006).

School teachers. — School teachers are county employees, being employees of the county governing authority through which the county acts in school matters, i.e., the county board of education. *Rosser v. Meriwether County*, 125 Ga. App. 239, 186 S.E.2d 788 (1971).

Employees of municipal corporations. — Municipal corporations and their employees come under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), irrespective of the number of employees in the service of the corporation. *City of Brunswick v. Edenfield*, 87 Ga. App. 434, 74 S.E.2d 133 (1953), for comment, see 15 Ga. B.J. 499 (1953).

Acting city director. — Acting director of a city housing authority was an employee for purposes of workers' compensation even though the director served without compensation. *Housing Auth. v. Jackson*, 226 Ga. App. 182, 486 S.E.2d 54 (1997).

Corporate executives. — Certain corporate executives are employees while performing some jobs and not while performing others. *Denis Aerial Ag-Plicators, Inc. v. Swift*, 154 Ga. App. 742, 269 S.E.2d 890 (1980).

Corporate officer is an employee for determination of whether the employer has

three or more employees, unless the officer files a written declaration of exemption. *Dennison v. G & M Quality Bldrs., Inc.*, 178 Ga. App. 548, 343 S.E.2d 786 (1986); rev'd on other grounds, 256 Ga. 617, 351 S.E.2d 622 (1987).

Partners. — The relationship between a partnership and a member of the partnership is not that of master and servant; and a member of the partnership, when in the performance for the partnership of any of the duties incumbent upon that individual as a member of the partnership, is not a servant of the partnership. *Chandler v. Harris*, 47 Ga. App. 535, 171 S.E. 174 (1933).

A partner is not an employee of the partnership, within the terms of the workers' compensation law (see O.C.G.A. § 34-9-1), even though at the time of the injury the partner is performing special services under a contract with the other partner, separate and independent from the articles of partnership, and is being paid compensation therefor in addition to the partner's share in the profits of the enterprise. *United States Fid. & Guar. Co. v. Neal*, 188 Ga. 105, 3 S.E.2d 80 (1939).

Unlike an independent contractor, a partner is not hired or employed by an employer so as to place the partner into the servant category intended to be protected by law. *Scoggins v. Aetna Cas. & Sur. Co.*, 139 Ga. App. 805, 229 S.E.2d 683 (1976).

A partner who performs services on behalf of and within the scope of a partnership cannot be an employee of the partnership. *Denis Aerial Ag-Plicators, Inc. v. Swift*, 154 Ga. App. 742, 269 S.E.2d 890 (1980).

Gratuitous services. — A person who performs a gratuitous service for another, although at the latter's request or suggestion, but for the person's own pleasure and accommodation, does not thereby become the employee or servant of the person for whom the person performs the service, and not being a servant or employee of the other person, is not entitled to compensation from such person for an injury received while in the performance of the service. *Jones v. Lumbermens Mut. Cas. Co.*, 58 Ga. App. 713, 199 S.E. 832 (1938).

Governmental employee. — One who is a laborer or workman, in every sense of the word, is an employee entitled to recover under the workers' compensation law (see

O.C.G.A. § 34-9-1 et seq.), even though the person's duties are governmental. *City of Atlanta v. Hatcher*, 31 Ga. App. 633, 121 S.E. 864, cert. denied, 31 Ga. App. 811, S.E. (1924).

Transportation department employee. — An employee of the State Department of Transportation has a right to bring an action directly against the department under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) for compensation for an injury arising out of and during the course of employment. *State Hwy. Dep't v. Parker*, 75 Ga. App. 237, 43 S.E.2d 172 (1947).

Baseball player. — The relationship between a baseball player and ball club is that of employee and employer. *Metropolitan Cas. Ins. Co. v. Huhn*, 165 Ga. 667, 142 S.E. 121, 59 A.L.R. 719 (1928).

Driver of municipal sanitary cart. — One employed by a city to drive a sanitary cart is an "employee" entitled to compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *City of Atlanta v. Hatcher*, 31 Ga. App. 633, 121 S.E. 864, cert. denied, 31 Ga. App. 811, 122 S.E. 260 (1924).

Armed security guard, who was shot during a robbery at a baseball stadium, was acting as the stadium concessionaire's servant, not as an independent contractor, where the guard was controlled by the concessionaire's security coordinator as to when to report to work, when to leave work, and what areas the person was to guard. *Braves, Inc. v. Leslie*, 190 Ga. App. 49, 378 S.E.2d 133, cert. denied, 190 Ga. App. 897, 378 S.E.2d 133 (1989).

Guard of municipal prisoners. — A guard of prisoners of a municipality who, in the performance of the guard's duties, wore no uniform, carried no firearms, and had no power or authority to make arrests, and who was designated by the ordinance authorizing appointment as an "employee" was an "employee" under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), and the guard's surviving spouse was entitled to an award for compensation for accidental death occurring in the performance of the guard's duties. *City of Atlanta v. Bailey*, 70 Ga. App. 711, 29 S.E.2d 514 (1944).

Fashion model. — Claimant model, who was instructed as to where and when claimant would begin work, the amount of lug-

gage claimant would be allowed to carry on the trip, what clothes claimant would wear and how they were to be fitted, the place where the claimant would give the show and the time when it was to be given, and even where the claimant would eat the claimant's meals, was not an independent contractor and was covered by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Davison-Paxon Co. v. Ferguson*, 94 Ga. App. 501, 95 S.E.2d 306 (1956).

Laundry worker in city university hospital. — A person employed to work as a laborer in laundry at a university hospital erected by the city, who was hired by the laundry superintendent and is subject to discharge by the laundry superintendent and superintendent of the hospital, and who was paid wages out of the common fund which consisted of funds appropriated by the city for the maintenance of the hospital and funds appropriated by the county and the medical college, was an employee of the city. *City Council v. Butler*, 50 Ga. App. 838, 179 S.E. 149 (1935).

Milk truck helper. — A boy employed as a helper, with the knowledge and the assent of the employer, by the driver of a milk truck to assist in deliveries and in unloading and cleaning the milk truck was an "employee" under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Minchew v. Huston*, 66 Ga. App. 856, 19 S.E.2d 422 (1942).

Pipe line construction worker. — Under a contract providing that the claimant would carry out and complete certain construction as and when directed by the city or the pipe line company construction chief, the claimant was an employee and not an independent contractor. *Old Republic Ins. Co. v. Pruitt*, 95 Ga. App. 235, 97 S.E.2d 521 (1957).

Smokestack painter. — Evidence that the claimant was employed by the day for daily wages as a laborer to paint smokestacks, that paint, brushes, and two helpers were furnished by the employer, and that no directions were to be given by the employer to the helpers, authorized an inference that the claimant was an employee and was entitled, upon a proper case, to compensation. *Cleveland-Oconee Lumber Co. v. Anderson*, 50 Ga. App. 613, 178 S.E. 753 (1935).

Truck driver. — There was no legal or equitable justification for denying workers'

Employer and Employee**Relationship (Cont'd)****7. Particular Workers (Cont'd)**

compensation to the claimant on the sole ground that on the trip in question the claimant was driving a rig leased to, instead of owned by, the employer since: 1) in every other particular, the claimant's duties and actions were the same in the claimant's position of supposed "contractor" as they were for the previous five years in the claimant's position of "employee"; and 2) the contract itself specified that claimant could furnish personally as within the "complement of experienced and qualified employees"; hence, it was held that the claimant should be treated as an "employee" under this section. *Ratliff v. Liberty Mut. Ins. Co.*, 149 Ga. App. 211, 253 S.E.2d 799 (1979) (see O.C.G.A. § 34-9-1).

Caretaker on estate used for business entertainment. — The evidence was sufficient to authorize a finding that at the time of death, the claimant's spouse, who worked as a caretaker on an estate belonging to the president and majority stockholder of the defendant drug company, which estate was used for business entertainment purposes, was an employee of the drug company. *Wender & Roberts, Inc. v. Jones*, 95 Ga. App. 82, 97 S.E.2d 160, cert. dismissed, 213 Ga. 375, 99 S.E.2d 142 (1957).

Peddler. — Evidence and logical inferences therefrom authorized the finding that the route, price, and means of transportation of the decedent "peddler" were controlled by the defendant to a sufficient degree to show a continuation of the peddler's previously existing legal status as an employee. *Atlantic Co. v. Moseley*, 99 Ga. App. 534, 109 S.E.2d 74, rev'd on other grounds, 215 Ga. 530, 111 S.E.2d 239 (1959).

Hospital authority employee. — The employee of a hospital authority who sustains an accident arising out of and in the course of employment by such employer is not entitled to compensation benefits. *Richmond County Hosp. Auth. v. McClain*, 112 Ga. App. 209, 144 S.E.2d 565 (1965).

Mason employed by foreman of general contractor. — Where the only evidence adduced showed that a mason agreed with the general foreman of a general contractor to provide masonry work for a dwelling at a

stipulated piece-work rate for work completed and accepted, and employed others at an hourly rate to assist the mason, over whom the general foreman did not exercise any control and over whom the general foreman had no authority, the evidence failed to negate the apparent status of an independent contractor occupied by the person employed by the general foreman, and would not support a determination of an employee-employer relationship between one employed by such a person and the general contractor. *American Cas. Co. v. Smith*, 116 Ga. App. 332, 157 S.E.2d 312 (1967), overruled on other grounds, *Wright Assocs. v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981).

Partner managing one of partnership drugstores. — A member of a partnership engaged in running two drugstores, who was a manager of the business at one of the stores, "looked after the business," and received from the partnership for the member's services \$150.00 a month, was held not to be an "employee" under this section. *Chandler v. Harris*, 47 Ga. App. 535, 171 S.E. 174 (1933) (see O.C.G.A. § 34-9-1).

Sawmill worker employed by independent contractor. — After 1) an individual was employed to saw lumber from timber belonging to the individual's employer; 2) the employer furnished the mill; 3) the person employed hired the person's own help and paid for it out of the person's own money, with the right to direct the help in the performance of the work and at the person's pleasure to discharge them; 4) the employer never gave directions as to the time, manner, and method of the performance of the work, nor did the employer have the right under the contract to do so; and 5) all the other acts performed by the employer and employee in the carrying out of the contract were consistent with the relationship of employer and independent contractor, the relationship between the employer and the employee was not shown to be that of master and servant; hence, an award to the claimant, employed by the independent contractor, against the sawmill owner, was without evidence to support it. *Banks v. Ellijay Lumber Co.*, 59 Ga. App. 270, 200 S.E. 480 (1938).

General contractor deemed statutory employer. — General contractor did not come

within liability exceptions of O.C.G.A. § 34-9-11(a) in action for recovery of personal injuries sustained by a subcontractor, where it was not an employee of the same employer, it was neither an insurer nor a person who provided workers' compensation benefits under a contract with the employer, nor was it a "construction design professional"; the contractor was deemed to be a statutory employer of the subcontractor, pursuant to the definition of O.C.G.A. § 34-9-1(3), where the subcontractor contracted with a principal, a plumbing company, which was the subcontracting company to the general contractor, for the subcontractor's workers' compensation coverage to be included under the company's workers' compensation coverage and the subcontractor received benefits therefrom. *Reynolds v. McKenzie-Perry Homes, Inc.*, 261 Ga. App. 379, 582 S.E.2d 534 (2003).

Employee of owner-operator could recover benefits from the statutory employer. — Because the workers' compensation exclusion for owner-operators was clearly stated in O.C.G.A. § 34-9-1(2), with no mention of the employees of such owner-operators, the employee of the owner-operator could recover benefits from the statutory employer. *C. Brown Trucking, Inc. v. Rushing*, 265 Ga. App. 676, 595 S.E.2d 346 (2004).

Convict. — A convict injured while serving a sentence in a county chain gang is not an employee of the county and is not entitled to compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Lawson v. Travelers Ins. Co.*, 37 Ga. App. 85, 139 S.E. 96 (1927).

Builder of residence of corporate officer. — The relation of employer and employee did not exist between the officer of a corporation and the person engaged to build the officer's residence. *Hartford Accident & Indem. Co. v. Thompson*, 167 Ga. 897, 147 S.E. 50 (1929).

Taxicab driver. — A taxi driver, who had an arrangement with a cab company under which the driver paid a fixed daily rate for the use of its cab, bought the gasoline, and retained all of the money collected as fares, while the company maintained and insured the cab, and most of the driver's calls came through the company's dispatcher by radio, was not an employee within the meaning of

this section. *Cole v. Peachtree Cab Co.*, 121 Ga. App. 177, 173 S.E.2d 278 (1970) (see O.C.G.A. § 34-9-1).

Cable television wiring installer. — Regardless of any purported contracts to the contrary, the evidence was sufficient to support the board's finding that decedent, who was electrocuted while installing cable television wiring for a cable television franchisee, was an employee and not an independent contractor, where the cable company assumed the right to control the time, manner and method of executing the work. *OCB Co./National Cable Sys. v. Wiley*, 178 Ga. App. 101, 341 S.E.2d 870 (1986), overruled on other grounds, *American Centennial Ins. Co. v. Flowery Branch Nursing Center*, 258 Ga. 222, 367 S.E.2d 788 (1988).

Job training partnership participant deemed "employee." — An employee of a nonprofit corporation which trained handicapped persons participating in a Job Training Partnership Act (29 U.S.C. § 1501 et seq.) program is an "employee" within the meaning of O.C.G.A. § 34-9-1, where, in addition to receiving classroom instruction, the participant performed work for the corporation under its supervision and control and was paid as long as the participant participated in the program. *Tommy Nobis Ctr. v. Barfield*, 187 Ga. App. 394, 370 S.E.2d 517 (1988).

Partner in vinyl siding installation partnership. — Award of workers' compensation benefits was upheld as there was evidence that the workers' compensation claimant was a direct employee of the employer where the claimant was a partner in a vinyl siding installation partnership that was employed as a subcontractor by the employer, the partnership received directions from the employer on how to perform the work, a representative of the employer established the time during which the work was to be performed, another partner sometimes acted on behalf of the employer during meetings on the jobsite and for the delivery of supplies to the employer, and where the other partner, after the accident, was transferred by the employer to another location. *Atlas Constr. Co. v. Pena*, 268 Ga. App. 566, 602 S.E.2d 151 (2004).

8. Employers

Corporations engaged in any business. — The definition of "employer" does not in-

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clude all corporations, but specifies corporations "engaged in any business." *Fulton-DeKalb Hosp. Auth. v. Gaither*, 241 Ga. 572, 247 S.E.2d 89 (1978).

The phrase "corporations engaged in any business" includes only corporations governed by the Georgia Business Corporation Code (see O.C.G.A. Ch. 2, T. 14). *Fulton-DeKalb Hosp. Auth. v. Gaither*, 241 Ga. 572, 247 S.E.2d 89 (1978).

Shareholders. — Where a contractor withheld monies from subcontractors ostensibly to pay for workers' compensation insurance, but instead used the money for general operations, including payment of salary and commissions to the sole shareholder and officer of the corporation, there was no evidence that the sole shareholder was the corporation's alter ego so as to deem the shareholder an employer. *Morgan v. Palace Indus., Inc.*, 195 Ga. App. 80, 392 S.E.2d 315 (1990).

Corporate officer. — Material issues of fact barring summary judgment existed as to whether defendant, in defendant's status as owner and landlord of the building in which plaintiff was injured, was a separate legal persona from defendant in defendant's status as president and therefore representative of plaintiff's corporate employer. *Doggett v. Patrick*, 197 Ga. App. 420, 398 S.E.2d 770 (1990).

Agent for undisclosed principal. — Where the agent of an undisclosed principal, while acting within the agent's authority, employs another, either the principal or the agent may be held liable to the employee for injuries in the course of employment, but not both jointly; but if such agent acts beyond the authority of the agent's principal, the agent alone is liable. *Davis v. Menefee*, 34 Ga. App. 813, 131 S.E. 527 (1926).

Where an employee of an agent for an undisclosed principal is injured, the injured employee may at the employee's election proceed in a workers' compensation action against either the principal or the agent, but having elected to proceed against one, the employee may not thereafter proceed against the other. *Roberts v. Burnette*, 72 Ga. App. 775, 35 S.E.2d 201 (1945).

Alter ego. — Third party who conducted an inspection of an employer's facilities for the employer's workers' compensation carrier was not the employer's alter ego under O.C.G.A. § 34-9-1(3) for purposes of exclusivity under O.C.G.A. § 34-9-11(a). *Coker v. Deep S. Surplus of Ga., Inc.*, 258 Ga. App. 755, 574 S.E.2d 815 (2002).

Exempted status. — The 1975 amendment to this section eliminated the exempted status for nonprofit business corporations and made the worker's compensation law apply to them as it does to profit-making corporations. *Fulton-DeKalb Hosp. Auth. v. Gaither*, 241 Ga. 572, 247 S.E.2d 89 (1978) (see O.C.G.A. § 34-9-1 et seq.).

Local hospital authority. — A local hospital authority is not covered under workers' compensation law. *Fulton-DeKalb Hosp. Auth. v. Gaither*, 241 Ga. 572, 247 S.E.2d 89 (1978).

A local hospital authority which, under the Constitution and its contract, was an instrumentality of the county, not of the state, was not covered by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) under its definition of "employer" as a state instrumentality. *Fulton-DeKalb Hosp. Auth. v. Gaither*, 241 Ga. 572, 247 S.E.2d 89 (1978).

A hospital authority is not a political subdivision of this state, nor is it otherwise an "employer" as that term is defined for purposes of workers' compensation. *Richmond County Hosp. Auth. v. McClain*, 112 Ga. App. 209, 144 S.E.2d 565 (1965).

Municipal corporation. — A municipal corporation is not given the right to accept or reject the provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), but is automatically placed in the category of an "employer" under the law. *City Council v. Young*, 218 Ga. 346, 127 S.E.2d 904 (1962).

Receiver, trustee, or personal representative operating business. — The term "employer" is applicable to a receiver or trustee of an individual, firm, association, or corporation engaged in any business operated for gain or profit, or to legal representatives of a deceased employer, not only where the injuries to the employee took place before their becoming such representatives, but as well as to injuries arising during the tenure of their status as such representatives. *Minchew v.*

Huston, 193 Ga. 272, 18 S.E.2d 487 (1942); *Minchew v. Huston*, 66 Ga. App. 856, 19 S.E.2d 422 (1942).

Lumber company rather than truck lessor as employer. — Where under a lease a contract lumber company had the right not only to select and discharge truck drivers but also the right to control the time, manner, methods, and means of performance of their employment duties, and the lessor of the trucks had no control whatsoever over the truck drivers, the deceased truck driver, at the time of the driver's death, was an employee of the lumber company, despite the fact that the parties never operated under the terms of the lease agreement. *American Cas. Co. v. Harris*, 96 Ga. App. 720, 101 S.E.2d 618 (1957).

Taxicab company. — A cab company with a permit to operate taxicabs upon a city's streets was bound to operate taxicabs in compliance with the city's regulatory ordinances, including an ordinance that no taxicabs could be operated by any person other than the owner or the owner's duly licensed employee, and could not delegate its duties as an operating company to its drivers, by an arrangement of leasing its taxicabs to drivers as independent contractors rather than as employees, in order to avoid liability under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) for death or injury to its drivers. *Diamond Cab Co. v. Adams*, 91 Ga. App. 220, 85 S.E.2d 451 (1954).

A taxicab company which obtained its permit pursuant to a regulatory ordinance could not delegate its duties as an operating company to its drivers by leasing its cars to its drivers, rather than paying wages, in order to avoid workers' compensation liability. *Yellow Cab Co. v. Worrell*, 155 Ga. App. 41, 273 S.E.2d 410 (1980).

Third-party tortfeasor paying compensation benefits. — Where a taxicab driver employed by a cab company was struck and injured by a taxi operated by an agent of another taxi company and the State Board of Workers' Compensation approved a stipulated settlement in which the second taxi company, on behalf of the employer, agreed to pay compensation to the driver to satisfy and extinguish all workers' compensation benefits, the second taxicab company fell within the definition of "employer" found in O.C.G.A. § 34-9-1 (3). *Rapid Cab Co. v.*

Colbert, 166 Ga. App. 881, 305 S.E.2d 668 (1983).

Municipality. — A municipality is an employer for the purposes of workers' compensation and thus liable for benefits to which city employees are entitled. *Cotton States Mut. Ins. Co. v. Smith*, 173 Ga. App. 95, 325 S.E.2d 408 (1984).

Fulton-DeKalb Hospital Authority. — The Supreme Court's decision in *Fulton-DeKalb Hosp. Auth. v. Gaither*, 241 Ga. 572, 247 S.E.2d 89 (1978) that the Fulton-DeKalb Hospital Authority is not an employer for purposes of the Workers' Compensation Act is no longer controlling. *Nunnally v. Fulton-DeKalb Hosp. Auth.*, 171 Ga. App. 12, 318 S.E.2d 759 (1984) (decided prior to the 1980 amendment to subdivision (3)).

Service agencies. — A service agency which is responsible for the administration of a self-insured employer's workers' compensation program is included under the umbrella of immunity provided by O.C.G.A. Ch. 9, T. 34, since by contract the service agency administers and facilitates the payment of benefits by the self-insurer, and anyone who "undertakes to perform or assist in the performance" of an employer's statutory duties under that chapter should be immune from an action as a third party tortfeasor. *Fred S. James & Co. v. King*, 160 Ga. App. 697, 288 S.E.2d 52 (1981).

Common carrier was statutory employer. — State Board of Workers' Compensation did not err in ruling that the motor common carrier was the employee's statutory employer because common carriers were not explicitly exempted from providing coverage to leased-operators. *C. Brown Trucking, Inc. v. Rushing*, 265 Ga. App. 676, 595 S.E.2d 346 (2004).

9. Insurance

Notice to insurer as notice to employer. — The deposition of a physician was taken with notice, where a nonattorney representative of the employer was present at the taking, since notice to the employer would serve as notice to the insurer. *Royal Globe Indem. Co. v. Thompson*, 123 Ga. App. 268, 180 S.E.2d 576 (1971).

When an employer was a nonresident employer, providing it with notice of a hearing on a workers' compensation claim by first class mail did not violate former

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O.C.G.A. § 34-9-102(j)(3), requiring service by certified mail or statutory overnight delivery, because its workers' compensation insurer was a Georgia resident, which was also provided with notice by first class mail, and, under O.C.G.A. § 34-9-1(3), the definition of employer included the insurer, so notice to one of them was notice to the other. *Am. Mobile Imaging, Inc. v. Miles*, 260 Ga. App. 877, 581 S.E.2d 396 (2003).

Exceptions to identity of insurer and employer. — The legislature, in employing the phrase "as far as applicable", must be presumed to have intended exceptions to the identity of insurer and employer. *Mull v. Aetna Cas. & Sur. Co.*, 226 Ga. 462, 175 S.E.2d 552 (1970).

Signatures required for validity of agreement. — A standard form agreement dealing with workers' compensation, bearing the board's approval, is valid when signed only by the employee and by the employer's insurance carrier, since the insurer is considered to be the alter ego of the insured employer. *Tuck v. Fidelity & Cas. Co.*, 131 Ga. App. 807, 207 S.E.2d 210 (1974).

Injury by Accident Arising Out of and in Course of Employment

1. In General

"Injury" defined. — Injury means injury by an accident arising out of and in the course of employment. *Blue Bell Globe Mfg. Co. v. Baird*, 61 Ga. App. 298, 6 S.E.2d 83 (1939).

If employment contributes to an injury, the injury is an accident and is compensable. *Fox v. Liberty Mut. Ins. Co.*, 125 Ga. App. 285, 187 S.E.2d 305 (1972).

The word "injury" means any injury arising from employment with the party from whom compensation is sought. *Employers Mut. Liab. Ins. Co. v. Powell*, 132 Ga. App. 708, 209 S.E.2d 76 (1974).

Injury by accident required. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) cannot be applied except in the case of an injury "by accident." *Covington v. Berkeley Granite Corp.*, 182 Ga. 235, 184 S.E. 871, answer conformed to, 53

Ga. App. 269, 185 S.E. 386 (1936), aff'd, 183 Ga. 801, 190 S.E. 8 (1937).

"Accident" defined. — The word "accident" means an unlooked-for mishap or untoward event, not expected or designed. *Brown v. Lumbermen's Mut. Cas. Co.*, 49 Ga. App. 99, 174 S.E. 359 (1934); *Shipman v. Employers Mut. Liab. Ins. Co.*, 105 Ga. App. 487, 125 S.E.2d 72 (1962).

The legislature, at the time it enacted this section, knew the broad meaning of the word "accident," and had it desired that this word be limited in its scope and confined to any particular types of accidents, it would, as it had the power and right to do, have so defined and restricted it; not having done so, the unambiguous language of the law should not be changed by judicial interpretation. *Lumbermens Mut. Cas. Co. v. Griggs*, 190 Ga. 277, 9 S.E.2d 84 (1940) (see O.C.G.A. § 34-9-1).

The word "accident", as used in this section, included an injury resulting from the negligence of an employer which afforded a right of action at common law. *Bartram v. City of Atlanta*, 71 Ga. App. 313, 30 S.E.2d 780 (1944) (see O.C.G.A. § 34-9-1).

The word "accident", as used in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), includes negligence. *Indemnity Ins. Co. of N. Am. v. Bolen*, 106 Ga. App. 684, 127 S.E.2d 832 (1962).

The word "accident" contemplates intentional torts. *Burbank v. Mutual of Omaha Ins. Co.*, 484 F. Supp. 693 (N.D. Ga. 1979), aff'd, 616 F.2d 565 (5th Cir. 1980).

The word "accident" in O.C.G.A. § 34-9-1 was not intended to mean anything except a physical occurrence. *Hanson Buick, Inc. v. Chatham*, 163 Ga. App. 127, 292 S.E.2d 428 (1982).

Intentional tortious conduct. — Intentional tortious conduct related to a disruption of the payment of workers' compensation benefits neither "arises out of" nor "arises in the course of" the employee's employment within the meaning of those phrases in the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. *Brazier v. Travelers Ins. Co.*, 602 F. Supp. 541 (N.D. Ga. 1984).

Aggravation of initial injury. — Under the broad definition of the term "accident", as used in this section, if the employee continued to perform duties of employment and

thereby aggravated the initial injury, this would amount to a new "injury by accident." *Mallory v. American Cas. Co.*, 114 Ga. App. 641, 152 S.E.2d 592 (1966) (see O.C.G.A. § 34-9-1).

Even if the wear and tear of ordinary life or ordinary work to some extent aggravates a preexisting infirmity, when that infirmity itself, stemming from the original trauma, continues to worsen, to the point where the employee is no longer able to continue work, this is not a new accident but a change of physical and economic condition, entitling claimant to compensation under the original award. *St. Paul Fire & Marine Ins. Co. v. Hughes*, 125 Ga. App. 328, 187 S.E.2d 551 (1972).

An accident arises "in the course of employment" if it is an aggravation of an injury which took place in the course of employment, or if it is the end product of a force or cause set in motion in the course of employment. *United States Asbestos v. Hammock*, 140 Ga. App. 378, 231 S.E.2d 792 (1976).

Sudden occurrences. — An occurrence which is sudden, unexpected, and undesigned by the workman comes within the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Brown v. Lumbermen's Mut. Cas. Co.*, 49 Ga. App. 99, 174 S.E. 359 (1934).

An injury which arises suddenly and unexpectedly, undesigned by the employee personally, although in the course of the performance of the usual duties of employment, and without any slipping, falling, or outside interference, is an accidental injury arising out of and in the course of the employment, within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *American Mut. Liab. Ins. Co. v. Savage*, 49 Ga. App. 106, 174 S.E. 363 (1934).

A sudden and violent rupture or break in the physical structure of the body of an employee, caused by some strain or exertion in employment, is an "accidental injury" within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), even though no external unforeseen event, such as slipping, falling, or being struck contributes thereto. *Brown v. Lumbermen's Mut. Cas. Co.*, 49 Ga. App. 99, 174 S.E. 359 (1934).

Extraordinary occurrences. — To constitute an injury by accident it is not necessary

that there should be an extraordinary occurrence in or about the performance of the work engaged in, such as falling, slipping, or being struck, nor is an employee barred from compensation merely because at the time of injury the employee was performing a duty for the employer in the usual and ordinary manner. *Hardware Mut. Cas. Co. v. Sprayberry*, 69 Ga. App. 196, 25 S.E.2d 74 (1943).

Certain injuries not "accidents." — Word "accident", as used in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), includes every injury except diseases not naturally growing out of injuries arising out of and in the course of employment, injuries caused by the willful act of a third person directed against such employee for reasons personal to that person, and willful misconduct on the part of the employee. *Reid v. Lummus Cotton Gin Co.*, 58 Ga. App. 184, 197 S.E. 904 (1938); *Hardware Mut. Cas. Co. v. Sprayberry*, 195 Ga. 393, 24 S.E.2d 315 (1943); *Hardware Mut. Cas. Co. v. Sprayberry*, 69 Ga. App. 196, 25 S.E.2d 74 (1943); *Southern Wire & Iron, Inc. v. Fowler*, 217 Ga. 727, 124 S.E.2d 738 (1962); *Helton v. Interstate Brands Corp.*, 155 Ga. App. 607, 271 S.E.2d 739 (1980); *Zamora v. Coffee Gen. Hosp.*, 162 Ga. App. 82, 290 S.E.2d 192 (1982); *Swanson v. Lockheed Aircraft Corp.*, 181 Ga. App. 876, 354 S.E.2d 204 (1987).

Damages for fraud. — Fraud is not an "accident" and the damages resulting therefrom do not arise "out of or in the course of the employment" but, rather, result from the intentional misconduct of the defendants subsequent to the physical injuries which gave rise to the original workers' compensation claim. Exemplary damages for fraud are not within the power of the Workers' Compensation Board to award. *Griggs v. All-Steel Bldgs., Inc.*, 209 Ga. App. 253, 433 S.E.2d 89 (1993).

Felonious assault. — A felonious assault does not prevent the resulting injury from being treated as an "accident" under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) if the willful act is not directed against the employee for reasons personal to the employee. *Helton v. Interstate Brands Corp.*, 155 Ga. App. 607, 271 S.E.2d 739 (1980).

Death arose out of employment. — In a wrongful death action, the trial court erred

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1. In General (Cont'd)

in denying an employer's motion for summary judgment against the claims filed by the decedent's parents as those claims were limited by the exclusivity provisions of the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., given evidence that the decedent's death arose out of and in the course of employment pursuant to O.C.G.A. § 34-9-1(4). *Burns Int'l Sec. Servs. Corp. v. Johnson*, 284 Ga. App. 289, 643 S.E.2d 800 (2007).

Sexual assault. — Assault and rape of an employee by another employee was an "accident" within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Helton v. Interstate Brands Corp.*, 155 Ga. App. 607, 271 S.E.2d 739 (1980).

Attack by co-employee. — Where an injury results from an attack by a co-employee on a claimant, the attack must be work-related rather than for personal reasons in order to be compensable. *Walsh Constr. Co. v. Hamilton*, 185 Ga. App. 105, 363 S.E.2d 301 (1987).

Accidental means. — The word "accident" in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) did not have the same meaning as the phrase "accidental means" often found in policies which insure against bodily injury effected solely and exclusively of all other causes from violent and external injury by accidental means. *Hardware Mut. Cas. Co. v. Sprayberry*, 69 Ga. App. 196, 25 S.E.2d 74 (1943).

Injuries due to negligence. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), in providing compensation for injuries resulting from "accident", did not intend to exclude injuries chargeable to negligence on the part of either the employer or employee. *Teems v. Enterprise Mfg. Co.*, 41 Ga. App. 708, 154 S.E. 466 (1930).

A question of negligence would not affect the question of recovery by an employee under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Continental Cas. Co. v. Weems*, 60 Ga. App. 410, 3 S.E.2d 846 (1939).

The negligence of an employee, no matter how gross, will not bar compensation where

the injury is otherwise compensable. *Lumbermen's Mut. Cas. Co. v. Lynch*, 63 Ga. App. 530, 11 S.E.2d 699 (1940).

Wrestler's acceptance of workers' compensation benefits foreclosed any tort claims against the employer because the employment contract was unambiguous and set out what happened if the wrestler became injured. *Eudy v. Universal Wrestling Corp.*, 272 Ga. App. 142, 611 S.E.2d 770 (2005).

Physiological injury. — If a worker, in the reasonable performance of the worker's duties, sustains a physiological injury as the result of the work the worker was engaged in, this was an accidental injury in the sense of this section. *Brown v. Lumbermen's Mut. Cas. Co.*, 49 Ga. App. 99, 174 S.E. 359 (1934) (see O.C.G.A. § 34-9-1).

Where a disability results which is objectively physiologically ascertainable, it is compensable, even though the onset of disability is imperceptible from day to day, and there is no one "accident" at a specifiable time and place to which the result may be attributable. *Thomas v. Ford Motor Co.*, 123 Ga. App. 512, 181 S.E.2d 874 (1971); *Home Indem. Co. v. Brown*, 141 Ga. App. 563, 234 S.E.2d 97 (1977).

Alcoholism prohibition extended to drug addiction. — The legislative intent of the 1973 amendment to O.C.G.A. § 34-9-1 (4) was to extend the absolute prohibition against a finding of compensability as an "injury" or "personal injury" to cases of alcoholism and to extend the conditional prohibition against such a finding to certain cases of drug addiction. *Dan River, Inc. v. Shinall*, 186 Ga. App. 572, 367 S.E.2d 846, cert. denied, 186 Ga. App. 917, 367 S.E.2d 846 (1988).

The legislative intent of the 1973 amendment to O.C.G.A. § 34-9-1 (4) was to address the compensability of claims involving addiction and to preclude a recovery for any and all claims for compensation based upon alcoholism, including a claim for alcohol detoxification expense asserted for alcohol dependency directly resulting from a compensable injury, and to authorize the recovery of claims for compensation based upon drug addiction under limited circumstances. *Dan River, Inc. v. Shinall*, 186 Ga. App. 572, 367 S.E.2d 846, cert. denied, 186 Ga. App. 917, 367 S.E.2d 846 (1988).

Drug addiction. — Claimant's drug addiction was not a pre-existing condition, where

it was not "caused by" the medications prescribed for the claimant's initial back injury, such medications having merely "worsened" an already existing addiction, which was further worsened by medication prescribed for a subsequent back injury. *Fulmer Bros. v. Kersey*, 190 Ga. App. 573, 379 S.E.2d 607 (1989).

Where there was no finding that claimant's drug addiction was caused by the use of drugs or medicines prescribed for the treatment of claimant's initial compensable injury, the trial court erred in affirming that portion of the award which directed the employer to provide the claimant with workers' compensation benefits in the form of detoxification care. *Waffle House, Inc. v. Bozeman*, 194 Ga. App. 860, 392 S.E.2d 48 (1990).

Non-physical injuries excluded. — Non-physical injuries, such as claims for slander and intentional infliction of emotional distress, are not compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Oliver v. Wal-Mart Stores, Inc.*, 209 Ga. App. 703, 434 S.E.2d 500 (1993).

Psychological disability. — Mental disability caused by post-traumatic stress disorder as a result of a motor vehicle accident in which plaintiff suffered a physical injury is also a compensable injury. *George v. Southwire Co.*, 217 Ga. App. 586, 458 S.E.2d 362 (1995), *aff'd*, 266 Ga. 739, 470 S.E.2d 865 (1996).

Claimant who suffered psychic trauma and disability which was not preceded or accompanied by a physical injury was not entitled to workers' compensation benefits. *Abernathy v. City of Albany*, 269 Ga. 88, 495 S.E.2d 13 (1998).

Immediate cause of accident need not be known. — An injury which arises out of and in the course of employment, and which is not the result of a claimant's willful misconduct or some other stated exception, is an injury "by accident" under the terms of this section, even though its immediate cause may be unknown. *Ideal Mut. Ins. Co. v. Ray*, 92 Ga. App. 273, 88 S.E.2d 428 (1955) (see O.C.G.A. § 34-9-1).

Where an accidental injury which is not explained occurs to an employee, it constitutes an accidental compensable injury. *Williams v. Maryland Cas. Co.*, 99 Ga. App. 489,

109 S.E.2d 325 (1959).

Unsafe working conditions. — An injury alleged to have been due to a failure to furnish an employee a safe place to work and safe appliances with which to work, not being a disease, and not coming within any exception named in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), is such an accident as is contemplated thereby. *Reid v. Lummus Cotton Gin Co.*, 58 Ga. App. 184, 197 S.E. 904 (1938).

Pain on account of inability to perform work. — Pain suffered by an employee because the employee engages in an occupation which the employee is physically unable to perform is not an accidental injury. *Johnston v. Boston-Old Colony Ins. Co.*, 106 Ga. App. 410, 126 S.E.2d 919 (1962).

Accident causing multiple injuries. — One accident may cause two injuries. *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952).

"Arising out of" and "in the course of" construed. — In order for an injury to be compensable, it must have been caused by an accident arising out of and in the course of the employment, neither alone being sufficient. *New Amsterdam Cas. Co. v. Sumrell*, 30 Ga. App. 682, 118 S.E. 786 (1923); *Maryland Cas. Co. v. Brown*, 48 Ga. App. 822, 173 S.E. 925 (1934); *American Mut. Liab. Ins. Co. v. Lemming*, 187 Ga. 378, 200 S.E. 141 (1938); *Lumbermen's Mut. Cas. Co. v. Babb*, 67 Ga. App. 161, 19 S.E.2d 550 (1942); *McClain v. Travelers Ins. Co.*, 71 Ga. App. 659, 31 S.E.2d 830 (1944); *Wilcox v. Shepherd Lumber Corp.*, 80 Ga. App. 71, 55 S.E.2d 382 (1949); *Hanson v. Globe Indem. Co.*, 85 Ga. App. 179, 68 S.E.2d 179 (1951), *for comment*, see 14 Ga. B. J. 4845 (1952); *Smith v. United States Fid. & Guar. Co.*, 94 Ga. App. 507, 95 S.E.2d 35 (1956); *Employers Mut. Liab. Ins. Co. v. Holloway*, 98 Ga. App. 265, 105 S.E.2d 370 (1958); *United States Fid. & Guar. Co. v. Hamlin*, 98 Ga. App. 167, 105 S.E.2d 481 (1958); *Samples v. Liberty Mut. Ins. Co.*, 99 Ga. App. 41, 107 S.E.2d 574 (1959); *Corbin v. Liberty Mut. Ins. Co.*, 117 Ga. App. 823, 162 S.E.2d 226 (1968).

The words "by accident arising out of and in the course of employment", as used in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), should be liberally construed in harmony with the humane pur-

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1. In General (Cont'd)

poses of the law. *Brown v. Lumbermen's Mut. Cas. Co.*, 49 Ga. App. 99, 174 S.E. 359 (1934).

"Arising out of" does not mean the same thing as "in the course of," but the expressions in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) impose a double condition. *Continental Cas. Co. v. Caldwell*, 55 Ga. App. 17, 189 S.E. 408 (1936).

An injury may occur in the course of employment but yet not arise out of it. *Continental Cas. Co. v. Caldwell*, 55 Ga. App. 17, 189 S.E. 408 (1936).

The terms "arising out of" and "in the course of" are not synonymous; the latter term refers to time, place, and circumstances under which the accident took place, while an accident "arises out of employment" when it is apparent to the rational mind, upon consideration of all the circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. *Hartford Accident & Indem. Co. v. Cox*, 101 Ga. App. 789, 115 S.E.2d 452 (1960); *Wood v. Aetna Cas. & Sur. Co.*, 116 Ga. App. 284, 157 S.E.2d 60 (1967); *State Dep't of Labor v. Yates*, 131 Ga. App. 71, 205 S.E.2d 36 (1974).

The terms "arising out of" and "in the course of" employment are not synonymous; one phrase refers to when the accident occurs within the period of employment, at a place where the employee reasonably may be in the performance of the employee's work, while the other phrase refers to a causal connection between the conditions under which the work is required to be performed and the resulting injury from the accident. *American Hdwe. Mut. Ins. Co. v. Burt*, 103 Ga. App. 811, 120 S.E.2d 797 (1961).

Where the first requirement of O.C.G.A. § 34-9-1 (4) is not met, in that the injury did not "arise out of" the employment, the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., is not applicable regardless of whether the injury met the second requirement and occurred "in the course of" the employment. *Garrett v. K-Mart Corp.*, 197 Ga. App. 374, 398 S.E.2d 302 (1990).

Both conditions required for compensation. — The terms "in the course of" and

"out of" are not synonymous; both must concur to render a case compensable. *Hartford Accident & Indem. Co. v. Cox*, 61 Ga. App. 420, 6 S.E.2d 189 (1939), overruled on other grounds, *National Fire Ins. Co. v. Edwards*, 152 Ga. App. 566, 263 S.E.2d 455 (1979); *Francis v. Liberty Mut. Ins. Co.*, 95 Ga. App. 225, 97 S.E.2d 553 (1957), overruled on other grounds, *Hartford Accident & Indem. Co. v. Cox*, 101 Ga. App. 789, 115 S.E.2d 452 (1960); *Samples v. Liberty Mut. Ins. Co.*, 99 Ga. App. 41, 107 S.E.2d 574 (1959); *Williams v. Maryland Cas. Co.*, 99 Ga. App. 489, 109 S.E.2d 325 (1959); *Crawford W. Long Hosp. v. Mitchell*, 100 Ga. App. 276, 111 S.E.2d 120 (1959); *Davis v. Houston Gen. Ins. Co.*, 141 Ga. App. 385, 233 S.E.2d 479 (1977).

Sufficiency of claimant's testimony under "any evidence" rule. — The claimant's testimony that it was "hard for me to get a job right now with my knee bad" would support a finding of proximate cause of the claimant's inability to secure employment elsewhere under the "any evidence" rule. *Brown v. Georgia Power Co.*, 181 Ga. App. 500, 352 S.E.2d 818 (1987).

Discharge for unrelated cause after return to work. — Where an employee returns to work following a disabling injury and is then discharged for a cause unrelated to the injury, the employee is entitled to receive benefits for a loss of earning capacity if the employee is unable to find other employment because of the disability. *Brown v. Georgia Power Co.*, 181 Ga. App. 500, 352 S.E.2d 818 (1987).

Question of fact. — Ordinarily, whether or not an accident arose out of and in the course of employment is a question of fact, and the award of the board, if supported by any evidence, is conclusive. *Employer's Mut. Liab. Ins. Co. v. Carlan*, 104 Ga. App. 170, 121 S.E.2d 316 (1961).

Mixed question of fact and law. — The issue of whether an injury arises out of and in the course of employment and hence is compensable under the workers' compensation law is a mixed question of fact and law. The finder of fact must first hear all the relevant evidence concerning the injury and, after finding the facts with regard thereto, render a conclusion of law on whether it was job-related. *Utz v. Powell*, 160 Ga. App. 888, 288 S.E.2d 601 (1982).

The issue of whether an injury arises out of and in the course of employment is a mixed question of fact and law. *Knight v. Gonzalez*, 181 Ga. App. 468, 352 S.E.2d 646 (1987).

Findings of Workers' Compensation Board. — If there is any evidence to support a finding of the Workers' Compensation Board of injury, the superior court is without authority to reverse it. *Parker v. American Carpet Mills*, 168 Ga. App. 171, 308 S.E.2d 409 (1983).

Burden of proof. — The burden is on the claimant to show that an injury arose out of and in the course of employment. *Fulton Bag & Cotton Mills v. Haynie*, 43 Ga. App. 579, 159 S.E. 781 (1931); *Gay v. Aetna Cas. & Sur. Co.*, 72 Ga. App. 122, 33 S.E.2d 109 (1945), disapproved on other grounds, *Federal Ins. Co. v. Coram*, 95 Ga. App. 622, 98 S.E.2d 214 (1957); *Harper v. National Traffic Guard Co.*, 73 Ga. App. 385, 36 S.E.2d 842 (1946); *Hughes v. Hartford Accident & Indem. Co.*, 76 Ga. App. 785, 47 S.E.2d 143 (1948); *Wilcox v. Shepherd Lumber Corp.*, 80 Ga. App. 71, 55 S.E.2d 382 (1949); *Aetna Cas. & Sur. Co. v. Fulmer*, 81 Ga. App. 97, 57 S.E.2d 865 (1950), later appeal, 85 Ga. App. 102, 68 S.E.2d 180 (1951); *Aetna Cas. & Sur. Co. v. Watson*, 91 Ga. App. 657, 86 S.E.2d 656 (1955); *Roberts v. Lockheed Aircraft Corp.*, 93 Ga. App. 440, 92 S.E.2d 51 (1956); *Sears Roebuck & Co. v. Wilson*, 215 Ga. 746, 113 S.E.2d 611 (1960); *Sanford v. University of Ga. Bd. of Regents*, 131 Ga. App. 858, 207 S.E.2d 255 (1974); *Zamora v. Coffee Gen. Hosp.*, 162 Ga. App. 82, 290 S.E.2d 192 (1982).

The burden is upon the claimant to establish that the employee sustained an accidental injury such as is contemplated by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Shelby Mut. Cas. Co. v. Huff*, 87 Ga. App. 463, 74 S.E.2d 251 (1953); *Rivers v. Travelers Ins. Co.*, 93 Ga. App. 779, 92 S.E.2d 818 (1956).

The burden of proof is on the claimant to show that an employee's death resulted instantly from an accident arising out of and in the course of employment, or later resulted proximately therefrom. *Lockheed Aircraft Corp. v. Marks*, 88 Ga. App. 167, 76 S.E.2d 507 (1953), overruled on other grounds, *Fowler v. City of Atlanta*, 116 Ga. App. 352, 157 S.E.2d 306 (1967).

The burden is on the claimant to show that an injury to the employee was the direct result of an injury caused by an accident, or that the injury to such employee arose both out of and in the course of the claimant's employment. *Williams v. Maryland Cas. Co.*, 99 Ga. App. 489, 109 S.E.2d 325 (1959).

The burden was on the claimant to show that the death of an employee occurred at a place where the employee might reasonably have been expected to be in the performance of duties, and while the employee was fulfilling duties or was engaged in doing something incidental thereto, and that the employee's employment was the contributing proximate cause thereof. *Williams v. Maryland Cas. Co.*, 99 Ga. App. 489, 109 S.E.2d 325 (1959).

The burden of proof is on the claimant to show that the employee suffered an accidental injury which arose out of and in the course of employment. *City of Pembroke v. Jones*, 109 Ga. App. 296, 136 S.E.2d 139, aff'd, 220 Ga. 213, 138 S.E.2d 276 (1964); *International Paper Co. v. Gilbourn*, 144 Ga. App. 175, 240 S.E.2d 722 (1977).

Shifting of burden to employer and carrier. — A claimant in a workers' compensation case having proved the injury and subsequent pain, disability, and death, and that the deceased's pain began the day the deceased was injured and lasted until the deceased died, the burden was upon the employer and the insurance carrier to prove, as a matter of affirmative defense, that some intervening or pre-existing agency was the cause of death, rather than the injury proved by the plaintiff. *Royal Indem. Co. v. Land*, 45 Ga. App. 293, 164 S.E. 492 (1932); *United States Cas. Co. v. Kelly*, 78 Ga. App. 112, 50 S.E.2d 238 (1948); *New Amsterdam Cas. Co. v. Brown*, 91 Ga. App. 12, 84 S.E.2d 594 (1954).

Evidence that claimant not employed on day of accident. — An essential element of proof as to the time when the accident happened was that it was within the statutory period prescribed by former Code 1933, § 114-305 (see O.C.G.A. § 34-9-82); however, where the claimant testified that the claimant was injured on a particular day, and described in detail the manner in which the accident happened, proof that on the date claimant testified claimant was injured claimant was not in the employer's service or

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1. In General (Cont'd)

was not performing the duties of the claimant's employment was evidence that could be considered in deciding whether the claimant sustained an accidental injury arising out of employment. *Skinner Poultry Co. v. Mapp*, 98 Ga. App. 772, 106 S.E.2d 825 (1958).

Proof of origin of disability or death. — Fact that a disability or death stemmed from an accidental injury arising out of and in the course of employment must be proved by some competent evidence and by a preponderance of the evidence. *City Council v. Williams*, 137 Ga. App. 177, 223 S.E.2d 227 (1976).

Presumptions as to injury. — When an injury is sustained and thereafter a continued disability ensues, such injury is the proximate cause of the disability, in the absence of some intervening cause; and the burden of showing such intervening cause is upon the employer. *Davis v. Bibb Mfg. Co.*, 75 Ga. App. 515, 43 S.E.2d 780 (1947).

Presumption as to death. — Where an employee is found dead in a place where the employee might reasonably be expected to be in the performance of the employee's duties, a natural presumption arises that the employee's death occurred out of and in the course of the employee's employment. *Aetna Cas. & Sur. Co. v. Fulmer*, 81 Ga. App. 97, 57 S.E.2d 865 (1950), later appeal, 85 Ga. App. 102, 68 S.E.2d 180 (1951); *Hartford Accident & Indem. Co. v. Cox*, 101 Ga. App. 789, 115 S.E.2d 452 (1960); *Travelers Ins. Co. v. Davis*, 120 Ga. App. 625, 171 S.E.2d 909 (1969); *Maryland Cas. Co. v. Jenkins*, 143 Ga. App. 192, 237 S.E.2d 664 (1977).

If a person is found dead or dying in a place where the person could reasonably be expected to be in the performance of the person's duties, a natural presumption arises that the death arose out of and in the course of the employment, but only where death is unexplained. *Hartford Accident & Indem. Co. v. Trigg*, 144 Ga. App. 74, 240 S.E.2d 725 (1977); *Odom v. Transamerica Ins. Group*, 148 Ga. App. 156, 251 S.E.2d 48 (1978); *Zamora v. Coffee Gen. Hosp.*, 162 Ga. App. 82, 290 S.E.2d 192 (1982).

Though a presumption may arise that an

employee's death arose out of and in the course of employment where such employee dies on account of injuries received in a place where the employee may reasonably be expected to be in the performance of the employee's duties, such presumption disappears upon introduction of evidence to the contrary. *Ladson Motor Co. v. Croft*, 212 Ga. 275, 92 S.E.2d 103 (1956), for comment, see 19 Ga. B.J. 237 (1956); *Weathers v. Jones*, 94 Ga. App. 50, 93 S.E.2d 390 (1956).

Rebuttal of presumption. — Where an employee, after sustaining an accidental injury arising out of and in the course of employment, is disabled continuously until the time of the employee's death shortly thereafter, or where expert opinion is submitted to the effect that the injury sustained had some connection with the subsequent death of the employee, there is ordinarily a natural and reasonable inference, sufficient to support a finding, that the accidental injury was the proximate cause of the employee's death, in the absence of other than conjectural evidence to the contrary. *American Mut. Liab. Ins. Co. v. King*, 88 Ga. App. 176, 76 S.E.2d 81 (1953).

Where the evidence showing an injury, continued disability, and almost immediate death, was sufficient to raise an inference that the employee's death was the result of an accidental injury sustained by the employee while on the job, the burden fell upon the employer to prove as a matter of affirmative defense that some intervening or preexisting agency was the cause of the employee's death, and that neither the exertion engaged in by the employee in performing the employee's work nor the injury sustained in the fall into the ditch was the cause of the employee's death. *Mayor of Athens v. Cook*, 102 Ga. App. 188, 115 S.E.2d 571 (1960).

Where an accident occurs during the course of employment, and an employee receives an injury at a place where the employee may reasonably be expected to be in the course of the employee's duties, a finding that the injury arose out of the employment is justified, but this presumption does not benefit an employee upon the introduction of uncontradicted evidence showing that the employee was not in such a place. *Argonaut Ins. Co. v. King*, 127 Ga. App. 566, 194 S.E.2d 282 (1972).

When an employee is found dead in a place where the employee might reasonably have been expected to be in the performance of the employee's duties, it is presumed that the death arose out of the employee's employment; and evidence which merely tends to negate what is the suspected cause of an unexplained death, but which does not affirmatively establish an alternate noncompensable explanation for the injury, does not rebut the general presumption. *International Paper Co. v. Gilbourn*, 144 Ga. App. 175, 240 S.E.2d 722 (1977); *Zamora v. Coffee Gen. Hosp.*, 162 Ga. App. 82, 290 S.E.2d 192 (1982).

Death while drawing compensation. — Where an employee dies while entitled to workers' compensation, no presumption arises that the employee's death resulted from the accident and injury for which the employee was being paid at the time of the employee's death. *Fowler v. City of Atlanta*, 116 Ga. App. 352, 157 S.E.2d 306 (1967).

Compensable injury. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) does not restrict the making of an award to accidents arising out of employment and solely by reason of the employment, but it covers injuries by an accident "arising out of and in the course of employment," which is broader. *Globe Indem. Co. v. Legien*, 47 Ga. App. 539, 171 S.E. 185 (1933).

An injury received while in the course of employment and in the performance of an act connected with the employment, which injury is unexpected and which may proceed from an unknown cause, or is the unusual effect of a known cause, is an injury caused by an accident, which is compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Brown v. Lumbermen's Mut. Cas. Co.*, 49 Ga. App. 99, 174 S.E. 359 (1934); *Williams v. Maryland Cas. Co.*, 67 Ga. App. 649, 21 S.E.2d 478 (1942).

In order for an injury to be compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), it must have been occasioned by an accident arising out of and in the course of the employment. *Hartford Accident & Indem. Co. v. Welker*, 75 Ga. App. 594, 44 S.E.2d 160 (1947).

In order for a death to be compensable to a dependent under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), it

must result instantly from an accident arising out of and in the course of employment, or later result proximately therefrom. *Lockheed Aircraft Corp. v. Marks*, 88 Ga. App. 167, 76 S.E.2d 507 (1953), overruled on other grounds, *Fowler v. City of Atlanta*, 116 Ga. App. 352, 157 S.E.2d 306 (1967), for comment, see 16 Ga. B.J. 215 (1953).

Presumption that accident compensable. — When an accident occurs in the course of employment otherwise unexplained, a presumption arises that it is compensable. *Lockhart v. Liberty Mut. Ins. Co.*, 141 Ga. App. 476, 233 S.E.2d 810 (1977).

2. Arising Out of Employment

"Arising out of employment" defined. — The words "arising out of employment" refer to a causal connection between the employment and the injury. *Continental Cas. Co. v. Caldwell*, 55 Ga. App. 17, 189 S.E. 408 (1936); *Helton v. Interstate Brands Corp.*, 155 Ga. App. 607, 271 S.E.2d 739 (1980).

The words "arising out of employment" mean that there must be some causal connection between the conditions under which the employee worked and the injury which the employee received; the causative danger must be incidental to the character of the employment, and not independent of the relation of master and servant. *Thornton v. Hartford Accident & Indem. Co.*, 198 Ga. 786, 32 S.E.2d 816 (1945); *Francis v. Liberty Mut. Ins. Co.*, 95 Ga. App. 225, 97 S.E.2d 553 (1957), overruled on other grounds, *Hartford Accident & Indem. Co. v. Cox*, 101 Ga. App. 789, 115 S.E.2d 452 (1960); *Sands v. Union Camp Corp.*, 559 F.2d 1345 (5th Cir. 1977).

The words "arising out of employment" mean that there must be some causal connection between the conditions under which the employee worked and the injury which the employee received. *Williams v. Maryland Cas. Co.*, 99 Ga. App. 489, 109 S.E.2d 325 (1959); *Employers Ins. Co. v. Wright*, 108 Ga. App. 380, 133 S.E.2d 39 (1963), for comment, see 1 Ga. St. B.J. 123 (1964); *Davis v. Houston Gen. Ins. Co.*, 141 Ga. App. 385, 233 S.E.2d 479 (1977); *Zamora v. Coffee Gen. Hosp.*, 162 Ga. App. 82, 290 S.E.2d 192 (1982).

The word "arising" connotes origin, not completion or manifestation. *United States*

Injury by Accident Arising Out of and in Course of Employment (Cont'd)
2. Arising Out of Employment (Cont'd)

Asbestos v. Hammock, 140 Ga. App. 378, 231 S.E.2d 792 (1976).

Essential element of valid claim. — In a workers' compensation case, an essential element of a valid claim is that the claimant sustains an accidental injury arising out of the claimant's employment. *De Howitt v. Hartford Fire Ins. Co.*, 99 Ga. App. 147, 108 S.E.2d 280 (1959).

Causal connection between employment and injury. — An accident arises out of employment when it arises because of it, as when the employment is a contributing proximate cause. *New Amsterdam Cas. Co. v. Sumrell*, 30 Ga. App. 682, 118 S.E. 786 (1923); *United States Fid. & Guar. Co. v. Waymick*, 42 Ga. App. 177, 155 S.E. 366 (1930), *aff'd*, 173 Ga. 67, 159 S.E. 564 (1931); *Employers' Liab. Assurance Corp. v. Montgomery*, 45 Ga. App. 634, 165 S.E. 903 (1932); *Maryland Cas. Co. v. Brown*, 48 Ga. App. 822, 173 S.E. 925 (1934); *Bibb Mfg. Co. v. Alford*, 51 Ga. App. 237, 179 S.E. 912 (1935); *Employers' Liab. Assurance Corp. v. Woodward*, 53 Ga. App. 778, 187 S.E. 142 (1936); *Liberty Mut. Ins. Co. v. Mangham*, 56 Ga. App. 498, 193 S.E. 87 (1937); *Glens Falls Indem. Co. v. Sockwell*, 58 Ga. App. 111, 197 S.E. 647 (1938); *Travelers Ins. Co. v. Clark*, 58 Ga. App. 115, 197 S.E. 650 (1938); *Hartford Accident & Indem. Co. v. Cox*, 61 Ga. App. 420, 6 S.E.2d 189 (1939); *Lumbermen's Mut. Cas. Co. v. Babb*, 67 Ga. App. 161, 19 S.E.2d 550 (1942); *Macon Dairies, Inc. v. Duhart*, 69 Ga. App. 91, 24 S.E.2d 732 (1943); *Hardware Mut. Cas. Co. v. Sprayberry*, 69 Ga. App. 196, 25 S.E.2d 74 (1943); *Aetna Cas. & Sur. Co. v. Honea*, 71 Ga. App. 569, 31 S.E.2d 421 (1944); *Thornton v. Hartford Accident & Indem. Co.*, 198 Ga. 786, 32 S.E.2d 816 (1945); *Harper v. National Traffic Guard Co.*, 73 Ga. App. 385, 36 S.E.2d 842 (1946); *Hartford Accident & Indem. Co. v. Welker*, 75 Ga. App. 594, 44 S.E.2d 160 (1947); *Wilcox v. Shepherd Lumber Corp.*, 80 Ga. App. 71, 55 S.E.2d 382 (1949); *General Accident Fire & Life Assurance Corp. v. Prescott*, 80 Ga. App. 421, 56 S.E.2d 137 (1949); *Aetna Cas. & Sur. Co. v. Fulmer*, 81 Ga. App. 97, 57 S.E.2d 865 (1959), later appeal, 85 Ga. App. 102, 68

S.E.2d 180 (1951); *Redd v. United States Cas. Co.*, 83 Ga. App. 838, 65 S.E.2d 255 (1951); *Fidelity & Cas. Co. v. Roberts*, 86 Ga. App. 472, 71 S.E.2d 718 (1952); *Bituminous Cas. Corp. v. Humphries*, 91 Ga. App. 271, 85 S.E.2d 456 (1954); *Smith v. United States Fid. & Guar. Co.*, 94 Ga. App. 507, 95 S.E.2d 35 (1956); *Williams v. Maryland Cas. Co.*, 99 Ga. App. 489, 109 S.E.2d 325 (1959); *Travelers Ins. Co. v. Davis*, 120 Ga. App. 625, 171 S.E.2d 909 (1969); *Ferguson v. City of Macon*, 121 Ga. App. 128, 173 S.E.2d 227 (1970).

An injury "arises out of" employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. *Georgia Ry. & Power Co. v. Clore*, 34 Ga. App. 409, 129 S.E. 799 (1925); *Globe Indem. Co. v. MacKendree*, 39 Ga. App. 58, 146 S.E. 46 (1928), *aff'd*, 169 Ga. 510, 150 S.E. 849 (1929); *Scott v. Travelers' Ins. Co.*, 49 Ga. App. 157, 174 S.E. 629 (1934); *Railway Express Agency, Inc. v. Shuttleworth*, 61 Ga. App. 644, 7 S.E.2d 195 (1940); *Fried v. United States Fid. & Guar. Co.*, 192 Ga. 492, 15 S.E.2d 704 (1941); *Hartford Accident & Indem. Co. v. Zachery*, 60 Ga. App. 250, 25 S.E.2d 135 (1943); *United States Fid. & Guar. Co. v. Phillips*, 97 Ga. App. 729, 104 S.E.2d 542 (1958); *Francis v. Liberty Mut. Ins. Co.*, 95 Ga. App. 225, 97 S.E.2d 553 (1957), *rev'd* on other grounds, *Hartford Accident & Indem. Co. v. Cox*, 101 Ga. App. 789, 115 S.E.2d 452 (1960); *Employers Ins. Co. v. Wright*, 108 Ga. App. 380, 133 S.E.2d 39 (1963), for comment, see 1 Ga. St. B.J. 123 (1964); *Borden Foods Co. v. Dorsey*, 112 Ga. App. 838, 146 S.E.2d 532 (1965); *Davis v. Houston Gen. Ins. Co.*, 141 Ga. App. 385, 233 S.E.2d 479 (1977); *Maxwell v. Hospital Auth.*, 202 Ga. App. 92, 413 S.E.2d 205 (1992).

Causative danger must be incidental to the character of the business and not independent of the relation of master and servant; it need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence. *Georgia Ry. & Power Co. v. Clore*, 34 Ga. App. 409, 129 S.E. 799 (1925); *Globe Indem.*

Co. v. MacKendree, 39 Ga. App. 58, 146 S.E. 46 (1928), *aff'd*, 169 Ga. 510, 150 S.E. 849 (1929); Scott v. Travelers' Ins. Co., 49 Ga. App. 157, 174 S.E. 629 (1934); United States Fid. & Guar. Co. v. Hamlin, 98 Ga. App. 167, 105 S.E.2d 481 (1958).

If the employee is engaged in some act incidental to the employee's employment and is injured, the injury is compensable. Glens Falls Indem. Co. v. Sockwell, 58 Ga. App. 111, 197 S.E. 647 (1938).

There must be a causal connection between the employment and the injury, and the injury must be the rational consequence of some hazard connected with the employment. Hartford Accident & Indem. Co. v. Cox, 61 Ga. App. 420, 6 S.E.2d 189 (1939), *overruled on other grounds*, National Fire Ins. Co. v. Edwards, 152 Ga. App. 566, 263 S.E.2d 455 (1979); Railway Express Agency, Inc. v. Shuttleworth, 61 Ga. App. 644, 7 S.E.2d 195 (1940); Hartford Accident & Indem. Co. v. Thornton, 71 Ga. App. 486, 31 S.E.2d 115 (1944), *rev'd on other grounds*, 198 Ga. 786, 32 S.E.2d 816 (1945).

For an injury or death to be compensable, the employment must be a contributing proximate cause. Francis v. Liberty Mut. Ins. Co., 95 Ga. App. 225, 97 S.E.2d 553 (1957), *rev'd on other grounds*, Hartford Accident & Indem. Co. v. Cox, 101 Ga. App. 789, 115 S.E.2d 452 (1960).

A disabling injury must flow from the employment, just as effect from cause; the mere fact that an injury is contemporaneous or coincidental with employment is not enough. United States Cas. Co. v. Thomas, 106 Ga. App. 441, 127 S.E.2d 169, *rev'd on other grounds*, 218 Ga. 493, 128 S.E.2d 749 (1962).

When the activity in which an employee was engaged at the time of the employee's death was in the interest of the employee's employer, and was reasonably incident to the employee's regular work, the employee's employment was a contributory cause of death. Employers Mut. Liab. Ins. Co. v. Rosenfeld, 130 Ga. App. 251, 202 S.E.2d 678 (1973).

A causative danger must be incidental to the character of the employment, and not independent of the relation of master and servant. Hartford Accident & Indem. Co. v. Zachery, 69 Ga. App. 250, 25 S.E.2d 135 (1943); Davis v. Houston Gen. Ins. Co., 141 Ga. App. 385, 233 S.E.2d 479 (1977).

Work necessary or reasonably incident to purposes of employment. — An injury which arises out of the conditions under which it is necessary for an employee to work, in the performance of the duties of the contract of employment, is an injury which arises out of the employment. Maryland Cas. Co. v. Sanders, 49 Ga. App. 600, 176 S.E. 104 (1934), *rev'd on other grounds*, 182 Ga. 594, 186 S.E. 693 (1936).

If, in the performance of an act which a person was directly employed to do, or an act reasonably necessary to be done in order to perform the act the person was employed to do, an employee receives an accidental injury, such injury is compensable; if the person's act does not come within either of these classifications, the injury is not compensable. United States Fid. & Guar. Co. v. Skinner, 188 Ga. 823, 5 S.E.2d 9 (1939); Ayers v. Gulf Life Ins. Co., 89 Ga. App. 808, 81 S.E.2d 234 (1954); Sanford v. University of Ga. Bd. of Regents, 131 Ga. App. 858, 207 S.E.2d 255 (1974).

A claimant's right to compensation depends upon whether there is sufficient competent evidence in the record to show that the deceased, when fatally injured, was engaged in work necessary or reasonably incident to the purpose of the deceased's employment. United States Fid. & Guar. Co. v. Hamlin, 98 Ga. App. 167, 105 S.E.2d 481 (1958).

Risks incident to employment. — If an injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. Pinkerton Nat'l Detective Agency v. Walker, 30 Ga. App. 91, 117 S.E. 281 (1923); Scott v. Travelers' Ins. Co., 49 Ga. App. 157, 174 S.E. 629 (1934); Railway Express Agency, Inc. v. Shuttleworth, 61 Ga. App. 644, 7 S.E.2d 195 (1940); Fried v. United States Fid. & Guar. Co., 192 Ga. 492, 15 S.E.2d 704 (1941); Hartford Accident & Indem. Co. v. Zachery, 69 Ga. App. 250, 25 S.E.2d 135 (1943); Aetna Cas. & Sur. Co. v. Fulmer, 81 Ga. App. 97, 57 S.E.2d 865 (1950), *later appeal*, 85 Ga. App. 102, 68 S.E.2d 180 (1951); Francis v. Liberty Mut. Ins. Co., 95 Ga. App. 225, 97 S.E.2d 553 (1957), *overruled on other grounds*, Hart-

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ford Accident & Indem. Co. v. Cox, 101 Ga. App. 789, 115 S.E.2d 452 (1960); Employers Ins. Co. v. Wright, 108 Ga. App. 380, 133 S.E.2d 39 (1963), for comment, see 1 Ga. St. B.J. 123 (1964); Wood v. Aetna Cas. & Sur. Co., 116 Ga. App. 284, 157 S.E.2d 60 (1967); Davis v. Houston Gen. Ins. Co., 141 Ga. App. 385, 233 S.E.2d 479 (1977).

Under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), an employee is entitled to compensation for injuries from accidents arising out of and in the course of employment, that is, for such occurrences as might have been reasonably contemplated by the employer as a risk naturally incident to the nature of the employment, or such as, after the event, might be seen to have had their origin in a risk connected with the business of the employment, and to have arisen out of and flowed from that source as a natural consequence. Keen v. New Amsterdam Cas. Co., 34 Ga. App. 257, 129 S.E. 174, cert. denied, 34 Ga. App. 836 (1925); United States Fid. & Guar. Co. v. Green, 38 Ga. App. 50, 142 S.E. 464, cert. denied, 38 Ga. App. 817 (1928), overruled on other grounds, American Mut. Liab. Ins. Co. v. Benford, 77 Ga. App. 93, 47 S.E.2d 673 (1948); Maddox v. Travelers Ins. Co., 39 Ga. App. 690, 148 S.E. 307 (1929); Hardware Mut. Cas. Co. v. Sprayberry, 69 Ga. App. 196, 25 S.E.2d 74 (1943); American Mut. Liab. Ins. Co. v. Benford, 77 Ga. App. 93, 47 S.E.2d 673 (1948); United States Cas. Co. v. Russell, 98 Ga. App. 181, 105 S.E.2d 378 (1958); Williams v. Maryland Cas. Co., 99 Ga. App. 489, 109 S.E.2d 325 (1959); Employers Mut. Liab. Ins. Co. v. Rosenfeld, 130 Ga. App. 251, 202 S.E.2d 678 (1973).

An injury arises "out of" employment when the risk thereof might have been contemplated by a reasonable person, when entering the employment, as incidental to it. Scott v. Travelers' Ins. Co., 49 Ga. App. 157, 174 S.E. 629 (1934).

A risk is incident to employment when it belongs to or is connected with what a workman has to do in fulfilling a workman's contract of service. Thornton v. Hartford Accident & Indem. Co., 198 Ga. 786, 32 S.E.2d 816 (1945); Employers Ins. Co. v.

Wright, 108 Ga. App. 380, 133 S.E.2d 39 (1963), for comment, see 1 Ga. St. B.J. 123 (1964).

A compensable accident must be one resulting from a risk reasonably incident to the employment. Employers Ins. Co. v. Wright, 108 Ga. App. 380, 133 S.E.2d 39 (1963), for comment, see 1 Ga. St. B.J. 123 (1964); Davis v. Houston Gen. Ins. Co., 141 Ga. App. 385, 233 S.E.2d 479 (1977).

It is only necessary that the claimant prove that the claimant's work brought the claimant within range of the danger by requiring the claimant's presence in the locale when the peril struck, even though any other person present would have also been injured irrespective of the person's employment. National Fire Ins. Co. v. Edwards, 152 Ga. App. 566, 263 S.E.2d 455 (1979).

Ordinary and extraordinary risks covered.

— Risk may be incidental to employment when it is either an ordinary risk directly connected with the employment or an extraordinary risk which is only indirectly connected with the employment owing to the special nature of the employment. Scott v. Travelers' Ins. Co., 49 Ga. App. 157, 174 S.E. 629 (1934); Employers Ins. Co. v. Wright, 108 Ga. App. 380, 133 S.E.2d 39 (1963), for comment, see 1 Ga. St. B.J. 123 (1964).

Risk common to others. — When the duties of an employee entail the employee's presence at a place and time, a claim for injury there occurring is not barred because it results from a risk common to all others, unless it is common to the general public without regard to such conditions, and independently of place, employment, or pursuit. National Fire Ins. Co. v. Edwards, 152 Ga. App. 566, 263 S.E.2d 455 (1979).

"Smoking" environment. — An employee's exclusive remedies for physical illness caused by pipe smoke of employer's vice president were under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., because the injuries arose in the course of and out of the employee's employment. Hennly v. Richardson, 264 Ga. 355, 444 S.E.2d 317 (1994).

Injury due to personal reasons. — The determination of whether injuries occurred due to "reasons personal to" an employee is decided on the basis of whether the alleged injuries arose out of and in the course of employment. Murphy v. ARA Servs., Inc., 164 Ga. App. 859, 298 S.E.2d 528 (1982).

Injuries caused to an employee by the willful act of a third person for reasons entirely personal to the employee were excluded from coverage. *Johnson v. Holiday Food Stores, Inc.*, 238 Ga. App. 822, 520 S.E.2d 502 (1999).

Foreseeability of injury. — A particular injury complained of need not have been foreseen or expected; it is sufficient if, after the injury, it can be traced to the employment as a contributing cause. *Brown v. Lumbermen's Mut. Cas. Co.*, 49 Ga. App. 99, 174 S.E. 359 (1934).

Hazard apart from employment. — An injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment is excluded. *Scott v. Travelers' Ins. Co.*, 49 Ga. App. 157, 174 S.E. 629 (1934); *Hartford Accident & Indem. Co. v. Zachery*, 69 Ga. App. 250, 25 S.E.2d 135 (1943).

Exposure to danger in job involving contact with public. — An employee whose occupation requires personal service to the public is exposed to the risk of physical danger as the result of having to come in contact and associate with people, and if such hazard becomes an actuality, it may, according to the circumstances and conditions present, constitute a reasonable incident of the employment, entitling the employee to workers' compensation benefits for injuries resulting therefrom. *Employers Ins. Co. v. Wright*, 108 Ga. App. 380, 133 S.E.2d 39 (1963), for comment, see 1 Ga. St. B.J. 123 (1964).

Danger as peculiar to work. — It is not a condition precedent to the allowance of compensation for an injury or death to have been the result of a hazard peculiar to the particular employment. *McKinney v. Reynolds & Manley Lumber Co.*, 79 Ga. App. 826, 54 S.E.2d 471 (1949), for comment, see 12 Ga. B.J. 208 (1949).

Injuries are not required to arise from something peculiar to the employment; an injury is compensable if after the event it is apparent to the rational mind that there is a causal connection between the conditions under which the employment was performed and the resulting injury. *Wood v. Aetna Cas. & Sur. Co.*, 116 Ga. App. 284, 157 S.E.2d 60 (1967).

To be compensable, an injury need not arise from something peculiar to the employment. *National Fire Ins. Co. v. Edwards*, 152 Ga. App. 566, 263 S.E.2d 455 (1979).

Case law holding that danger must be peculiar to the work and not common to the neighborhood for an injury to arise out of and in the course of employment has been overruled. *National Fire Ins. Co. v. Edwards*, 152 Ga. App. 566, 263 S.E.2d 455 (1979).

Employee without special permission to act. — If an employee is injured while doing something in the interest of an employer, which is reasonably necessary or incident to the employee's regular work, the injury arises out of the employee's employment; this is true even though the employee has no special permission from the employer to do the particular act, which is beyond the scope of the employee's specific duties, and it applies especially when the employee has no instruction from the employer prohibiting the act, and has some discretionary authority. *Pike v. Maryland Cas. Co.*, 107 Ga. App. 49, 129 S.E.2d 78 (1962), for comment, see 26 Ga. B.J. 131 (1963); *McElreath v. McElreath*, 155 Ga. App. 826, 273 S.E.2d 205 (1980).

Employee's free time. — If the employee is free to use time for the employee's own individual affairs and an injury occurs during this time, the injury is not compensable as it does not arise out of employment. *Street v. Douglas County Rd. Dep't*, 160 Ga. App. 559, 287 S.E.2d 586 (1981).

New accidents arising in course of employment. — When other employment intervenes between an original award of compensation and a claimant's subsequent disability, an award against the original employer based upon a "change of condition" is not, as a matter of law, barred unless the subsequent employment, in which the gradual worsening condition occurred, evidences a work environment and work circumstances which are "new" and "different" from those existing in the claimant's previous "ordinary work." Then it can be said that the claimant has suffered a compensable "accident" arising out of the claimant's subsequent employment rather than a mere economic "change of condition" proximately resulting from the claimant's original "accident." *Slattery Assocs. v. Jones, Batson-Cook & Russell*, 161 Ga. App. 389, 288 S.E.2d 654 (1982).

Injury by Accident Arising Out of and in Course of Employment (Cont'd)

2. Arising Out of Employment (Cont'd)

New and different work environments. —

The decisive issue in determining ultimately whether the claimant has suffered proximately a "change of condition" or a separately compensable "accident" during the claimant's subsequent employment is, assuming there is no subsequent specific job-related incident, whether the environment and circumstances of the new employment are "new" and "different" from those which would have existed in the "ordinary work" encompassed by the claimant's previous employment. If the environment and circumstances surrounding the new employment differ from the claimant's previous "ordinary work," the claimant's gradually worsening condition is, as a matter of law, causally connected with the "ordinary work" associated with those new and different circumstances which exist in the subsequent employment. *Slattery Assocs. v. Jones, Batson-Cook & Russell*, 161 Ga. App. 389, 288 S.E.2d 654 (1982).

New accident claim asserted against current employer. — When the initial claim is based upon the "new accident" theory, it must be asserted against that employer in whose employment the proximate cause of the "new accident" — the aggravation of the original uncompensated injury — occurred. *Slattery Assocs. v. Jones, Batson-Cook & Russell*, 161 Ga. App. 389, 288 S.E.2d 654 (1982).

Claim for "change of condition" is claim for additional compensation under the original award. A "change of condition" claim for additional compensation is predicated upon the claimant's gradually worsening condition, from the wear and tear of performing the claimant's usual employment duties and of ordinary life, to the point that the claimant can no longer continue to perform the claimant's ordinary work. *Slattery Assocs. v. Jones, Batson-Cook & Russell*, 161 Ga. App. 389, 288 S.E.2d 654 (1982).

3. Arising in Course of Employment

"In course of employment" defined. —

An injury arises "in the course of employment" within the meaning of the workers'

compensation law (see O.C.G.A. § 34-9-1 et seq.) when it occurs within the period of the employment, at a place where the employee reasonably may be in the performance of the employee's duties, and while the employee is fulfilling those duties or engaged in doing something incidental thereto. *New Amsterdam Cas. Co. v. Sumrell*, 30 Ga. App. 682, 118 S.E. 786 (1923); *United States Fid. & Guar. Co. v. Waymick*, 42 Ga. App. 177, 155 S.E. 366 (1930), *aff'd*, 173 Ga. 67, 159 S.E. 564 (1931); *Employers' Liab. Assurance Corp. v. Montgomery*, 45 Ga. App. 634, 165 S.E. 903 (1932); *Maryland Cas. Co. v. Brown*, 48 Ga. App. 822, 173 S.E. 925 (1934); *Bibb Mfg. Co. v. Alford*, 51 Ga. App. 237, 179 S.E. 912 (1935); *Employers' Liab. Assurance Corp. v. Woodward*, 53 Ga. App. 778, 187 S.E. 142 (1936); *Continental Cas. Co. v. Caldwell*, 55 Ga. App. 17, 189 S.E. 408 (1936); *Liberty Mut. Ins. Co. v. Mangham*, 56 Ga. App. 498, 193 S.E. 87 (1937); *Glens Falls Indem. Co. v. Sockwell*, 58 Ga. App. 111, 197 S.E. 647 (1938); *Travelers Ins. Co. v. Clark*, 58 Ga. App. 115, 197 S.E. 650 (1938); *Hartford Accident & Indem. Co. v. Cox*, 61 Ga. App. 420, 6 S.E.2d 189 (1939); *Lumbermen's Mut. Cas. Co. v. Babb*, 67 Ga. App. 161, 19 S.E.2d 550 (1942); *Macon Dairies, Inc. v. Duhart*, 69 Ga. App. 91, 24 S.E.2d 732 (1943); *Hardware Mut. Cas. Co. v. Sprayberry*, 69 Ga. App. 196, 25 S.E.2d 74 (1943); *Aetna Cas. & Sur. Co. v. Honea*, 71 Ga. App. 569, 31 S.E.2d 421 (1944); *Thornton v. Hartford Accident & Indem. Co.*, 198 Ga. 786, 32 S.E.2d 816 (1945); *Harper v. National Traffic Guard Co.*, 73 Ga. App. 385, 36 S.E.2d 842 (1946); *Hartford Accident & Indem. Co. v. Welker*, 75 Ga. App. 594, 44 S.E.2d 160 (1947); *Free v. McEver*, 79 Ga. App. 831, 54 S.E.2d 372 (1949); *Wilcox v. Shepherd Lumber Corp.*, 80 Ga. App. 71, 55 S.E.2d 382 (1949); *Aetna Cas. & Sur. Co. v. Fulmer*, 81 Ga. App. 97, 57 S.E.2d 865 (1950), *later appeal*, 85 Ga. App. 102, 68 S.E.2d 180 (1951); *Employers Ins. Co. v. Bass*, 81 Ga. App. 306, 58 S.E.2d 516 (1950); *Redd v. United States Cas. Co.*, 83 Ga. App. 838, 65 S.E.2d 255 (1951); *Smith v. United States Fid. & Guar. Co.*, 94 Ga. App. 507, 95 S.E.2d 35 (1956); *Williams v. Maryland Cas. Co.*, 99 Ga. App. 489, 109 S.E.2d 325 (1959); *Employers Ins. Co. v. Wright*, 108 Ga. App. 380, 133 S.E.2d 39 (1963), *for comment*, see 1 Ga. St. B.J. 123 (1964);

Travelers Ins. Co. v. Davis, 120 Ga. App. 625, 171 S.E.2d 909 (1969); *Ferguson v. City of Macon*, 121 Ga. App. 128, 173 S.E.2d 227 (1970); *McDonald v. State Hwy. Dep't*, 127 Ga. App. 171, 192 S.E.2d 919 (1972); *Barge v. City of College Park*, 148 Ga. App. 480, 251 S.E.2d 580 (1978); *International Bus. Machs., Inc. v. Bozardt*, 156 Ga. App. 794, 275 S.E.2d 376 (1980).

An injury is received "in course of" employment when it occurs while a workman is doing duty which the workman is employed to perform. *Georgia Ry. & Power Co. v. Clore*, 34 Ga. App. 409, 129 S.E. 799 (1925); *Globe Indem. Co. v. MacKendree*, 39 Ga. App. 58, 146 S.E. 46 (1928), *aff'd*, 169 Ga. 510, 150 S.E. 849 (1929).

The phrase "in course of employment" refers to the time, place, and circumstances under which the accident took place. *Continental Cas. Co. v. Caldwell*, 55 Ga. App. 17, 189 S.E. 408 (1936); *Thornton v. Hartford Accident & Indem. Co.*, 198 Ga. 786, 32 S.E.2d 816 (1945); *Maddox v. Buice Transf. & Storage Co.*, 81 Ga. App. 503, 59 S.E.2d 329 (1950); *Employers Ins. Co. v. Wright*, 108 Ga. App. 380, 133 S.E.2d 39 (1963), for comment, see 1 Ga. St. B.J. 123 (1964); *McDonald v. State Hwy. Dep't*, 127 Ga. App. 171, 192 S.E.2d 919 (1972); *Sands v. Union Camp Corp.*, 559 F.2d 1345 (5th Cir. 1977); *International Bus. Machs., Inc. v. Bozardt*, 156 Ga. App. 794, 275 S.E.2d 376 (1980).

An injury arising from the performance of anything incidental to a claimant's duties arises out of and in the course of employment and is compensable. *Thompson-Weinman Co. v. Yancey*, 90 Ga. App. 213, 82 S.E.2d 725 (1954).

If at the moment an employee is accidentally injured the employee is engaged in the regular duties of employment, the accident occurs in the course of and within the scope of the employee's employment. *United States Fid. & Guar. Co. v. Hamlin*, 98 Ga. App. 167, 105 S.E.2d 481 (1958).

4. Accidents Held to Arise Out of and in Course of Employment

Death from tree falling on highway. — Where an employee, while traveling in an automobile upon a public highway in the regular course of the employee's employment, was killed in a section of woodland through which the road passed, by a tree

which stood near the road and which was blown upon the employee and the employee's automobile by a sudden and violent storm, the employee's death arose out of the employee's employment, within the meaning of Ga. L. 1922, p. 185, § 1 (see O.C.G.A. § 34-9-1). *Globe Indem. Co. v. MacKendree*, 39 Ga. App. 58, 146 S.E. 46 (1928), *aff'd*, 169 Ga. 510, 150 S.E. 849 (1929).

Accident en route to customer's store. —

An injury to the claimant insurance salesman, whose car was hit by a train on a Saturday afternoon while the claimant was traveling to the store of a customer to collect an insurance premium, arose out of and in the course of the claimant's employment. *Lumbermen's Mut. Cas. Co. v. Babb*, 67 Ga. App. 161, 19 S.E.2d 550 (1942).

Injury to salesmen while traveling highway. — Award of compensation to a salesman injured on the highway was authorized by the evidence. *New Amsterdam Cas. Co. v. Sumrell*, 33 Ga. App. 299, 126 S.E. 271 (1924), *cert. denied*, 33 Ga. App. 829 (1925).

Assault while returning from meal. —

Where employee, in the course of employment, was walking on a street at night returning from a meal, in an area where the employee was placed on account of the employee's employment, which was particularly susceptible to crimes against the person, the injury sustained from an assault made for reasons not personal to the employee "arose out of" the employment. *General Fire & Cas. Co. v. Bellflower*, 123 Ga. App. 864, 182 S.E.2d 678 (1971), for comment, see 23 Mercer L. Rev. 449 (1972).

Evidence that a bus driver worked an irregular schedule requiring the driver to be away from home, and that at the time of the driver's fatal injury the driver was "off duty" but "on call," occupying lodging furnished by the employer, and was returning on a direct route to the driver's lodging after having visited a convenient place in the area to eat, supported a determination that the driver was injured in the course of employment. *General Fire & Cas. Co. v. Bellflower*, 123 Ga. App. 864, 182 S.E.2d 678 (1971), for comment, see 23 Mercer L. Rev. 449 (1972).

Delivering cargo on alternate route. — It could not realistically be said as a matter of law that a deceased employee, when using a prohibited alternate route for delivering

Injury by Accident Arising Out of and in Course of Employment (Cont'd)

4. Accidents Held to Arise Out of and in Course of Employment (Cont'd)

cargo, was not pursuing the employer's business at the time of a fatal accident, as the employee was doing the very job for which the employee was employed, namely, driving a tractor-trailer for the purpose of delivering cargo to an intended destination. *Smith v. Liberty Mut. Ins. Co.*, 111 Ga. App. 616, 142 S.E.2d 459 (1965).

Collision of delivery wagon and train. — The death of one who is employed to drive an ice wagon and deliver ice to various points in a city, and who in the discharge of such duties must travel along a certain route which crosses a railroad track, when caused by a collision at such crossing between the wagon driven by that person and a railroad train, while the driver was in the discharge of the driver's duty in attempting to drive across the railroad crossing, arose out of the employment. *Atlantic Ice & Coal Corp. v. Wishard*, 30 Ga. App. 730, 119 S.E. 429 (1923).

Express messenger. — An injury to an express messenger who slipped and fell under a train, which was coming into a station, while speaking to another express messenger who was on the ground, was from an accident arising out of and in the course of employment. *Southeastern Express Co. v. Edmondson*, 30 Ga. App. 697, 119 S.E. 39 (1923).

Fall from truck used to haul logs. — Laborer who is employed to assist in hauling logs from a swamp to an employer's sawmill, and who is permitted by an employer to ride upon the truck when going to the mill from the swamp for the purpose of bringing back logs, is in the discharge of duties when so riding upon the truck; and where injured by falling from the truck, the laborer's injury arises out of and in the course of the laborer's employment. *Integrity Mut. Cas. Co. v. Jones*, 33 Ga. App. 489, 126 S.E. 876 (1925).

Meal made incidental to employment by contract. — Where a proper evening meal was by contract made necessary and incidental to a minor claimant's employment, in that the employer furnished the transportation, controlled the time and duration, and retained the right to have certain duties

performed during the trip, a finding that an injury arose not only in the course of but also out of the employment, within the requirements of this section, was authorized. *American Hdwe. Mut. Ins. Co. v. Burt*, 103 Ga. App. 811, 120 S.E.2d 797 (1961) (see O.C.G.A. § 34-9-1).

Trip with two objectives. — Where a mission may have had two objectives, business as intended by the contract of employment and also the personal pleasure of the employee, and there was no deviation from the course which the employee would have followed had the trip been entirely upon the business of the employer and no real deviation therefrom was intended before the full duty to the employer was to have been performed, an injury sustained by an employee while en route to the place where the employee was to perform the duties of employment was an injury arising out of and in the course of the employment and compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Hartford Accident & Indem. Co. v. Welker*, 75 Ga. App. 594, 44 S.E.2d 160 (1947).

There is no requirement in Georgia's workers' compensation law that an employee at the time of his or her injury must have no objective other than the business of his or her employer. *Amedisys Home Health, Inc. v. Howard*, 269 Ga. App. 656, 605 S.E.2d 60 (2004).

Rule of continuous employment. — When a nurse, who was required to be on 24-hour call, and to complete reports of the nurse's visits to patients by the morning following the visit, was injured while carrying such reports, a pager, a cellular telephone, and a pizza for the nurse's family's dinner into the nurse's home, the nurse was injured in the course and scope of employment because, in addition to delivering the family's dinner, the nurse was also carrying time sensitive job-related paperwork and job-related equipment into the nurse's home, and, given the 24-hour nature of the employment, the rule of continuous employment applied. *Amedisys Home Health, Inc. v. Howard*, 269 Ga. App. 656, 605 S.E.2d 60 (2004).

Delivery person killed while standing by truck. — Where a driver was killed by being run over by an automobile while the driver was standing by the driver's truck engaged in

making deliveries of the products which the driver was employed to deliver, a finding that the injury arose out of and in the course of the driver's employment as an agent for the oil company whose products the driver was delivering, and, as such, was entitled to compensation, was authorized. *Roberts v. United States Fid. & Guar. Co.*, 42 Ga. App. 668, 157 S.E. 537 (1931).

Injury while procuring wood. — Where an employment contract contemplated that an employee, while on duty, would procure wood to heat the house where the employee stayed awaiting the occasion to do the work which an employer engaged the employee to do, the procuring of this wood was incidental to the employment. *Free v. McEver*, 79 Ga. App. 831, 54 S.E.2d 372 (1949).

Burns while "sounding" still. — Where a still catches fire from a bolt of lightning, and the person who is working at the still is burned in the performance of the duties for which the person is employed, i.e., "sounding" the still, the burns thus received constitute an injury arising out of and in the course of the employment. *Moody v. Tillman*, 45 Ga. App. 84, 163 S.E. 521 (1932).

Death following operation. — Where the attending physician testified, in effect, that the physician did not know what caused the employee's death, that it was not caused by the operation for compensable accidental injury as such but that the employee would still be alive if the operation had not been performed, and that the operation was necessary in order to permit the employee to return to work, a finding that the employee died as a result of the injury which arose out of and in the course of the employee's employment was authorized. *Armour & Co. v. Cox*, 96 Ga. App. 829, 101 S.E.2d 733 (1958).

Contact with high voltage equipment during storm. — Where the claimant fell or was thrown to the ground when the claimant's body came in contact with a charge of electricity while the claimant was working in the vicinity of high voltage electrical equipment during a thunderstorm, a finding was authorized that the claimant received injuries as a result of this occurrence, and compensation was justified. *Stockbridge Stone Div. Vulcan Materials Co. v. Rolley*, 111 Ga. App. 447, 142 S.E.2d 86 (1965).

Wiping of officer's gun. — A policeman may be in the discharge of the policeman's

duty while wiping a gun furnished the policeman by the city while at home for supper. *Employers Liab. Assurance Corp. v. Henderson*, 37 Ga. App. 238, 139 S.E. 688 (1927), cert. denied, 37 Ga. App. 833 (1928).

Instruction of junior officers in use of gun. — Where the evidence authorized a finding that the deceased police officer was engaged in instructing junior members of a police force in the practice of quick drawing and shooting, as the deceased had been instructed to do, when the deceased was accidentally shot by another policeman, the fatal accident arose out of and in the course of the deceased's employment for purposes of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *United States Fid. & Guar. Co. v. Phillips*, 97 Ga. App. 729, 104 S.E.2d 542 (1958).

Replacing belts at ginnery. — Injury received in replacing belts at a ginnery arose "out of and in the course of" an injured person's employment with company. *Zurich Gen. Accident & Liab. Ins. Co. v. Ellington*, 34 Ga. App. 490, 130 S.E. 220 (1925).

Attempted repair of machinery. — Where the claimant operated a grinding machine and was injured when the claimant attempted to replace a belt on a drill press which had been used by a co-employee, the attempted repair was an incident of the claimant's regular work, even though the claimant had not been authorized to use the drill press and the co-employee was not on the premises at the time of the accident. *Graves v. Builders Steel Supply*, 186 Ga. App. 736, 368 S.E.2d 188 (1988).

Assisting fellow travelers. — The evidence was sufficient to support an award on the basis that lending assistance to fellow travelers upon the highway was within the scope and course of deceased's employment for a tractor repair service. *United States Fid. & Guar. Co. v. Hamlin*, 98 Ga. App. 167, 105 S.E.2d 481 (1958).

Traveling to obtain bulldozer for fire-fighting purposes. — An employee summoned by an employer to assist in extinguishing a fire by cutting fire lanes with a bulldozer, traveling to the place where the bulldozer was to be obtained by the employee was incidental to and in the course of employment, and the injury that the employee received while thus employed was by

Injury by Accident Arising Out of and in Course of Employment (Cont'd)
4. Accidents Held to Arise Out of and in Course of Employment (Cont'd)

an accident arising out of and in the course of employment. *Bituminous Cas. Corp. v. Humphries*, 91 Ga. App. 271, 85 S.E.2d 456 (1954).

Use of elevator in violation of rule. — An act done in violation of the rule against use of an elevator by employees is not necessarily one outside the scope of employment to the extent of excluding the master and servant relation; and where there was nothing to show that the rule had been approved by the commission (now board), its violation would not bar compensation. *American Mut. Liab. Ins. Co. v. Hardy*, 36 Ga. App. 487, 137 S.E. 113 (1927).

Fall of tree on timber cutter. — If an employee, while in the performance of the employee's work cutting timber, was injured by a tree falling on the employee and breaking the employee's leg, the injury sustained arose out of and in the course of employment. *Love Lumber Co. v. Thigpen*, 42 Ga. App. 83, 155 S.E. 77 (1930).

Death by lightning. — Where an employee was where the employee's duties required the employee to be, in a large lumberyard among stacks of wet or damp lumber, when struck by lightning, the employee's death was from an accident arising out of and in the course of employment. *McKinney v. Reynolds & Manley Lumber Co.*, 79 Ga. App. 826, 54 S.E.2d 471 (1949), for comment, see 12 Ga. B.J. 208 (1949).

Ear injury. — An injury to an ear causing diminution in earning capacity is compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) where such an injury arises out of and during the course of employment. *Blue Bell Globe Mfg. Co. v. Baird*, 61 Ga. App. 298, 6 S.E.2d 83 (1939).

Contact of clothes with open fire. — Where a room in which the employee works in the discharge of the duties of the contract of employment is heated by an open fire, an injury to the employee which is caused while the employee is in the performance of the employee's duties, from burns received by the employee's clothes accidentally becoming ignited, is an injury which arises out of

and in the course of the employment. *Maryland Cas. Co. v. Sanders*, 49 Ga. App. 600, 176 S.E. 104 (1934), rev'd on other grounds, 182 Ga. 594, 186 S.E. 693 (1936).

Contribution of fall to herniated disc. — Where the evidence demanded a finding that the claimant's fall at least contributed to a herniated disc for which the claimant was operated on, the court did not err in reversing a denial of compensation. *Riegel Textile Corp. v. Craig*, 96 Ga. App. 791, 101 S.E.2d 740 (1957).

Injury to arm in throwing cigarette while riding elevator. — If an employee, in the line of the employee's duty in the place of business of the employer, entered a freight elevator to carry an article from one floor to another on a continuous nonstop trip to the second floor, but, before reaching the second floor, threw a cigarette out of the door to a fellow employee, and the employee's arm was caught and crushed while throwing the cigarette, that act was not a deviation by claimant from the course of employment such as would defeat a recovery for compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Columbia Cas. Co. v. Parham*, 69 Ga. App. 258, 25 S.E.2d 147 (1943).

Injury during slack time. — If an employer knew that the claimant used slack time to work on personal projects and condoned or permitted such activity, the employee was required to remain on the premises during such slack periods, and the injury occurred during a slack or enforced lull period while engaged in an authorized activity, in an authorized place, and during an authorized time, the injury arose out of and in the course of employment. *Parker v. Travelers Ins. Co.*, 142 Ga. App. 711, 236 S.E.2d 915 (1977).

Injury in fall during epileptic attack. — An employee afflicted with an epileptoid condition suffered an injury which arose out of and in the course of employment where, while in the course of employment, the employee was seized with an epileptic attack which caused the employee to fall against the sharp edge of a table producing an injury. *United States Cas. Co. v. Richardson*, 75 Ga. App. 496, 43 S.E.2d 793 (1947).

Accidental injury to finger as cause of blood poisoning. — The rule that if there is evidence which points to a theory of causa-

tion indicating a logical sequence of cause and effect, then there is a juridical basis for a determination as to how the event happened, authorized a finding that the injury to the employee's finger was the proximate cause of the employee's death from blood poisoning. *Aetna Cas. & Sur. Co. v. Nuckolls*, 69 Ga. App. 649, 26 S.E.2d 473 (1943).

Discovery of deceased employee on premises. — Where a deceased employee was discovered in a fatally injured condition beside a swimming pool on the premises of the employer motel, and it did not appear that in being at such location on the premises of the employer the employee was not in the line of the employee's duty and in the performance thereof, the night clerk having sent the employee on an errand, a finding that as a matter of law the deceased employee did not meet death by reason of an injury or accident occurring in the course of the employee's employment or arising out of the employee's employment was error. *Williams v. Maryland Cas. Co.*, 99 Ga. App. 489, 109 S.E.2d 325 (1959).

When an employee is found dead in a place where the employee might reasonably have been expected to be in the performance of the employee's duties, it is presumed that the death arose out of the employee's employment, but this inference applies only to cases where the death is unexplained, that is, where the employee literally is "found dead" and the cause of death is not known. If the death is found to be explained as heart-related, the case is expressly governed by the specific standard of proof in O.C.G.A. § 34-9-1 (4). *Lavista Equip. Supply, Inc. v. Elliott*, 186 Ga. App. 585, 367 S.E.2d 811, 186 Ga. App. 918, 367 S.E.2d 811 (1988).

Fractured vertebra. — A finding that an employee's disability was caused by a kidney ailment rather than by a fractured vertebra was unauthorized by the evidence where, while the record showed that the employee was unable to work full-time on account of the employee's kidney ailment, the employee's total inability to work stemmed from the very moment that the employee fell while attempting to lift a tire in the course of the employee's employment, as it is inconceivable that kidney trouble can cause the fracture of a vertebra. *Whitener v. Baly Tire Co.*, 98 Ga. App. 257, 105 S.E.2d 775 (1958).

Death from snakebite. — Since the evidence shows that the deceased husband of a claimant never recovered from the effect of a snakebite arising out of and in the course of the deceased's employment, but died after a lingering illness, a finding of fact that the effects of the compensable snakebite contributed proximately to the deceased's death eleven weeks after was proper. *Phoenix Ins. v. Weaver*, 124 Ga. App. 423, 183 S.E.2d 920 (1971).

Conditions of employment as causally connected with attack. — The conditions of the victim's employment, including the early morning hour at which the victim was required to report to work and the location of the company parking lot in an area of known criminal activity, not only provided the time and place for the assault upon the victim, but actually contributed to an increase in the risk of attack, and provided causal connection with the victim's employment. *Helton v. Interstate Brands Corp.*, 155 Ga. App. 607, 271 S.E.2d 739 (1980).

Employee murdered by fellow employee. — Since an employee was murdered by another employee during an armed robbery while making a night deposit at a local bank for their employer, the exclusivity provision of the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., provided immunity for the employer in a tort action because the employee's death arose out of and in the course of employment. *Hadsock v. J.H. Harvey Co.*, 212 Ga. App. 782, 442 S.E.2d 892 (1994).

Suicide resulting from compensable injury. — Because sufficient evidence supported a finding that the decedent's tinnitus resulted from an automobile accident which occurred in the course of employment, and that such deprived the decedent of normal judgment, the trial court did not err in awarding the surviving spouse both outstanding TTD and statutory death benefits based on the decedent's suicide. Moreover: (1) the question of whether the decedent's suicide was a reasonably foreseeable result of the automobile accident was irrelevant; and (2) any finding that the decedent's suicide constituted an unforeseeable intervening cause would serve only to relieve the tortfeasor of liability, but would not bear on the question of whether the death was compensable. *Bayer Corp. v. Lassiter*, 282 Ga. App. 346, 638 S.E.2d 812 (2006).

Injury by Accident Arising Out of and in Course of Employment (Cont'd)

4. Accidents Held to Arise Out of and in Course of Employment (Cont'd)

Employee required to consult physician.

— Injuries sustained by the claimant while enroute to see a doctor arose out of and in the course of employment, where the claimant was required by the employer to consult with the claimant's personal physician as a precondition to the claimant's return to work and transportation was furnished by the employer. *Firestone Tire & Rubber Co. v. Crawford*, 177 Ga. App. 242, 339 S.E.2d 292 (1985).

Handling of firearm in performance of duties. — If the work of an employee or the performance of an incidental duty involves exposure to the perils of handling a firearm, the protection of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) extends to the employee while the employee is handling the firearm in the performance of the employee's duties. *Ferguson v. City of Macon*, 121 Ga. App. 128, 173 S.E.2d 227 (1970).

5. Accidents Held Not to Arise Out of and in Course of Employment

Alleged poisoning from gases of exploding dynamite. — A decree denying compensation on the grounds that death was not from an injury arising out of the course of employment was authorized by evidence showing that a deceased employee did not show symptoms of alleged poisons from gases of exploding dynamite until three or four days after exposure thereto, that the mine was well ventilated, and that a person inhaling quantity of such gas sufficient to cause death is affected within 24 hours. *Maryland Cas. Co. v. England*, 34 Ga. App. 354, 129 S.E. 446 (1925).

Handling live wire after warnings. — The deceased, in catching hold of a live, smoking, and disconnected wire lying in a yard, in spite of the repeated warnings of a fellow employee, was held not to have acted in any such emergency, so as to bring oneself within the scope and operation of the rule as to acting within the scope of employment when confronted by a sudden emergency. *Metro-politan Cas. Ins. Co. v. Dallas*, 39 Ga. App. 38, 146 S.E. 37 (1928).

Assistant store manager. — The character and nature of the deceased's employment as an assistant grocery store manager, a public service occupation exposing the manager to certain "causative danger", is insufficient standing alone to show that the manager's homicide arose out of the course of the manager's employment. *Wood v. Aetna Cas. & Sur. Co.*, 116 Ga. App. 284, 157 S.E.2d 60 (1967).

Reversion to nervous state after restoration to normalcy. — Where the cause which brings about a nervous state, with resultant injury to the claimant, is removed, and such claimant is restored to a normal condition, and thereafter claimant reverts to the same nervous state, resulting in hysterical paralysis, the cause of such hysterical paralysis not being the result of an injury sustained out of and in the course of claimant's employment, it is not compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Swift & Co. v. Ware*, 53 Ga. App. 500, 186 S.E. 452 (1936).

Conversion reaction producing supposed paralysis. — Where an employee held a discussion with the employer relative to whether an absence was to be charged against the employee unexcused because of a failure to notify the office that the employee would not come in, and the employee became emotionally upset and developed a conversion reaction from which the employee supposed the employee's arm to be paralyzed, but the doctors could find no physical reason for it, a finding that the employee did not suffer an accidental injury arising out of employment was authorized. *Brady v. Royal Mfg. Co.*, 117 Ga. App. 312, 160 S.E.2d 424 (1968), for comment, see 20 *Mercer L. Rev.* 473 (1969).

Return from lunch to boarding house. — Where the evidence authorized a finding that the deceased truck driver, when killed, was driving the truck of the deceased's employer on a mission purely personal, that of returning from the deceased's boarding house where the deceased had been to lunch and where the deceased had taken the truck of the employer without authority, an award against the claimant was authorized. *Indemnity Ins. Co. of N. Am. v. Westmoreland*, 93 Ga. App. 888, 93 S.E.2d 193 (1956).

Death while on personal mission in unauthorized area. — Evidence of the employer

to the effect that the employee was specifically instructed not to go over into the area where the employee met death was sufficient to rebut the presumption that the employee was engaged in the employer's duties, and a denial of compensation was sustainable on the theory that the employee was engaged on a mission personal to the employee. *Weathers v. Jones*, 94 Ga. App. 50, 93 S.E.2d 390 (1956).

Fall on concrete floor without obstruction. — Evidence that the claimant fell while walking along an aisle marked off on the concrete floor of the employer's plant while proceeding to the employee's place of work in another part of the plant, that it appeared to an eyewitness as though the employee might have fainted or a muscle might have given way or something like that, that there was nothing at the place where the employee fell for the employee to fall over, and that there was nothing but the floor that the employee could have hit as the employee fell was sufficient to authorize a finding that there was no causal connection between the injury which the employee sustained when the employee fell and the employee's employment. *Borden Foods Co. v. Dorsey*, 112 Ga. App. 838, 146 S.E.2d 532 (1965).

Building turkey pen. — Where the employee of a corporation was injured while performing a service for the president of the corporation, who had directed the employee to secure poles with which to build a turkey pen in the woods adjacent to the corporation's mill property (raising turkeys not being the business of the corporation), it could not be held that the injury resulted from an accident arising out of and in the course of the employer's business, notwithstanding the fact that the officers and directors of the corporation called upon the employee to do odd jobs for them, which odd jobs were not separated from the employee's regular job of keeping the mill and houses in repair. *American Mut. Liab. Ins. Co. v. Lemming*, 187 Ga. 378, 200 S.E. 141 (1938).

Fatal accident while piloting plane for pleasure. — Where the claimant's spouse was killed in an airplane accident while piloting an airplane of the deceased's employer which the deceased had authority to use at the time but which was being used solely for the deceased's own personal pleasure and that of the deceased's companions,

the deceased's death did not arise out of and in the course of employment so as to be compensable. *Aetna Cas. & Sur. Co. v. Fulmer*, 81 Ga. App. 97, 57 S.E.2d 865 (1950), later appeal, 85 Ga. App. 102, 68 S.E.2d 180 (1951).

Eighteen mile trip for seafood dinner and view of ocean. — A traveling salesman and collector who had been called to the employer's office for a conference, the whole trip, including lodging and meals, at the expense of the company, in an automobile furnished by the company, who was injured in an accident after the conference while the salesman and a superior coemployee were going from the office a distance of 18 miles for the sole purpose of getting a seafood dinner and seeing the ocean, was not acting in the course of the salesman's employment at the time of the accident. *United States Fid. & Guar. Co. v. Skinner*, 188 Ga. 823, 5 S.E.2d 9 (1939).

Return from all-day cock fight with prospective customer. — Where the claimant failed to show that the duties of claimant's employment specifically included a weekend trip to watch an all-day exhibition of game-cock fighting with a prospective customer, or that the trip was reasonably necessary to sell insurance, the claimant's injury while returning from the trip did not have its origin in a risk connected with the employment. *Ayers v. Gulf Life Ins. Co.*, 89 Ga. App. 808, 81 S.E.2d 234 (1954).

Diving off barge. — The action of the employee, a workman on a barge removing sand from the bottom of a pond, in removing the employee's upper clothing and diving from the barge into the water, where the employee drowned, was an act not arising "out of" the employee's employment, although performed "in the course of" it. *Argonaut Ins. Co. v. King*, 127 Ga. App. 566, 194 S.E.2d 282 (1972).

Examination of gun for gratification of curiosity. — Where a deputy clerk in a recorder's court, whose duties consisted, among other things, of taking guns to or from court, as required, while on duty, undertook to examine a pistol shown the clerk by a police officer, accidentally injuring the clerk's left hand in the process, such injury did not arise out of the claimant's employment, for the reason that the examination of the pistol was not incidental to any of the

Injury by Accident Arising Out of and in Course of Employment (Cont'd)

5. Accidents Held Not to Arise Out of and in Course of Employment (Cont'd)

clerk's duties, nor was there a causal connection between the conditions under which the clerk's employment was performed and the resulting injury, but the examination of the pistol was solely for the gratification of the clerk's own curiosity. *Ferguson v. City of Macon*, 121 Ga. App. 128, 173 S.E.2d 227 (1970).

Issue of material fact. — The trial court erred in granting summary judgment for a recreation club against the parents of a lifeguard who was electrocuted on club property where genuine issues of material fact existed as to whether the club was a charitable institution entitled to the charitable immunity, whether the club employed the requisite number of employees to qualify for workers' compensation, and whether the electrocution arose out of and was within the lifeguard's course of employment. *Molton v. Lizella Recreation Club, Inc.*, 172 Ga. App. 154, 322 S.E.2d 354 (1984).

Sexual verbal and physical abuse. — The risk of verbal and physical abuse of a sexual nature by a supervisor was not causally connected with the appellant's employment by the defendant cafeteria merely because the discharge of the appellant was performed under authority properly exercised by such supervisor. *Murphy v. ARA Servs., Inc.*, 164 Ga. App. 859, 298 S.E.2d 528 (1982).

Plaintiff's claims were not barred by the exclusivity provision of O.C.G.A. § 34-9-1 where the injury, although arising in the course of employment, did not arise out of employment; plaintiff charged the defendants with rape and sexual harassment, which could, under the circumstances, only be classified as willful acts conducted for personal reasons. *Simon v. Morehouse Sch. of Medicine*, 908 F. Supp. 959 (N.D. Ga. 1995).

Mental disability without prior physical injury is not compensable as an accident arising out of and in the course of employment. *Hanson Buick, Inc. v. Chatham*, 163 Ga. App. 127, 292 S.E.2d 428 (1982).

Trauma at work not shown. — Administrative law judge correctly concluded that appellee failed to carry appellee's burden of

proof that the trauma did in fact occur at work because the evidence otherwise indicated that appellee did not consider a date and time of the incident until over 26 weeks after the alleged event. *Fitzgerald Railcar Servs. v. Stevens*, 212 Ga. App. 92, 441 S.E.2d 91 (1994).

6. Entering and Leaving Premises and Preparing for Work

In general. — Generally, an injury on an employer's premises in going to or from work is within the course of employment and is entitled to compensation. *United States Cas. Co. v. Russell*, 98 Ga. App. 181, 105 S.E.2d 378 (1958).

Reasonable time. — A reasonable time must ensue after an employee reaches the employer's premises prior to the time when work should begin, and a reasonable time after work ends before leaving the premises, during which time an accident occurring should be construed as arising out of and in the course of the employment. *Jackson v. Lumberman's Mut. Cas. Co.*, 33 Ga. App. 35, 125 S.E. 515 (1924).

Where an employee is on the employer's premises in anticipation of work, at a reasonable time before the employee is required to begin work, and in a place which the employer permits employees to use in going to and from a restroom used by employees, the relation of master and servant exists. *Mobley v. Durham Iron Co.*, 83 Ga. App. 690, 64 S.E.2d 469 (1951).

No more than a reasonable time must ensue after an employee reaches an employer's premises prior to the time for beginning work, during which time an accident occurring shall be construed as arising out of and in the course of the employment. *General Accident, Fire & Life Assurance Corp. v. Worley*, 86 Ga. App. 794, 72 S.E.2d 560 (1952); *De Howitt v. Hartford Fire Ins. Co.*, 99 Ga. App. 147, 108 S.E.2d 280 (1959).

A period of employment generally includes a reasonable time for ingress and egress from the place of work while on the employer's premises. *United States Cas. Co. v. Russell*, 98 Ga. App. 181, 105 S.E.2d 378 (1958).

The words "in the course of", applied in accordance with the liberal interpretation of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), refer not only to

that time for which the employee is drawing an hourly wage, but to that reasonable time which, after reaching the premises, is necessary in order to get into position to commence remunerative activities at the proper time. *United States Cas. Co. v. Russell*, 98 Ga. App. 181, 105 S.E.2d 378 (1958).

A servant's relationship with a master does not end the moment the servant finishes the task allotted to the servant or the period of the servant's employment expires, but the servant must be given reasonable time to depart the master's premises before the relationship of master and servant ceases. *AMOCO v. McCluskey*, 116 Ga. App. 706, 158 S.E.2d 431 (1967), *rev'd* on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968).

An employee is allowed a reasonable time for egress from the immediate place of work, during which time the employee remains in the course of the employee's employment. *West Point Pepperell, Inc. v. McEntire*, 150 Ga. App. 728, 258 S.E.2d 530 (1979).

Accident involving only means of ingress and egress. — An injury received by an employee in entering or leaving a place of employment, in a building in which the employer leases or uses only a part, has generally been held to arise out of and in the course of employment where the means used by the employee to enter or leave the building is the only means of ingress or egress; the term "only means of ingress and egress" means no other way of entering or leaving the place of employment except through the building where the place of employment is located, and is not intended to restrict the area of an employer's premises to one of two or more ways through the building to an employer's place of business. *De Howitt v. Hartford Fire Ins. Co.*, 99 Ga. App. 147, 108 S.E.2d 280 (1959).

Where the employer's place of business is located in a building of which it occupies only a part, and two ways through the building are the only means of ingress and egress, both ways are parts of the employer's premises within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), so that an accident occurring there shall be construed as arising out of and in the course of employment. *De Howitt v. Hartford Fire Ins. Co.*, 99 Ga. App. 147, 108 S.E.2d 280 (1959).

Preparations as part of duties of employment. — Preparations made by the employee at the place of employment, to begin the work for which the employee is employed, are a part of the duties of the employment. *Maryland Cas. Co. v. Sanders*, 49 Ga. App. 600, 176 S.E. 104 (1934), *rev'd* on other grounds, 182 Ga. 594, 186 S.E. 693 (1936); *Employers Ins. Co. v. Bass*, 81 Ga. App. 306, 58 S.E.2d 516 (1950).

When injuries are sustained by employees who are not at the moment actually engaged in doing the work they have been hired to do, during the time for which compensation is paid them, but who are performing acts preparatory to entering or leaving their employment, or other incidental acts within the period of their employment but not strictly in furtherance of it, it becomes ordinarily a question of fact as to whether the requirements of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) have been met, and the burden is upon claimant to meet these requirements. *Fulton County Civil Court v. Elzey*, 101 Ga. App. 520, 114 S.E.2d 314 (1960).

Accidents in parking lot. — Where the claimant was injured in proceeding from the immediate work area on an employer's premises to another part of an employer's premises where the claimant was furnished parking facilities, a finding that the accident arose out of and in the course of the claimant's employment was authorized. *Federal Ins. Co. v. Coram*, 95 Ga. App. 622, 98 S.E.2d 214 (1957).

Where it was necessary for an employee, after entering the premises of an employer, to park the employee's automobile in a lot supervised by plant guards for that purpose, and then walk approximately one-half mile to the place where the employee received an identification badge, and thence to an adjacent building to actually commence work, an allowance of 30 minutes between leaving the car and commencing work was not an unreasonable time under all the circumstances. *United States Cas. Co. v. Russell*, 98 Ga. App. 181, 105 S.E.2d 378 (1958).

Where a state employee was injured in the parking lot of a state office building and such lot was provided by the state for its own convenience as well as that of the employees, such injury occurred within the course of employment. *Department of Human Re-*

Injury by Accident Arising Out of and in Course of Employment (Cont'd)

6. Entering and Leaving Premises and Preparing for Work (Cont'd)

sources v. Jankowski, 147 Ga. App. 441, 249 S.E.2d 124 (1978).

Employee was precluded by O.C.G.A. § 34-9-11 from further recovery from a fellow employee whose car collided with the employee's vehicle in a parking lot where, although the employee was finished with the employee's daily work shift, the employee was in a parking lot on the employee's employer's premises and the accident occurred within a reasonable time for the employee's egress from the employee's workplace. Crawford v. Meyer, 195 Ga. App. 867, 395 S.E.2d 327 (1990).

Employer was properly granted summary judgment, in an employee's personal injury and loss of consortium suit filed against it, because the employee's accidental injury, which occurred as the employee was walking to work from an employer-owned parking facility to the employee work building and was struck by an employer-operated vehicle, was compensable under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., under the parking lot exception. Longuepee v. Ga. Inst. of Tech., 269 Ga. App. 884, 605 S.E.2d 455 (2004).

Parking lot exception failed to apply. — Parking lot exception did not apply because a workers' compensation claimant was injured in a crosswalk on a public street leading to the place of employment as neither the parking lot nor the crosswalk was owned, controlled, or maintained by the employer. Collie Concessions, Inc. v. Bruce, 272 Ga. App. 578, 612 S.E.2d 900 (2005).

Parking lot owned or maintained by employer. — When an employee is injured in, or going to and from, a parking lot which is owned or maintained by the employer, the incident is compensable under workers' compensation, since the injury arose during the employee's ingress or egress from employment. Tate v. Bruno's Inc./Food Max, 200 Ga. App. 395, 408 S.E.2d 456, cert. denied, 200 Ga. App. 897, 408 S.E.2d 456 (1991).

Where a parking lot is neither owned, controlled, nor maintained by the employer, the lot is not part of the employer's premises

and the rationale which allows recovery of workers' compensation benefits does not apply. City of Atlanta v. Spearman, 209 Ga. App. 644, 434 S.E.2d 87 (1993).

Public parking lot. — The provisions of O.C.G.A. § 34-9-1 were not intended to afford compensation to injuries of employees in public parking lots. Tate v. Bruno's Inc./Food Max, 200 Ga. App. 395, 408 S.E.2d 456, cert. denied, 200 Ga. App. 897, 408 S.E.2d 456 (1991).

Control over parking lot. — City's control over the allocation of parking spaces was not equal to control and direction over the parking lot itself. Thus, an accident in the parking lot did not arise out of and in the course of employment. City of Atlanta v. Spearman, 209 Ga. App. 644, 434 S.E.2d 87 (1993).

Accident on street. — For purposes of the ingress and egress rule, an employer's premises is real property owned, maintained or controlled by the employer; where a janitor at a law school crashed the janitor's bicycle after the janitor passed the law school building en route to another building where the janitor had to sign in and obtain keys to the law school, the janitor was involved in conduct arising out of and in the course of the janitor's job and was entitled to compensation. Peoples v. Emory Univ., 206 Ga. App. 213, 424 S.E.2d 874 (1992).

Assault and kidnapping on employer's premises. — An assault and kidnapping which took place on the employer's premises while the employee was in the process of going to work occurred "in the course of" the victim's employment. Helton v. Interstate Brands Corp., 155 Ga. App. 607, 271 S.E.2d 739 (1980).

Injury on way to dressing room. — Where an employer made provisions for employees to enter a work building ahead of time in order to change into working clothes, and in view of the fact that 20 minutes cannot be held an unreasonable length of time to proceed to a dressing room, change clothes, and proceed to the work station, an award to the claimant for an injury on the way to the dressing room prior to starting the claimant's shift was not without evidence to support it. General Accident, Fire & Life Assurance Corp. v. Worley, 86 Ga. App. 794, 72 S.E.2d 560 (1952).

Accident while returning from supper. — The claimant, having reached the employ-

er's premises upon returning from supper, was entitled to a reasonable time for ingress to the claimant's place of work, and an accident occurring during such time would be construed as arising out of and in the course of employment. *Chandler v. General Accident Fire & Life Assurance Corp.*, 101 Ga. App. 597, 114 S.E.2d 438 (1960), for comment, see 23 Ga. B.J. 565 (1961).

Crew member returning after shore leave.

— Where a member of a crew on a vessel lying at the docks, part of the terminal of defendant, obtained shore leave and, after two hours spent ashore, returned to the terminals and demanded entrance at a gate, even if the relationship of master and servant existing between the crew member and the transportation company had been suspended, that relationship came immediately into existence again as soon as the servant returned to the gate and demanded admittance. *Holliday v. Merchants & Miners Transp. Co.*, 161 Ga. 949, 132 S.E. 210 (1926).

Where an employee on a ship, while the ship was docked, obtained leave for a few hours to go into an adjacent city, the employee was in the course of employment when the employee attempted, on the employee's way back to the ship, to enter a gate maintained by the employee's master between its private docks and terminals and a public street, the entrance and exit of the master's employees; the relation of master and servant was not suspended, but was merely dormant. *Holliday v. Merchants & Miners Transp. Co.*, 32 Ga. App. 567, 124 S.E. 89 (1924).

Employees subject to call. — An employee leaving work after working hours is not "on the job" while so leaving, even where the employee is subject to call at all hours of the day and the employee's work just before the employee left the premises on the occasion in question might be said to have been equivalent to a special call. *Welsh v. Aetna Cas. & Sur. Co.*, 61 Ga. App. 635, 7 S.E.2d 85 (1940), disapproved, *Lewis Wood Preserving Co. v. Jones*, 110 Ga. App. 689, 140 S.E.2d 113 (1964).

7. Lunch and Rest Breaks

Injury during free time. — A hotel employee who during a 15-minute rest period, desiring to obtain some cold water to drink,

went to the hotel basement, and, in attempting to obtain some ice out of a machine used to crush ice, severely injured the employee's hand, was properly denied compensation, as the employee's injury did not arise out of the employee's employment. *Austin v. General Accident, Fire & Life Assurance Corp.*, 56 Ga. App. 481, 193 S.E. 86 (1937).

Where an employee is free to use time for the employee's own individual affairs and an injury occurs during this time, the injury is not compensable as not arising out of employment. *Teems v. Aetna Cas. & Sur. Co.*, 131 Ga. App. 685, 206 S.E.2d 721 (1974).

Children's home employee who resided on premises, and was "subject to call" when the employee perished in a fire on the premises, was fulfilling a part of the employee's duties when the employee was involved in the fire, and the employee's death was therefore compensable under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. *Blair v. Georgia Baptist Children's Home & Family Ministries, Inc.*, 189 Ga. App. 579, 377 S.E.2d 21 (1988), cert. denied, 189 Ga. App. 911, 377 S.E.2d 21 (1989).

Where the worker fell at a restaurant on a scheduled lunch break and the worker's employer corporation had no control over the worker during that period, the worker's injury did not arise out of employment and a workers' compensation award was reversed. *ATC Healthcare Serv. v. Adams*, 263 Ga. App. 792, 589 S.E.2d 346 (2003).

Fall on way to restroom during break. — Where the claimant was injured in a fall while on the way to the restroom on the employer's premises during a ten-minute rest break, being free to use the time as the claimant chose, an injury occurring during this time arose out of the claimant's individual pursuit and not out of the claimant's employment. *Wilkie v. Travelers Ins. Co.*, 124 Ga. App. 714, 185 S.E.2d 783 (1971), for comment, see 23 Mercer L. Rev. 703 (1972).

Accident in unauthorized room during lunch hour. — In a claim for compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), where the evidence showed that the claimant, who was employed to pick up waste around a cotton mill, was injured by reason of a fire which occurred in the "hopper room" where the claimant had gone during the lunch hour and while off duty for the purpose of sleep-

Injury by Accident Arising Out of and in Course of Employment (Cont'd)
7. Lunch and Rest Breaks (Cont'd)

ing and that the claimant's duty did not require the claimant to go into the hopper room, and where the overseer of the employer testified that during the lunch hour the employees were permitted to lounge anywhere except the hopper room, a finding that the injury to the claimant did not arise out of and in the course of employment was authorized. *Drummond v. Employers' Liab. Assurance Corp.*, 43 Ga. App. 595, 159 S.E. 740 (1931).

Injury during scheduled break. — Injuries occurring during a scheduled lunch break or rest break, while the claimant is free to do as the claimant chooses, are generally not compensable. *Rampley v. Travelers Ins. Co.*, 143 Ga. App. 612, 239 S.E.2d 183 (1977).

Even if the employee is on a scheduled break and even if the employee is free to use the break time as the employee pleases, if the employee is in fact engaged in employment-related activities, the injury is compensable under the workers' compensation law, O.C.G.A. § 34-9-1 et seq. *Swanson v. Lockheed Aircraft Corp.*, 181 Ga. App. 876, 354 S.E.2d 204 (1987).

Conducting employer's business during break. — An injury while an employee is conducting the employer's business or following job-related instructions during a "break" is compensable. *Wilkie v. Travelers Ins. Co.*, 124 Ga. App. 714, 185 S.E.2d 783 (1971), for comment, see 23 Mercer L. Rev. 703 (1972).

Burden of proof. — Once a claimant has introduced evidence establishing that an accident or injury occurred on the employer's premises during the regularly scheduled workday, even though the claimant was on break when it happened, it falls on the employer's shoulders to introduce evidence to show that the break was a scheduled one during which the claimant was not subject to the employer's demands or control. *Rampley v. Travelers Ins. Co.*, 143 Ga. App. 612, 239 S.E.2d 183 (1977).

Preparation for lunch. — The preparation for and the eating of lunch by an employee during a 30-minute lunch period was the employee's individual affair and was not a part of the employer's work where the em-

ployee was not required to eat lunch on the premises; thus, the injury suffered during the lunch period was not compensable. *Aetna Cas. & Sur. Co. v. Honea*, 71 Ga. App. 569, 31 S.E.2d 421 (1944).

Returning to work after lunch. — Where a claimant left claimant's employment to eat lunch at a time given claimant for that purpose, but was injured while returning to employment at a place and time where it was necessary for claimant to be in order to get back to claimant's work station at the time set for claimant to recommence duties, the situation was exactly the same as though claimant were arriving in the morning preparatory to undertaking the day's duties, and the injury would, therefore, be presumed to have arisen out of and in the course of claimant's employment. *Travelers Ins. Co. v. Smith*, 91 Ga. App. 305, 85 S.E.2d 484 (1954), for comment, see 17 Ga. B.J. 516 (1955).

Employee obtaining lunch for employer. — An employee obtaining lunch for an employer is not a task of a personal nature but one of benefit to the employer entitling the employee to workers' compensation benefits in the event the employee is injured in a restaurant while obtaining the lunch. *Edwards v. State*, 173 Ga. App. 87, 325 S.E.2d 437 (1984).

Common-law action. — An employee, who was injured in an automobile accident while being driven back to the employee's office by a co-employee after lunch, was barred from pursuing a common-law negligence action against the co-employee because workers' compensation covered the incident, where the trial court found that the lunch was a business lunch at which recruitment needs, sources of recruitment, and recruiting strategy were discussed. *Mann v. Workman*, 257 Ga. 70, 354 S.E.2d 831 (1987).

Recreational or social activities are within the course of employment, and thus subject to the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., if: (1) they occur on work premises during a lunch or recreation period as a regular incident of employment; or (2) employee participation is required, either expressly or by implication; or (3) the employer derives a substantial benefit from the event beyond the improvement in employee health and morale that is common to

all kinds of recreational or social activities. *Pizza Hut of Am., Inc. v. Hood*, 198 Ga. App. 112, 400 S.E.2d 657 (1990), cert. denied, 198 Ga. App. 897, 400 S.E.2d 657 (1991).

Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., did not provide the exclusive remedy for the drowning of an employee during a company picnic, where the picnic did not occur on work premises and employee attendance was not required, notwithstanding the company's contention that the picnic had the purpose of promoting its new product of traditional hand-tossed pizza and recruiting and maintaining employees. *Pizza Hut of Am., Inc. v. Hood*, 198 Ga. App. 112, 400 S.E.2d 657 (1990), cert. denied, 198 Ga. App. 897, 400 S.E.2d 657 (1991).

8. Traveling to and from Work

In general. — Death or injury to an employee on the employee's way to work while pursuing a course of the employee's own selection does not arise out of and in the course of employment within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Georgia Ry. & Power Co. v. Clore*, 34 Ga. App. 409, 129 S.E. 799 (1925).

It is the general rule that a worker injured while going to or from the worker's place of work is not in the course of the worker's employment. *Wilcox v. Shepherd Lumber Corp.*, 80 Ga. App. 71, 55 S.E.2d 382 (1949).

Hazards encountered by employees while going to or returning from their regular place of work, before reaching or after leaving the employer's premises, are not ordinarily incident to the employment, and for this reason injuries resulting from such hazards are in most instances held not to be compensable as arising out of and in the course of the employment. *Wilcox v. Shepherd Lumber Corp.*, 80 Ga. App. 71, 55 S.E.2d 382 (1949).

The general rule is that where an employee's duties begin and end at the employee's place of employment and the employer does not furnish the employee transportation to and from that place, accidents occurring while the employee is en route to or coming from such place do not arise out of the employee's employment. *Lewis Wood Preserving Co. v. Jones*, 110 Ga. App. 689, 140 S.E.2d 113 (1964).

Positional risk doctrine. — Because the employee was struck in a crosswalk on the way to work as a cashier at a golf tournament, the general rule applied and the injury was not compensable; the court declined to extend the positional risk doctrine to the crosswalk which was not a part of the employer's premises. *Collie Concessions, Inc. v. Bruce*, 272 Ga. App. 578, 612 S.E.2d 900 (2005).

Travel incident to employment. — While the hazards encountered by employees while going to or returning from the regular place of work are in most instances held not to be compensable as arising out of and in the course of employment, that rule is ordinarily applied only in those cases involving employees whose hours and place of employment are fixed and who show that travel is not an incident of their employment, that is, in those cases where there is a sharp division between the personal requirements of the employee and the requirements of the employer. *American Mut. Liab. Ins. Co. v. Casey*, 91 Ga. App. 694, 86 S.E.2d 697 (1955).

Exceptions to general rule. — Generally, injuries sustained by an employee while going to or coming from the employee's employment are not compensable, except in certain instances, such as: 1) where the employer furnishes transportation; 2) doing some act permitted or required by the employer and beneficial to the employer while en route to and from work; 3) going to and from parking facilities provided by the employer; and 4) where an employee is on call and furnishes or is reimbursed for the employee's transportation costs. *Corbin v. Liberty Mut. Ins. Co.*, 117 Ga. App. 823, 162 S.E.2d 226 (1968); *Street v. Douglas County Rd. Dep't*, 160 Ga. App. 559, 287 S.E.2d 586 (1981).

Exceptions to the general rule that an injury suffered by an employee while driving home at the end of the employee's day of work is not one arising out of and in the course of the employee's employment include situations where the employer furnishes the vehicle or transportation, or where the employee, while using the employee's own vehicle, is doing some act permitted, required, or beneficial to the employer while en route to or from work, or where the employee is on call. *United States Fire Ins. Co. v. Phillips*, 120 Ga. App. 51, 169 S.E.2d

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665 (1969), later appeal, 124 Ga. App. 7, 183 S.E.2d 13 (1971).

Transportation furnished by employer. —

It is the general rule that a worker injured going to or coming from the place of work is not in the course of the worker's employment; however, when a worker is injured while being transported in a vehicle furnished by the worker's employer as an incident of employment, the worker is within the course of the worker's employment, as contemplated by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *American Mut. Liab. Ins. Co. v. Curry*, 187 Ga. 342, 200 S.E. 150 (1938); *Indemnity Ins. Co. of N. Am. v. Bolen*, 106 Ga. App. 684, 127 S.E.2d 832 (1962); *Board of Trustees v. Christy*, 154 Ga. App. 488, 269 S.E.2d 33 (1980); *Jose Andrade Painting v. Jaimes*, 207 Ga. App. 596, 428 S.E.2d 640 (1993).

When a vehicle is supplied by an employer for the mutual benefit of the employer and a worker to facilitate the progress of the work, employment begins when the worker enters the vehicle and ends when the worker leaves it on the termination of the worker's labor; this exception to the general rule may arise either as the result of custom or contract, express or implied, and may be implied from the nature and circumstances of the employment and the custom of the employer to furnish transportation. *American Mut. Liab. Ins. Co. v. Curry*, 187 Ga. 342, 200 S.E. 150 (1938); *Jose Andrade Painting v. Jaimes*, 207 Ga. App. 596, 428 S.E.2d 640 (1993).

While going to or returning from the place of work, a worker is not "in the course of his employment", unless the means of transportation used by the worker has been furnished by the worker's employer as incident to or as part of the contract of the worker's employment. *Wilcox v. Shepherd Lumber Corp.*, 80 Ga. App. 71, 55 S.E.2d 382 (1949).

When an employee was killed in an automobile accident while driving a truck provided by the employer, an award of compensation based on a finding that the employee was injured on the way to the job site was supported by the doctrine providing coverage to an employee injured on the way to or

from work while in a vehicle furnished by the employer as an incident of the employment. *Ray Bell Constr. Co. v. King*, 281 Ga. 853, 642 S.E.2d 841 (2007).

Employee on call. — Where an employee is subject to call and sustains an injury while going to or from work, and at the time of the injury is actually engaged in furthering the employer's business, the injury arises out of and in the course of the employment and is compensable. *Lewis Wood Preserving Co. v. Jones*, 110 Ga. App. 689, 140 S.E.2d 113 (1964).

An exception to the general rule that an injury must arise out of and in the course of employment is where an employee is on call and is reimbursed for the employee's transportation costs; however, there is no difference between an employee on call and one off call when the employee provides the employee's own lodging and transportation. *Foster v. Brown Transp. Corp.*, 143 Ga. App. 371, 238 S.E.2d 738 (1977).

Police officer who was injured in a car accident one block away from the officer's precinct while driving to work, in uniform, armed, and with the officer's radio on, was entitled to workers' compensation benefits because the officer was subject to duty 24 hours per day. *Mayor v. Stevens*, 261 Ga. App. 694, 583 S.E.2d 553 (2003).

Although, for purposes of workers' compensation, a police officer's injuries from a traffic accident while the officer was driving to work arose in the course of employment under the continuous employment doctrine, the accident was not related to the employee's work as a police officer and thus the injuries did not arise out of employment. *Mayor & Aldermen of Savannah v. Stevens*, 278 Ga. 166, 598 S.E.2d 456 (2004).

Mall leading to employer's hotel. — Workers' compensation claimant was not entitled to workers' compensation benefits under the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., for injuries the claimant sustained in a fall in a mall, 100 to 200 yards from the escalator leading to the claimant's employer's hotel that was adjacent to the mall and which the claimant's employer did not own, control, or maintain. *Hill v. Omni Hotel at CNN Ctr.*, 268 Ga. App. 144, 601 S.E.2d 472 (2004).

Performance of duties while en route to work. — When an employee is permitted or

required by the employee's master to perform a part of the work contemplated by the contract of employment, or some act incidental thereto and beneficial to the employer, while en route to work, and is accidentally injured at such time, the injury arises in the course of employment. *Travelers Ins. Co. v. Moore*, 115 Ga. App. 295, 154 S.E.2d 385 (1967).

Transportation furnished by subcontractor. — If transportation was furnished by a subcontractor to the claimant and other employees of the principal contractor free of charge and in the interest of assisting the principal contractor in performing the work, with the full knowledge and consent of the employer, and was relied on by the employees as the means of transportation to and from their work, the claimant, while being thus transported, was engaged in doing something incidental to the performance of the claimant's duties, and the evidence was sufficient to support an award in the claimant's favor for injuries suffered while being transported. *Liberty Mut. Ins. Co. v. Mangham*, 56 Ga. App. 498, 193 S.E. 87 (1937).

Car pool financed by employer. — Where employees were members of a car pool financed by their employer, they were within the scope of employment when they were involved in an accident on the way home, even though they had deviated from their usual route prior to the accident by stopping at a whiskey store. *Adams v. United States Fid. & Guar. Co.*, 125 Ga. App. 232, 186 S.E.2d 784 (1971).

Car pool. — Injury was not sustained in the course of employment, where employer met the employees every morning at an apartment complex to give out work assignments, the apartment complex having been chosen as a meeting point because many of the employees lived in or around the complex; after receiving their work assignment, the employees would form car pools to travel to the various job sites, using their own vehicles, the employer's vehicle and another vehicle furnished by the employer; on occasion, the employer would give employees money for gas; at the end of the work day, some employees would return to the complex to drop off co-workers from the complex; the workers were only paid for time at the job site; employee was injured returning

to the apartment complex at the end of a work day in a co-worker's car; and on the day of the accident the co-worker was not given any money for gas. *Jose Andrade Painting v. Jaimes*, 207 Ga. App. 596, 428 S.E.2d 640 (1993).

Transportation via company truck. — While the deceased was paid from the time the deceased started work at a mill, and the time the deceased spent riding on a company truck going to and from the deceased's work was not counted, a finding that the deceased was actually in the service of the deceased's employer while the deceased was riding to and from work, and that the real beginning of the deceased's work was when the deceased boarded the truck, was authorized. *Hamner v. White*, 80 Ga. App. 648, 56 S.E.2d 653 (1949).

Choice of mode of transportation other than that furnished by employer. — The rule that an employee is injured in the course of employment, within the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), when, at the time of the accident, the employee is being transported to or from work by the employer as a part of the contract of employment, is not applicable where the means of transportation or the way is provided by the employer, but the employee does not choose to avail oneself of such means of transportation, and sustains harm by being, or attempting to be, transported by a conveyance furnished by another employee and selected by the claimant employee personally; in such a case the injury is not compensable. *Martin v. State Hwy. Bd.*, 54 Ga. App. 856, 189 S.E. 614 (1936).

Gratuitous ride on employer's vehicle. — Gratuitous and permissive riding on an employer's vehicle by an employee in going forth and back between the employee's home and the employee's place of work, not in furtherance of the employer's business, did not justify the conclusion that a right to do so became by implication a part of the contract, and a fatal injury suffered by the employee during the ride home did not arise out of and in the course of employment. *American Mut. Liab. Ins. Co. v. Curry*, 187 Ga. 342, 200 S.E. 150 (1938).

Ride to workplace with third party. — Where the actual work of the employee was in a woods 20 miles from the employee's residence, the employee's residence being

Injury by Accident Arising Out of and in Course of Employment (Cont'd)

8. Traveling to and from Work (Cont'd)

near the mill of the employee's employer, and each morning the employee caught a ride on the truck of a third person from the mill to the employee's place of work, with the knowledge, consent, and expectation of the employer but without any express agreement between the parties, a finding that the injury and death of such employee when the employee was thrown from the truck arose out of and in the course of employment was authorized. *Cooper v. Lumbermen's Mut. Cas. Co.*, 179 Ga. 256, 175 S.E. 577 (1934).

Voluntary transportation by coemployee. — Where bartender who frequently worked until 4 A.M. was voluntarily taken home by another employee, without additional remuneration, and the employer, who was aware of this practice, did not consider such transportation as additional remuneration, a finding that the death of the bartender one morning on the bartender's way home from work did not arise out of and in the course of the bartender's employment was authorized. *Thane v. Maryland Cas. Co.*, 99 Ga. App. 753, 109 S.E.2d 829 (1959).

Travel to home to repair employer's tractor. — The deceased's death in a traffic accident which occurred as the deceased was returning from a job site, to which the deceased had gone to secure tools, to the deceased's home, at which the deceased was to make repairs to the employer's tractor, was occasioned by the engagement in the deceased's employment. *Manufacturers Cas. Ins. Co. v. Mansfield*, 78 Ga. App. 248, 50 S.E.2d 370 (1948).

Car furnished for business and personal use. — Where an employee was killed in an automobile accident while returning home from a convention and banquet relating to the electrical supply business in which the employer was engaged, the evidence demanded a finding that the employee's death was not the result of an accident arising out of or in the course of employment, despite the fact that the automobile in which the deceased was traveling belonged to the employer and was furnished to the employer for use in employment, since the employer permitted the deceased to use the automobile for the deceased's own personal use.

Roper v. American Mut. Liab. Ins. Co., 69 Ga. App. 726, 26 S.E.2d 488 (1943).

Newspaper boy turning in money collected. — Where newspaper boy had gone to the office of the employer to turn in money collected and was injured while riding a bicycle home, he was on his own time, and a finding that such injury was not compensable because it did not arise out of and during the course of his employment was supported by the evidence. *United States Cas. Co. v. Scott*, 51 Ga. App. 115, 179 S.E. 640 (1935).

Negligent refusal to permit employee to leave early. — Where an employer was negligent in refusing to permit an employee to leave employment at a time when the employee could have avoided a snowstorm and effected a safe return home, a cause of action for negligence on the part of the employer was related to the employment of the employee and had to be sought under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) rather than by an action for negligence. *Allied Chem. Corp. v. Peacock*, 151 Ga. App. 278, 259 S.E.2d 681 (1979).

9. Deviation from Employment

In general. — An injury may be compensable where an employee is on a mission with two objectives, one personal and the other connected with employment, but this rule is qualified by the requirement that the trip must have a direct, immediate, and substantial business objective. *Ayers v. Gulf Ins. Co.*, 89 Ga. App. 808, 81 S.E.2d 234 (1954).

Personal errand completed. — Employee was engaged in an activity that arose out of and in the course of employment at the time the employee was fatally injured as the employee's company-supplied vehicle was struck by another vehicle after the employee had completed a personal errand and was returning to either the company-supplied housing or the company's job site. *Ray Bell Constr. Co. v. King*, 277 Ga. App. 144, 625 S.E.2d 541 (2006).

Exclusivity of business objectives. — There is no requirement that the employee, at the time of an injury, must have no objective other than the business of the employer; it is sufficient if the injury is occasioned by an accident arising out of and

in the course of the employment. *Hartford Accident & Indem. Co. v. Welker*, 75 Ga. App. 594, 44 S.E.2d 160 (1947).

Break in continuity of employment for employee's own purposes. — If a servant steps aside from the master's business for however short a time to do an act entirely disconnected from it, and an injury results to another from such an independent voluntary act, the servant may be liable, but the master is not liable. *Travelers Ins. Co. v. Clark*, 58 Ga. App. 115, 197 S.E. 650 (1938).

Where the employee steps aside from the employer's business to do some act of the employee's own, not connected with the employer's business, the relationship of employer and employee, or master and servant, is, as to that act, completely suspended, and an accident occurring at that time, resulting in injury to the employee, does not arise out of the employment within the meaning of this section; however, the incident necessary to constitute a break in the employer must be of a pronounced character. *Hartford Accident & Indem. Co. v. Souther*, 110 Ga. App. 84, 137 S.E.2d 705 (1964) (see O.C.G.A. § 34-9-1).

Resumption of duties. — The fatal injury of a laundry truck driver who deviated from the driver's employment in going to the aid of some fellow travelers on the highway, but was at a place where the driver had a right to be in pursuance of the driver's duties, had indicated that the driver's mission of helpfulness was at an end, and had put one foot on the running board, one hand on the door and one hand on the steering wheel of the driver's truck as incidental to entering the truck to resume the driver's duties for the master at the time the driver was fatally struck by an automobile was in the course of and arose out of employment. *Glens Falls Indem. Co. v. Sockwell*, 58 Ga. App. 111, 197 S.E. 647 (1938).

Where an employee breaks the continuity of employment for purposes of the employee's own, and is injured before the employee returns back into the line of employment, the injury does not arise out of and in the course of employment; but where the personal mission has been accomplished and the employee is once more engaged in the duties of employment when injured, the injury arises out of and in the course of the employment. *Parks v. Maryland Cas. Co.*, 69

Ga. App. 720, 26 S.E.2d 562 (1943); *General Accident Fire & Life Assurance Corp. v. Prescott*, 80 Ga. App. 421, 56 S.E.2d 137 (1949).

Although a servant may have made a temporary departure from the service of the master, and in so doing may for the time have severed the relationship of master and servant, yet, where the object of the servant's departure has been accomplished and the servant has resumed the discharge of the servant's duties to the master, the responsibility of the master for the acts of the servant reattaches. *Parks v. Maryland Cas. Co.*, 69 Ga. App. 720, 26 S.E.2d 562 (1943).

The fact that an employee, after making deliveries pursuant to the employee's duties as an employee, went outside of the employee's duties and visited among the employee's friends did not deprive the employee of the status of an employee in and about the employer's business where afterwards, in the discharge of the duties of employment, the employee proceeded with a delivery to the employer. *Parks v. Maryland Cas. Co.*, 69 Ga. App. 720, 26 S.E.2d 562 (1943).

Concurrence of personal gratification. — When an activity in which an employee was engaged when the employee died was in the interest of the employer and was reasonably incident to the employee's regular work, the employment was a contributing cause of death, and the concurrence of personal gratification in the activity will not defeat compensability under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Cabin Crafts, Inc. v. Pelfrey*, 119 Ga. App. 809, 168 S.E.2d 660 (1969).

Drowning. — The drowning of a watchman while seeking to save the watchman's dog was held not to have occurred in the performance of the watchman's duties to the master. *Montgomery v. Maryland Cas. Co.*, 39 Ga. App. 210, 146 S.E. 504 (1929), aff'd, 169 Ga. 746, 151 S.E. 363 (1930).

Accident while drinking with companion. — Where the deceased deliveryman was located five miles in the opposite direction from an employer's plant and at places at which deliveries were made, having run a delivery truck into a large tree and sustained fatal injuries, and another man, who was not an employee, was found in the truck with the deceased, along with a whiskey bottle, and the odor of whiskey was strong on the breath

Injury by Accident Arising Out of and in Course of Employment (Cont'd)
9. Deviation from Employment (Cont'd)

of the deceased, a finding that the fatal injury did not arise out of and in the course of the deceased's employment and that there had been such a departure from the scope of the employment as would bar recovery of compensation by the widow of the deceased was authorized. *Travelers Ins. Co. v. Curry*, 76 Ga. App. 312, 45 S.E.2d 453 (1947).

10. Horseplay

Injury resulting from employee's own "horseplay." — Where an injury was the result of "horseplay" or "fooling" by the injured employee, who instigated the occurrence, the employer was not liable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) for the injuries so sustained, as even though the accident occurred in the course of the employment, it did not arise out of the employment. *Givens v. Travelers Ins. Co.*, 71 Ga. App. 50, 30 S.E.2d 115 (1944).

Where workmen step aside from their employment and engage in horseplay or practical joking, or so engage while continuing their work, and accidental injury results, the injury is not one arising out of the employment within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Bibb Mfg. Co. v. Cowan*, 85 Ga. App. 816, 70 S.E.2d 386 (1952), for comment, see 4 Mercer L. Rev. 216 (1952).

Injury to a covered employee resulting from "horseplay" in which the claimant was the instigator or a participant does not "arise out of" the employment. *Universal Underwriters Ins. Co. v. Georgia Auto. Dealers' Ass'n Group Self-Insurers' Fund*, 182 Ga. App. 595, 356 S.E.2d 686 (1987).

Injury of a nonparticipating employee. — The injury of an innocent employee in the course of employment by the horseplay of a fellow employee, in which the injured employee did not participate, arises out of the employee's employment, and nothing more appearing, is compensable. *American Mut. Liab. Ins. Co. v. Benford*, 77 Ga. App. 93, 47 S.E.2d 673 (1948), for comment, see 11 Ga. B.J. 79 (1948).

An employee who is not participating in

practical joking or horseplay but is discharging the duties of employment at the time the employee is injured by the playful prank of a fellow employee sustains an accidental injury arising out of employment within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Baird v. Travelers Ins. Co.*, 98 Ga. App. 882, 107 S.E.2d 579 (1959).

Employer's acquiescence. — The fact that an employer has permitted the practice of practical joking and should anticipate that it may result in an employee being injured must be considered in determining whether the risk of injury from practical joking or prank playing has become a risk of the employment so that a resulting injury arose out of the employment. *Baird v. Travelers Ins. Co.*, 98 Ga. App. 882, 107 S.E.2d 579 (1959).

Fall on knife while engaged in horseplay. — The death of an employee caused by falling on a knife when engaged in horseplay with another employee did not arise out of employment. *Maddox v. Travelers Ins. Co.*, 39 Ga. App. 690, 148 S.E. 307 (1929).

Accidental shooting after tampering with gun. — Where convict guards were leisurely gathered in camp, one of whom took from the pocket of another a gun in a joking fashion, snapped it, unbreached it, and then in this condition delivered it to its owner, who, in attempting to breach it preparatory to returning it to one's pocket, accidentally fired the gun, killing the deceased, the commission (now board) properly found that while this accident arose in the course of employment it did not arise out of the employment, there being nothing to indicate that such handling of the gun was an incident to the employment. *Georgia Cas. Co. v. Martin*, 157 Ga. 909, 122 S.E. 881 (1924).

Where an employee, in sport or horseplay, tampers with a pistol belonging to another, such act not being properly within the course of the scope of employment, and thus creates a situation as a result of which the employee is accidentally shot by the owner of the pistol, the employee's death is not compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *United States Fid. & Guar. Co. v. Phillips*, 97 Ga. App. 729, 104 S.E.2d 542 (1958).

11. Traveling Salesmen and Employees

Injury arising from travel. — Where the duties of an employee are such that the employee is required to travel away from home to perform the duties of employment, and sustains an accidental injury on account of such hazards as may arise from the fact of traveling, such injury is one arising out of and in the course of employment. *Aetna Cas. & Sur. Co. v. Jones*, 82 Ga. App. 422, 61 S.E.2d 293 (1950).

Scope of employment. — The scope and range of a traveling employee's territorial activity necessarily broadens the field of employment, but in no other way is the traveling employee distinguished from ordinary employees who do not have to travel in the performance of their work. *Hartford Accident & Indem. Co. v. Thornton*, 71 Ga. App. 486, 31 S.E.2d 115 (1944), rev'd on other grounds, 198 Ga. 786, 32 S.E.2d 816 (1945).

The scope of employment of a traveling employee is wider than that of an ordinary employee, and is not broken by mere intervals of leisure such as those taken for a meal, unless the employee is doing something wholly foreign to the employee's employment. *Thornton v. Hartford Accident & Indem. Co.*, 198 Ga. 786, 32 S.E.2d 816 (1945).

Continuous employment. — If an employee is required to be away from home at night by the duties of employment, and the employee's compensation covers the expense necessary and incident to spending the night away from home, the protection of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) extends to such employee while so engaged in the service of the employer. *Railway Express Agency, Inc. v. Shuttleworth*, 61 Ga. App. 644, 7 S.E.2d 195 (1940).

While a servant, such as a traveling salesman, is traveling for the benefit of an employer and performing acts incident to employment, including lodging or eating, the servant is considered to be within the course and scope of employment continuously. *Johnston v. United States*, 310 F. Supp. 1 (N.D. Ga. 1969).

When an employee who lived in an employer-provided apartment was killed in an accident after delivering some family furniture to a storage shed, the employee's child was entitled to workers' compensation

dependency benefits under the continuous employment doctrine; when the employee returned from the personal mission to the general proximity of the area where the employee worked, coverage resumed whether the employee was resuming the employee's trip to the job site or was returning to the employer-provided housing. *Ray Bell Constr. Co. v. King*, 281 Ga. 853, 642 S.E.2d 841 (2007).

Test for continuous employment. — The proper test to be applied to determine whether an injury arises out of the course of employment is whether an employee, while working away from home, is required by employment to lodge and work within an area geographically limited by the necessity of being available for work on the employer's job site, so that the employee is, in effect, in continuous employment. *United States Fid. & Guar. Co. v. Navarre*, 147 Ga. App. 302, 248 S.E.2d 562 (1978).

Stepping aside for personal reasons. — A traveling salesperson is in continuous employment, day and night, but this does not mean that the salesperson cannot step aside from employment for personal reasons, or reasons in no way connected with the salesperson's employment, just as might an ordinary employee working on a schedule of hours at a fixed location. *International Bus. Machs., Inc. v. Bozardt*, 156 Ga. App. 794, 275 S.E.2d 376 (1980).

Effect of personal nature of trip. — If the motivating purpose of a trip was personal interest and the journey would have been made just the same without the interest or task to be done for the employer, an injury in the course of travel would be not in the course of employment; however, if the journey would still have been made for the work or business of the employer had the element of personal interest been lacking, the injury would be in the course of employment and compensable. *Lumbermen's Mut. Cas. Co. v. Babb*, 67 Ga. App. 161, 19 S.E.2d 550 (1942).

Where an employee sustains an accidental injury because of hazards arising solely on account of being engaged in a matter purely personal to the employee amounting to a deviation from acts reasonably necessary in traveling away from home in order to perform duties of employment, such accidental injury is not one arising out of and in the course of employment. *Aetna Cas. & Sur. Co.*

**Injury by Accident Arising Out of and in
Course of Employment (Cont'd)**

**11. Traveling Salesmen and
Employees (Cont'd)**

v. Jones, 82 Ga. App. 422, 61 S.E.2d 293 (1950).

Acts of ministration to self. — Acts of ministration by a servant to the servant, such as quenching the servant's thirst or relieving the servant's hunger, are incidents of the servant's employment, and consequently no break in the employment is caused by the mere fact that the worker is ministering to the worker's personal comforts to procure drink and food. *Railway Express Agency, Inc. v. Shuttleworth*, 61 Ga. App. 644, 7 S.E.2d 195 (1940).

Where the duties of a traveling salesperson take the salesperson away from home, the salesperson's acts of ministration to the salesperson do not take the salesperson outside the scope of employment, so long as the salesperson performs these acts in a normal and prudent manner. *Thornton v. Hartford Accident & Indem. Co.*, 198 Ga. 786, 32 S.E.2d 816 (1945); *McDonald v. State Hwy. Dep't*, 127 Ga. App. 171, 192 S.E.2d 919 (1972); *International Bus. Machs., Inc. v. Bozardt*, 156 Ga. App. 794, 275 S.E.2d 376 (1980).

A traveling salesman, while lodging in a hotel or preparing to eat, or while going to or returning from a meal, is performing an act incident to the salesman's employment, unless the salesman steps aside from the salesman's employment for personal reasons. *Thornton v. Hartford Accident & Indem. Co.*, 198 Ga. 786, 32 S.E.2d 816 (1945); *International Bus. Machs., Inc. v. Bozardt*, 156 Ga. App. 794, 275 S.E.2d 376 (1980).

An employee who is required to be away from home about the business of an employer will be allowed compensation for an injury which occurs by reason of the fact that the employee has to eat or sleep during that time, as proper food and proper rest are necessary and incidental to the performance of the labor required. *International Bus. Machs., Inc. v. Bozardt*, 156 Ga. App. 794, 275 S.E.2d 376 (1980).

Injuries while traveling. — Injuries sustained by a traveling salesman while traveling by automobile from one town to another

on business for an employer are compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *United States Fid. & Guar. Co. v. Skinner*, 188 Ga. 823, 5 S.E.2d 9 (1939).

Protection from perils of highway and hazards of hotels. — Where the work of an employee or the performance of an incidental duty involves exposure to the perils of the highway, the protection of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) extends to the employee while the employee is passing along the highway in the performance of the employee's duties. *New Amsterdam Cas. Co. v. Sumrell*, 30 Ga. App. 682, 118 S.E. 786 (1923); *United States Fid. & Guar. Co. v. Waymick*, 42 Ga. App. 177, 155 S.E. 366 (1930), aff'd, 173 Ga. 67, 159 S.E. 564 (1931); *Railway Express Agency, Inc. v. Shuttleworth*, 61 Ga. App. 644, 7 S.E.2d 195 (1940).

An employee whose work requires that the employee travel and spend nights away from home, at hotels or lodging places, is protected by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) from exposure to the perils of the highway and the hazards of hotels which occur in the normal, usual, and accustomed manner, and which are incident to such exposure. *Hartford Accident & Indem. Co. v. Thornton*, 71 Ga. App. 486, 31 S.E.2d 115 (1944), rev'd on other grounds, 198 Ga. 786, 32 S.E.2d 816 (1945).

Highway risks common to all. — Where the duties of an employee entail the employee's presence or travel upon a highway, a claim for an injury occurring there is not to be barred because it results from a risk common to all others upon the highway under like conditions, unless it is also common to the general public without regard to such conditions, and independently of place, employment, or pursuit. *Globe Indem. Co. v. MacKendree*, 39 Ga. App. 58, 146 S.E. 46 (1928), aff'd, 169 Ga. 510, 150 S.E. 849 (1929).

Bus driver analogous to traveling salesman. — Status of a bus driver who is required to be away from home overnight is substantially analogous to that of a traveling salesman required to remain away from home. *International Bus. Machs., Inc. v. Bozardt*, 156 Ga. App. 794, 275 S.E.2d 376 (1980).

12. Disease Resulting from Accident

Editor's notes. — Cases relating to disease resulting from employment should be read in light of Art. 8 of this chapter, relating to occupational diseases.

In general. — In order to be compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), a disease must arise out of or result from an accident or injury arising out of and in the course of employment. *Lumbermen's Mut. Cas. Co. v. Lynch*, 63 Ga. App. 530, 11 S.E.2d 699 (1940).

Traumatic disease. — A traumatic disease, as distinguished from an idiopathic disease, is one which is caused by physical injury, and is compensable. *Griggs v. Lumbermens Mut. Cas. Co.*, 61 Ga. App. 448, 6 S.E.2d 180 (1939), *aff'd*, 190 Ga. 277, 9 S.E.2d 84 (1940).

"Injury" defined. — Injury means an injury by an accident arising out of and in the course of employment, and does not include a disease in any form, except a disease resulting naturally and unavoidably from the accident or injury received. *United States Fid. & Guar. Co. v. Maddox*, 52 Ga. App. 416, 183 S.E. 570 (1935).

"Naturally" defined. — The word "naturally", as employed in this section, means according to the laws of nature of the usual course of things. *United States Cas. Co. v. Smith*, 34 Ga. App. 363, 129 S.E. 880 (1925), *aff'd*, 162 Ga. 130, 133 S.E. 851 (1926) (see O.C.G.A. § 34-9-1).

"Unavoidably" defined. — The word "unavoidably" is to be given a reasonable interpretation according to its general acceptance, keeping in mind the general requirements of the law as to the care and diligence which a person ordinarily exercises for that person's own safety and protection; it is not employed in the absolute sense, and does not imply that the disease must follow certainly. A thing is generally considered unavoidable when common prudence and foresight cannot prevent it. *United States Cas. Co. v. Smith*, 33 Ga. App. 363, 129 S.E. 880 (1925), *aff'd*, 162 Ga. 130, 133 S.E. 851 (1926).

A disease results naturally and unavoidably from injury when it is contracted in a way that is natural to the disease and when it could not have been avoided by the victim through the exercise of reasonable care and

caution. *United States Cas. Co. v. Smith*, 34 Ga. App. 363, 129 S.E. 880 (1925), *aff'd*, 162 Ga. 130, 133 S.E. 851 (1926); *Maryland Cas. Co. v. Brown*, 48 Ga. App. 822, 173 S.E. 925 (1934).

"Result from" construed. — Physical sickness and disease "result from" injury when there is a causal connection between them. *Lumbermen's Mut. Cas. Co. v. Lynch*, 63 Ga. App. 530, 11 S.E.2d 699 (1940).

Injury aggravating preexisting disease. — This section did not contemplate any disease, except where it resulted naturally and unavoidably from the accident; however, an injury which aggravated a preexisting disease was compensable, where such increased result would not have occurred except for the injury. *Aetna Cas. & Sur. Co. v. Chandler*, 61 Ga. App. 311, 6 S.E.2d 142 (1939) (see O.C.G.A. § 34-9-1).

Unusual and sudden inhalation of fumes. — A disability to an employee caused by a disease which results from unusual, sudden, and unexpected inhalation of gas or fumes while performing the duties of employment, where the disease causing the injury is not the natural result of the existence of conditions necessary incident to the work being performed, is the result of an injury by accident and is compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), and the employee's negligence in continuing to work after knowingly inhaling such fumes would not constitute a bar to compensation. *Lumbermen's Mut. Cas. Co. v. Lynch*, 63 Ga. App. 530, 11 S.E.2d 699 (1940).

Consulting physician promptly. — Where evidence showed that an employee consulted a physician promptly and was constantly under treatment, it was sufficient to establish that the employee could not have avoided the disease by ordinary care. *United States Cas. Co. v. Smith*, 34 Ga. App. 363, 129 S.E. 880 (1925), *aff'd*, 162 Ga. 130, 133 S.E. 851 (1926).

Dermatitis resulting from contact of abrasions with cleaning agent. — Where an employee skinned the employee's hands as the result of an accident arising out of and in the course of employment, and such abrasions came in contact with a cleaning agent used on the job, resulting in dermatitis so that the employee suffered a "loss of use" of the employee's hands, such employee was enti-

Injury by Accident Arising Out of and in Course of Employment (Cont'd)
12. Disease Resulting from Accident (Cont'd)

tled to compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Shore v. Pacific Employers Ins. Co.*, 102 Ga. App. 431, 116 S.E.2d 526 (1960).

13. Willful Acts of Third Persons

Chapter inapplicable where employee attacked by co-employee. — Where the evidence of record did not establish as a matter of law the existence of any causal relationship between the plaintiff's performance of plaintiff's duties at the supermarket and the incident which gave rise to the action, but instead it was inferred from the evidence that a co-employee attacked the plaintiff for reasons which were purely personal, within the contemplation of O.C.G.A. § 34-9-1 (4), it followed that the employee was not entitled to summary judgment on the basis of O.C.G.A. § 34-9-11. *Lindsey v. Winn Dixie Stores, Inc.*, 186 Ga. App. 867, 368 S.E.2d 813 (1988).

Intent of legislature. — The legislature did not intend to except all injuries caused by the willful act of third persons from the operation of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), as had that been its intention, the phrase "for reasons personal to such employee", would not have been used; rather, it was intended that certain injuries, though inflicted by the willful act of a third person, should come, for purposes of compensation, within the scope of that law. *Pinkerton Nat'l Detective Agency v. Walker*, 30 Ga. App. 91, 117 S.E. 281 (1923).

Injury for personal reasons. — An injury is not compensable when it was caused by the willful act of a third party directed against the claimant employee for reasons personal to such employee. *Jackson v. Wilson*, 84 Ga. App. 684, 67 S.E.2d 161 (1951).

For a claimant to be entitled to compensation under this section, the claimant must show that the employee's death resulted from an accident arising out of and in the course of the claimant's employment; however, the accident cannot be a willful act of a third person directed against the employee for reasons personal to such employee. *Hart-*

ford Accident & Indem. Co. v. Cox, 101 Ga. App. 789, 115 S.E.2d 452 (1960) (see O.C.G.A. § 34-9-1).

Where an injury results from an attack by a coemployee on a claimant, the attack must be work-related rather than for personal reasons for the injury to be compensable. *State v. Purmort*, 143 Ga. App. 269, 238 S.E.2d 268 (1977).

Although workers' compensation may provide the exclusive remedy where the injured party is a nonparticipating victim of "horseplay" or the subject of willful actions taken by fellow employees, workers' compensation is not the exclusive remedy, and thus does not bar a common-law tort claim, where the willful actions are directed against the nonparticipating victim by fellow employees for purely nonwork-related personal reasons. *Brown v. Trefz & Trefz*, 173 Ga. App. 586, 327 S.E.2d 556 (1985).

In cases where an employee is injured in a physical altercation with a co-employee occurring on the job but stemming from personal animosity, the employee's injuries will nevertheless be considered compensable under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., if it is shown that the animosity arose from reasons related to the employee's performance of the employee's work-related duties. *Western Waterproofing Co. v. Rogers*, 204 Ga. App. 779, 420 S.E.2d 606, cert. denied, 204 Ga. App. 922, 420 S.E.2d 606 (1992).

Accidental injury. — The fact that an injury is the result of the willful or criminal assault of a third person does not necessarily prevent it from being accidental within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Scott v. Travelers' Ins. Co.*, 49 Ga. App. 157, 174 S.E. 629 (1934); *Liberty Mut. Ins. Co. v. Reed*, 56 Ga. App. 68, 192 S.E. 325 (1937); *Hartford Accident & Indem. Co. v. Cox*, 101 Ga. App. 789, 115 S.E.2d 452 (1960); *Sands v. Union Camp Corp.*, 559 F.2d 1345 (5th Cir. 1977); *Zamora v. Coffee Gen. Hosp.*, 162 Ga. App. 82, 290 S.E.2d 192 (1982).

An injury caused by the attack of a third person may be accidental so far as the injured person is concerned. *Liberty Mut. Ins. Co. v. Reed*, 56 Ga. App. 68, 192 S.E. 325 (1937).

Where injury is the result of the willful or criminal assault of a third person, and an

employee is guilty of no misconduct, the injury may be "accidental" within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Metropolitan Life Ins. Co. v. Coney*, 102 Ga. App. 155, 115 S.E.2d 633 (1960).

Willful criminal assault is accidental injury. — The fact that the injury resulted from a willful or criminal assault by a third person, while the employee was engaged in the work of an employer, does not necessarily prevent the injury from being accidental within the meaning of the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. *Woodward v. St. Joseph's Hosp.*, 160 Ga. App. 676, 288 S.E.2d 10 (1981).

Where a servant is injured by a fellow servant or superior employee in a dispute, not provoked by the injured servant, arising over the conduct of the master's business, the injury may be the result of an accident, insofar as the injured employee is concerned. *McLaughlin v. Thompson, Boland & Lee, Inc.*, 72 Ga. App. 564, 34 S.E.2d 562 (1945); *Echols v. Chattooga Mercantile Co.*, 74 Ga. App. 18, 38 S.E.2d 675 (1946); *Southern Wire & Iron, Inc. v. Fowler*, 217 Ga. 727, 124 S.E.2d 738 (1962).

The fact that an injury sustained by an employee is the result of a willful criminal assault does not prevent the injury from being an accidental injury within the purview of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) if there is no misconduct on the part of the claimant and no question of prior personal motivation or ill will between the claimant and the assailant. *Employers Ins. Co. v. Wright*, 108 Ga. App. 380, 133 S.E.2d 39 (1963), for comment, see 1 Ga. St. B.J. 123 (1964).

Unprovoked animosity. — Language "nor shall 'injury' and 'personal injury' include injury caused by the willful act of a third person directed against an employee for reasons personal to such employee" was not intended to exclude compensation where the animosity of an assailant, which results in injury to an employee, begins while the employee is on the job for the employer, under circumstances where the employee does nothing to justify the animosity at the time and does nothing subsequently to provoke its continuance or aggravate it. *Commercial Constr. Co. v. Caldwell*, 111 Ga. App. 1, 140 S.E.2d 298 (1965), for comment, see 2

Ga. St. B.J. 135 (1965).

Employee as aggressor. — Under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), a claimant is not entitled to compensation where the injury to a deceased employee was the result of a fight between the claimant and a fellow employee in which the deceased employee was the aggressor; in such a case the injury was not an accident arising out of the employment. *Fulton Bag & Cotton Mills v. Haynie*, 43 Ga. App. 579, 159 S.E. 781 (1931); *Liberty Mut. Ins. Co. v. Reed*, 56 Ga. App. 68, 192 S.E. 325 (1937).

In some cases, active participation by an employee in a fight with another employee would constitute an assault and would label such employee the aggressor, and in such a case, any resulting injury would not be an accident arising out of the employment within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Scott v. Travelers' Ins. Co.*, 49 Ga. App. 157, 174 S.E. 629 (1934).

Intervening to protect employer's property. — In some cases, active intervention on the part of an employee may be for the protection of the master's property, and in such cases the employee would not be guilty of an assault so as to label the employee an "aggressor." *Scott v. Travelers' Ins. Co.*, 49 Ga. App. 157, 174 S.E. 629 (1934).

Assault where traceable back to employment. — If the chain of events culminating in assault and injury leads back to an employee's employment and the state of mind of the assailant, the fact that the assault happens at a different time, not too remote and in a different place, is immaterial since the other necessary factors are present. *Commercial Constr. Co. v. Caldwell*, 111 Ga. App. 1, 140 S.E.2d 298 (1965), for comment, see 2 Ga. St. B.J. 135 (1965).

Fight with co-employee. — Injury received by the claimant as a result of and during a fight with a fellow employee, arising over the manner in which the claimant performed the duties of employment, which fight was precipitated by the claimant's using strong language towards the co-employee, is not compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Kimbro v. Black & White Cab Co.*, 50 Ga. App. 143, 177 S.E. 274 (1934).

Homicide by co-employee. — When a truck driver was called aside by the driver's

Injury by Accident Arising Out of and in Course of Employment (Cont'd)

13. Willful Acts of Third Persons (Cont'd)

employer, and while engaged with the latter in conversation, became involved in a personal quarrel with a co-employee over a matter (a quarrel between their respective wives) entirely disassociated with the employment of either of the employees and the co-employee went away and came back with a gun, with which the co-employee shot the employee with whom that person had been quarreling, the injury thus sustained was caused by the "willful act" of the person doing the shooting, for reasons personal to such employee, and was not compensable. *Lanier v. Brown Bros.*, 44 Ga. App. 831, 163 S.E. 263 (1932).

Homicide of taxicab driver. — The death of a cabdriver who was shot and killed during the operation of a taxicab arose out of and in the course of the driver's employment. *Atlanta Checker Cab Co. v. Padgett*, 154 Ga. App. 43, 267 S.E.2d 464 (1980).

Assault on night watchman by robbers. — Where the claimant was shot and injured while performing regular duties as a night watchman at the manufacturing plant of an employer, by a person or persons who intended to commit a robbery upon the claimant, and owing to the nature of claimant's employment the claimant was subjected to special danger from persons inclined to such violence, the assault was not directed against claimant for reasons personal to claimant, but was one arising out of claimant's employment within the purview of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *American Mut. Liab. Ins. Co. v. Her-ring*, 43 Ga. App. 249, 158 S.E. 448 (1931).

Homicide of detective guarding jewelry store. — An exception in Ga. L. 1922, p. 185, § 1 (see O.C.G.A. § 34-9-1), excluding injury caused by the willful act of a third person directed against an employee for reasons personal to such employee, did not apply to the homicide of a detective who was assigned by an employer detective agency to a jewelry store for the purpose of protecting it from thefts, and who was in the front of the store for this purpose, without anything on the detective's person to indicate the nature of the detective's employment, when shot and killed by a thief fleeing with a

diamond ring taken from the store, whom the detective had just grabbed to prevent the thief from escaping. *Pinkerton Nat'l Detective Agency v. Walker*, 30 Ga. App. 91, 117 S.E. 281 (1923).

Assault while ejecting trespasser. — If an employee, while attempting to eject a trespasser from the employer's premises, using only the amount of force necessary, was struck by the trespasser with a stick and wounded, the employee should not then be penalized because the employee was the aggressor. *Scott v. Travelers' Ins. Co.*, 49 Ga. App. 157, 174 S.E. 629 (1934).

Sexual assault. — Employee's claims against bank, alleging that a member of the bank's board of directors sexually assaulted the employee, was not covered under workers' compensation because the employee was equally exposed to the hazard of sexual assault apart from employment, and the risk of physical sexual abuse was unconnected to the employee's responsibilities of employment. *Kennedy v. Pineland State Bank*, 211 Ga. App. 375, 439 S.E.2d 106 (1993).

Angry customer. — Where a garage employee, while asking instructions from an employer, was shot by a customer who was irritated at the employer's refusal to do additional work on the car without further charge, the injury occurred not only while the employee was engaged in the work of employment but also in the performance of ordinary duties, arising out of and in the course of employment within the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), the assault not being directed against the employee for reasons personal to the employee. *Keen v. New Amsterdam Cas. Co.*, 34 Ga. App. 257, 129 S.E. 174, cert. denied, 34 Ga. App. 836 (1925).

After a dispute arose between an employee, superintendent, and a customer about a wheel which had been left for repair, and the employee did some act of violence to the customer, the death of the employee when the customer returned with a gun and killed the employee without further altercation was not within the scope of employment under former Ga. L. 1920, p. 167 §§ 2, 45 (see O.C.G.A. § 34-9-1), but fell within the exception as to willful acts for reasons personal to the employee. *Hightower v. United States Cas. Co.*, 30 Ga. App. 123, 117 S.E. 98 (1923).

Tort action. — Where a supervisor strikes an employee immediately upon firing the employee, the employee may not institute a tort action since the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., is still applicable as the aggressive acts of the supervisor are part of the *res gestae* of the discharge which creates an employment-related situation and constitutes an injury out of and in the course of employment. *Woodward v. St. Joseph's Hosp.*, 160 Ga. App. 676, 288 S.E.2d 10 (1981).

Workers' compensation is not the exclusive remedy, and thus does not bar a common law tort claim, where the willful actions are directed against the employee by fellow employees for purely non-work-related personal reasons. *Knight v. Gonzalez*, 181 Ga. App. 468, 352 S.E.2d 646 (1987).

Murder for "business reason." — A workers' compensation award is authorized where an employee was murdered because the employee's partner desired to gain complete control of the business. *Handcrafted Furn., Inc. v. Black*, 182 Ga. App. 115, 354 S.E.2d 696 (1987).

Even if the employee is on a scheduled break and even if the employee is free to use the break time as the employee pleases, if the employee is in fact engaged in employment-related activities, the injury is compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Swanson v. Lockheed Aircraft Corp.*, 181 Ga. App. 876, 354 S.E.2d 204 (1987).

14. Injury Due to Exertion or Aggravation of Condition

A. In General

Editor's note. — For provisions concerning the aggravation of a preexisting condition as "injury" or "personal injury", see the second sentence of paragraph (4), added in 1994.

Effect of 1963 amendment. — The 1963 amendment to this section, excepting heart disease, heart attack, the failure or occlusion of coronary blood vessels, or thrombosis as compensable "injuries" unless it is "shown by a preponderance of competent and credible evidence" that they were attributable to the usual work of employment, only made explicit the law contained in judicial decisions. *Burson v. Howell*, 112 Ga. App. 675,

145 S.E.2d 718 (1965) (see O.C.G.A. § 34-9-1).

In general. — Where a previously diseased condition of the claimant is aggravated by an injury or accident arising out of and in the course of employment, resulting in disability to the claimant, there is a compensable injury. *Griggs v. Lumbermens Mut. Cas. Co.*, 61 Ga. App. 448, 6 S.E.2d 180 (1939), *aff'd*, 190 Ga. 277, 9 S.E.2d 84 (1940).

An accident arises out of employment when the required exertion producing the accident is too great for the person undertaking the work, whatever the degree of exertion or the condition of the person's health. *Williams v. Maryland Cas. Co.*, 67 Ga. App. 649, 21 S.E.2d 478 (1942); *Lumbermen's Mut. Cas. Co. v. Kitchens*, 81 Ga. App. 470, 59 S.E.2d 270 (1950); *Maryland Cas. Co. v. Dixon*, 83 Ga. App. 172, 63 S.E.2d 272 (1951); *Atlanta Newspapers, Inc. v. Clements*, 88 Ga. App. 648, 76 S.E.2d 830 (1953); *Globe Indem. Co. v. Simonton*, 88 Ga. App. 694, 76 S.E.2d 837 (1953); *Orkin Exterminating Co. v. Wright*, 92 Ga. App. 224, 88 S.E.2d 205 (1955).

If the employment of the employee contributes to the injury it is an accident under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) and is compensable, regardless of what combined with the employment to produce it. *Fidelity & Cas. Co. v. Adams*, 70 Ga. App. 297, 28 S.E.2d 79 (1943); *Davis v. American Mut. Liab. Ins. Co.*, 72 Ga. App. 783, 35 S.E.2d 203 (1945); *Liberty Mut. Ins. Co. v. Meeks*, 81 Ga. App. 800, 60 S.E.2d 258 (1950); *Maryland Cas. Co. v. Dixon*, 83 Ga. App. 172, 63 S.E.2d 272 (1951); *Atlanta Newspapers, Inc. v. Clements*, 88 Ga. App. 648, 76 S.E.2d 830 (1953).

Where the work of an employee contributes to an injury it is accidental, even if the work done is usual and is done in the customary manner, or is too great for the person undertaking the work, whatever the degree of exertion or the condition of the person's health. *Fidelity & Cas. Co. v. Adams*, 70 Ga. App. 297, 28 S.E.2d 79 (1943).

Disability or death resulting from aggravation, by accidental injury arising out of and in the course of employment, of a preexisting bodily infirmity is compensable. *United States Cas. Co. v. Kelly*, 78 Ga. App. 112, 50 S.E.2d 238 (1948).

Injury by Accident Arising Out of and in Course of Employment (Cont'd)

14. Injury Due to Exertion or Aggravation of Condition (Cont'd)

A. In General (Cont'd)

In order for an injury to be compensable where disease or a physical disability exists, exertion on the part of the employee in the performance of the employee's duties must combine with the disease and its effects and contribute to the resulting condition of the employee. *Finch v. Evins Amusement Co.*, 80 Ga. App. 457, 56 S.E.2d 489 (1949).

An injury which aggravates a preexisting disease is compensable where such increased result would not have occurred except for the injury. *McDaniel v. Employers Mut. Liab. Ins. Co.*, 104 Ga. App. 340, 121 S.E.2d 801 (1961).

The aggravation of a preexisting infirmity, whether congenital or otherwise, is compensable. *Thomas v. Ford Motor Co.*, 123 Ga. App. 512, 181 S.E.2d 874 (1971).

If an accident is a precipitating cause of a disability, it matters not what preexisting factor it combined with. *St. Paul Fire & Marine Ins. Co. v. Hughes*, 125 Ga. App. 328, 187 S.E.2d 551 (1972).

If an employee's disability results as the immediate consequence of an accident arising out of and in the course of employment, it matters not that it combines with a preexisting injury or disease, or that the accident would not have resulted in disablement except for the prior condition, or even that if the accident had not occurred at the time and place it did, it might have subsequently occurred in some manner unrelated to the employment or might eventually have occurred in any event. *Employers Mut. Liab. Ins. Co. v. Powell*, 132 Ga. App. 708, 209 S.E.2d 76 (1974).

The aggravation of a preexisting condition may be sufficient of itself to constitute a compensable injury. *Thornton Chevrolet, Inc. v. Morgan*, 148 Ga. App. 711, 252 S.E.2d 178 (1979).

If a work-related accident combines with a preexisting injury or disease to cause a disability which would not otherwise have occurred, it is compensable, whether or not the latter is related to the employment. *Rachel v. Simmons Co.*, 151 Ga. App. 735, 261 S.E.2d 467 (1979).

Preexisting condition causing death or disability. — While susceptibility to injury will not prevent a recovery for disability or death proximately caused by an injury arising out of the employment, no compensation is payable where a preexisting condition causes the death or disability independent of any subsequent mishap; hence, if death comes during the course of the employment, in an ordinary way natural to the progress of the disease with which the employee is afflicted and with which the employee was smitten before the accident, there can be no recovery. *Aetna Cas. & Sur. Co. v. Chandler*, 61 Ga. App. 311, 6 S.E.2d 142 (1939).

Previous weakened condition of employee. — In determining whether or not a physical seizure was in fact induced by employment, consideration should be given to any previous weakened condition of the employee, since it could be true that the work of any employment, under such circumstances, might induce the seizure when otherwise it would have no such deleterious effect, especially if it appears that the prior existing illness had been brought to the attention of the employer by the employee, and the employee was induced to continue at the employee's post by the solicitation of the employer. *Bibb Mfg. Co. v. Alford*, 51 Ga. App. 237, 179 S.E. 912 (1935).

Time element. — If, in a workers' compensation case, the immediate precipitating cause of the injury to the employee is over-exertion within the necessary and regular course of employment, the injury is compensable, even though the attack from which the employee died may not actually have incapacitated the employee until after the day's employment was ended. *Liberty Mut. Ins. Co. v. Meeks*, 81 Ga. App. 800, 60 S.E.2d 258 (1950).

If the exertion of employment was the immediate precipitating cause of an employee's death or disability, the mere fact that the attack itself was delayed somewhat, and occurred after the employee left the premises of the employer, is not in itself a sufficient reason for denying compensation. *Maryland Cas. Co. v. Dixon*, 83 Ga. App. 172, 63 S.E.2d 272 (1951).

Place where injury occurs. — Where the duties of employment call for a quantity and quality of exertion which actually contributes as an immediate precipitating factor to

an injury to the physical condition of an employee's health, the injury is compensable, regardless of whether or not it occurred on or off the actual physical premises of the employer. *Maryland Cas. Co. v. Dixon*, 83 Ga. App. 172, 63 S.E.2d 272 (1951).

Standard of health. — There is no standard of health set up or provided in this section. *Lumbermens Mut. Cas. Co. v. Griggs*, 190 Ga. 277, 9 S.E.2d 84 (1940) (see O.C.G.A. § 34-9-1).

Perfect health not prerequisite. — It is not necessary, in order for an employee to recover compensation as an injured worker, that the worker must have been in perfect health or free from disease at the time the worker received the injury; every worker brings with them to employment certain infirmities, and the employer takes the worker as the employer finds the worker and assumes the risk of a diseased condition aggravated by injury. *Griggs v. Lumbermens Mut. Cas. Co.*, 61 Ga. App. 448, 6 S.E.2d 180 (1939), *aff'd*, 190 Ga. 277, 9 S.E.2d 84 (1940).

Compensation is not made to depend upon the health of the employee, nor upon the employee's freedom from liability to injury through a constitutional weakness or a latent tendency; compensation is awarded for an injury which is a hazard of the employment, and it is the hazard of the employment acting upon the particular employee in the employee's condition of health, not what that hazard would be if acting upon a healthy employee or upon the average employee. *Griggs v. Lumbermens Mut. Cas. Co.*, 61 Ga. App. 448, 6 S.E.2d 180 (1939), *aff'd*, 190 Ga. 277, 9 S.E.2d 84 (1940).

Perfect health is not a prerequisite to enjoying the benefits of this section. *Lumbermens Mut. Cas. Co. v. Griggs*, 190 Ga. 277, 9 S.E.2d 84 (1940) (see O.C.G.A. § 34-9-1).

Specific job-connected incident. — If employment contributes to the aggravation of a preexisting injury, there is an accident which is compensable; and it is not necessary that there be a specific job-connected incident which aggravates the previous injury. *Home Indem. Co. v. Brown*, 141 Ga. App. 563, 234 S.E.2d 97 (1977).

External factors. — To construe the plain language of this section to embrace only those accidents that were external, and to

exclude those that are internal was to quibble with distinctions where there were no differences. *Lumbermens Mut. Cas. Co. v. Griggs*, 190 Ga. 277, 9 S.E.2d 84 (1940) (see O.C.G.A. § 34-9-1).

An accident, to be compensable, need not be one caused by external factors alone, such as a blow or other external violence; a stroke, a ruptured blood vessel, or a heart attack may, under proper circumstances, be the subject matter of compensation. *Maryland Cas. Co. v. Dixon*, 83 Ga. App. 172, 63 S.E.2d 272 (1951).

Physical impact. — A physical impact is not a necessary prerequisite to an "injury". *Williams v. Maryland Cas. Co.*, 67 Ga. App. 649, 21 S.E.2d 478 (1942); *Georgia Power Co. v. Reid*, 87 Ga. App. 621, 74 S.E.2d 672 (1953); *Orkin Exterminating Co. v. Wright*, 92 Ga. App. 224, 88 S.E.2d 205 (1955); *Shipman v. Employers Mut. Liab. Ins. Co.*, 105 Ga. App. 487, 125 S.E.2d 72 (1962).

Unusual or excessive physical exertion. — It is immaterial that the physical exertion engaged in by an employee is not unusual or excessive. *Atlanta Newspapers, Inc. v. Clements*, 88 Ga. App. 648, 76 S.E.2d 830 (1953).

Cumulative trauma injury compensable. — Employee's skin condition was a compensable injury caused and aggravated by the numerous surgical pre-scrubbings and in-office cleansings required by the employee's profession; further, such condition was an injury caused by cumulative trauma, which fell within the definition of injury found in O.C.G.A. § 34-9-1(4). *D.W. Adcock, M.D., P.C. v. Adcock*, 257 Ga. App. 700, 572 S.E.2d 45 (2002).

Evidence. — If the evidence showed excessive exertion, peculiar to the employment and peculiar to the employee, which brought about an arteriosclerotic attack resulting in injury to the employee, an award would be considered to be founded on sufficient competent testimony. *Standard Accident Ins. Co. v. Handspike*, 76 Ga. App. 67, 44 S.E.2d 704 (1947).

Where an injury is claimed to have been precipitated by job exertion, the evidence must show that the exertion was such that, when considering all other facts of the case, a natural inference through human experience would be raised to indicate that the

Injury by Accident Arising Out of and in Course of Employment (Cont'd)

14. Injury Due to Exertion or Aggravation of Condition (Cont'd)

A. In General (Cont'd)

exertion contributed to the injury, or medical testimony must be that the exertion was sufficient to precipitate the injury. *McDaniel v. Employers Mut. Liab. Ins. Co.*, 104 Ga. App. 340, 121 S.E.2d 801 (1961).

The requirement of competent and credible evidence in O.C.G.A. § 34-9-1 (4) does not go to the form of evidence required to support a claim for compensation in heart injury cases. *Southwire Co. v. Eason*, 181 Ga. App. 708, 353 S.E.2d 567 (1987).

Rebuttal of presumption of death. — Where the facts are sufficient to raise the presumption that the death of an employee arose out of and in the course of employment, such presumption may be rebutted by a showing that the injury resulted from willful conduct or was not otherwise within the provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Hartford Accident & Indem. Co. v. Cox*, 101 Ga. App. 789, 115 S.E.2d 452 (1960).

Inferences. — Where there is no evidence, opinion or otherwise, as to the cause of death, an inference cannot legitimately be raised that the normal exertion of the employee in the course of daily employment, not shown to be unusual or severe, contributed to aggravate another and unspecified disease so as to contribute to the employee's death. *Shelby Mut. Cas. Co. v. Huff*, 87 Ga. App. 463, 74 S.E.2d 251 (1953).

In cases involving heart disease, heart attack, heart failure, occlusion of any of the coronary blood vessels, or thrombosis, a natural inference from the human experience constituted competent creditable evidence as to causation sufficient to be found to satisfy the preponderance of the evidence requirement of this section, where there was no medical testimony to the contrary. *Guye v. Home Indem. Co.*, 241 Ga. 213, 244 S.E.2d 864 (1978) (see O.C.G.A. § 34-9-1).

Injury not induced by employment. — An injury arising from a physical seizure not induced by or related to the employment is not such an accident as would afford compensation even though it might appear that the particular consequences of the seizure

were such as would not have resulted elsewhere than at the place of employment. *Bibb Mfg. Co. v. Alford*, 51 Ga. App. 237, 179 S.E. 912 (1935).

No prior employer responsibility. — Where there was evidence showing the worker's later employment aggravated a pre-existing problem, it was proper to find that aggravation of a pre-existing condition was a new injury and the worker's prior employer had no duty to pay for surgery. *Haralson County v. Lee*, 264 Ga. App. 68, 589 S.E.2d 872 (2003).

B. Heart Attacks

Second accident. — If the claimant sustains a second accident as the result of a specific job-related incident which aggravates a pre-existing condition which resulted from a prior accident, the second accident which aggravated the pre-existing condition is a new injury, if the second accident at least partially precipitated the claimant's disability. *Mutual Sav. Life Ins. Co. v. Pruitt*, 178 Ga. App. 476, 343 S.E.2d 495 (1986).

In general. — The mere fact that an employee suffered a fatal heart attack while working for an employer does not, in and of itself, require a finding that the attack was caused by exertion on the part of the employee in the course of employment. *Hansard v. Georgia Power Co.*, 105 Ga. App. 486, 124 S.E.2d 926 (1962).

A heart attack caused by exertion on the job was an accident arising out of and in the course of employment within the meaning of this section. *Home Indem. Co. v. Floyd*, 122 Ga. App. 87, 176 S.E.2d 269 (1970) (see O.C.G.A. § 34-9-1).

Predisposition to attack. — When an employee has a heart attack, it matters not how predisposed the employee is to the attack, if the employee is in the course of employment and if the exertion of that employment, no matter how slight, contributes, no matter in what degree, to the accident. *Brown Transp. Corp. v. Jenkins*, 129 Ga. App. 457, 199 S.E.2d 910 (1973).

Pre-existing condition. — The fact that an attack is made more likely or probable by a pre-existing weakened physical condition is not a ground for denying compensation, if there is sufficient competent evidence that it was traumatic rather than idiopathic in origin. *Maryland Cas. Co. v. Dixon*, 83 Ga. App.

172, 63 S.E.2d 272 (1951).

Presumption as to death by heart attack. — Prima facie presumption, which usually arises where an employee is found dead at a place where the employee is reasonably expected to be in the performance of the employee's duties, that the death arose out of and in the course of employment, must be bolstered in heart cases by evidence of a causal connection between the work and the heart attack. *Aetna Cas. & Sur. Co. v. Shaddrick*, 114 Ga. App. 58, 150 S.E.2d 314 (1966).

Burden of proof. — The burden is on the one seeking compensation for death due to a heart attack to show a causal connection between employment and death. *United States Cas. Co. v. Thomas*, 106 Ga. App. 441, 127 S.E.2d 169, rev'd on other grounds, 218 Ga. 493, 128 S.E.2d 749 (1962).

Shifting of burden to employer. — A heart attack or other sudden seizure experienced by an employee while physically exerting oneself in the course of employment, and caused by such exertion, was an accident arising out of and within the course of employment within the meaning of this section, and the fact of such accident, when proved by competent evidence, shifted the burden of evidence to the employer to show by a preponderance of the evidence that the disability or death of the employee was not the result of that accident. *Thomas v. United States Cas. Co.*, 218 Ga. 493, 128 S.E.2d 749 (1962), for comment, see 26 Ga. B.J. 126 (1963), (see O.C.G.A. § 34-9-1).

Time lapse. — The mere fact that a heart attack from which the claimant's husband died occurred at a moment when he was attending to personal business, rather than a few minutes earlier when he was engaged in the course of his employment, was not in and of itself sufficient to predicate a denial of compensation. *Maddox v. Buice Transf. & Storage Co.*, 81 Ga. App. 503, 59 S.E.2d 329 (1950).

Where the evidence is sufficient to authorize a finding that during an automobile chase of a hit-and-run driver participated in by the chief of police two days before death, the police chief suffered a heart attack, and that this attack was a contributing concurrent proximate cause of death, a finding that this attack was an accident within the meaning of the workers' compensation law (see

O.C.G.A. § 34-9-1 et seq.) was authorized. *Maryland Cas. Co. v. Dixon*, 83 Ga. App. 172, 63 S.E.2d 272 (1951).

An employee's heart attack, which resulted in death and was contributed to by an automobile accident arising out of and in the course of employment, was sufficient to authorize an award of compensation even though the heart attack occurred 17 hours after the accident and the cause of the heart attack was contradicted by other medical testimony. *Aetna Cas. & Sur. Co. v. Williams*, 117 Ga. App. 713, 161 S.E.2d 396 (1968).

The "natural inference" that a strenuous job contributes to the precipitation of heart attacks is not available where the symptoms of the heart attack did not occur until the claimant had been home several hours. *Southwire Co. v. Cato*, 250 Ga. 895, 302 S.E.2d 91 (1983).

Evidence in general. — It cannot be questioned that physical exertion contributes to a heart stroke or exhaustion suffered while one is engaged in physical effort or immediately following; but, to carry a claimant's burden, the claimant should have some evidence in the record as to the exertion which actually existed at the time of the heart stroke, and some testimony, opinion or otherwise, that the quantum of physical exertion present would contribute to the seizure. *Globe Indem. Co. v. Simonton*, 88 Ga. App. 694, 76 S.E.2d 837 (1953).

Where compensation is sought under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), based on an accident growing out of the death of the employee due to a heart attack alleged to have been precipitated by exertion on the part of such employee while in the course of employment, in order for there to be a recovery either the evidence must show that the work engaged in by the employee was sufficiently strenuous or of such a nature that, combined with the other facts of the case, it raises a natural inference through human experience that the exertion contributed toward the precipitation of the attack, or there must be medical testimony that the exertion, however slight, would have been sufficient to precipitate such an attack. *Hoffman v. National Sur. Corp.*, 91 Ga. App. 414, 85 S.E.2d 784 (1955); *Milledgeville State Hosp. v. Norris*, 101 Ga. App. 502, 114 S.E.2d 298 (1960).

The mere fact that an employee suffered a

Injury by Accident Arising Out of and in Course of Employment (Cont'd)

14. Injury Due to Exertion or Aggravation of Condition (Cont'd)

B. Heart Attacks (Cont'd)

fatal attack while at work does not require a finding that the attack was caused by exertion in the course of employment, but medical testimony that there is a reasonable probability that such an exertion contributed to the attack is sufficient to support a finding that it did. *Cabin Crafts, Inc. v. Pelfrey*, 119 Ga. App. 809, 168 S.E.2d 660 (1969).

When an employee has a sudden fatal attack while exerting oneself at work, and there is no medical evidence that exertion at work did or did not contribute to the attack, an award of compensation is demanded. *Cabin Crafts, Inc. v. Pelfrey*, 119 Ga. App. 809, 168 S.E.2d 660 (1969).

When an employee in the course of employment dies of a heart attack, the evidence must be weighed to determine whether or not the employment was a contributing proximate cause of the attack. *Brown Transp. Corp. v. Jenkins*, 129 Ga. App. 457, 199 S.E.2d 910 (1973).

In determining whether a heart attack arose out of and in the course of employment, a fact-finding body may rely on several different forms of evidence to establish whether there is a causal connection between the employment activities and the heart attack, including medical opinion, lay observations and opinion, and a natural inference through human experience. *Employees Mut. Liab. Ins. Co. v. Bennett*, 148 Ga. App. 129, 251 S.E.2d 96 (1978).

Any evidence rule. — The “any evidence” rule precluded the superior court’s reversal of the board’s award, where there was ample evidence to support a finding that the deceased employee died of a heart attack and that the evidence did not show the work the deceased did on the date of death was a precipitating or aggravating cause. *G & H Loggins, Inc. v. Burch*, 178 Ga. App. 28, 341 S.E.2d 868 (1986).

Evidence held sufficient. — Where an employee suffered a coronary occlusion while engaged in the regular course of employment, and the evidence authorized the finding that the immediate precipitating

cause of the injury was overexertion within the regular course of employment, which exertion was too great for the man undertaking the activity in the employee’s existing physical condition, the injury was an accident and was compensable; the fact that total incapacity did not result until after the day’s work was over would not alter the situation. *Federated Mut. Implement & Hdwe. Ins. Co. v. Elliott*, 88 Ga. App. 266, 76 S.E.2d 568 (1953).

Where a deceased employee, who died of coronary occlusion, complained of pain in the stomach or chest while performing the normal duties of employment, the evidence was sufficient to support a finding that the employee had an accident arising out of and in the course of employment, and it was immaterial that the physical exertion the employee engaged in was not unusual or excessive. *Delta C. & S. Airlines v. Perry*, 94 Ga. App. 107, 93 S.E.2d 771 (1956), for comment, see 19 Ga. B.J. 235 (1956).

There was sufficient evidence to support an award of compensation where an employee suffered a heart attack when attempting to repair the motor of a loading crane which necessitated the employee pulling oneself up onto the crane approximately at head height, during which activity the employee felt sharp chest pains radiating down the employee’s left arm. *Howell v. Federated Mut. Implement & Hdwe. Ins. Co.*, 114 Ga. App. 321, 151 S.E.2d 195 (1966).

Medical opinion that exertion in working abnormally long hours over a long period contributed to an attack and death authorized a finding that the work was a contributing cause of death. *J.D. Jewell, Inc. v. Peck*, 116 Ga. App. 405, 157 S.E.2d 806 (1967).

Where the deceased died of a heart attack after driving an empty truck some 65 miles, the evidence was sufficient to find that the heart attack did not arise out of the course of employment. *Brown Transp. Corp. v. Blanchard*, 126 Ga. App. 333, 190 S.E.2d 625 (1972).

Where there was medical evidence in the record that prior exertion could have caused a coronary occlusion, the evidence was sufficient to authorize a finding that the exertion produced an employee’s death and that the employee died as a result of an accident and injury which arose out of and in the course of employment. *Georgia Cas. & Sur.*

Co. v. Stephen, 125 Ga. App. 277, 187 S.E.2d 534 (1972).

A claimant suffered a compensable heart injury, where the record showed that claimant experienced severe chest pain while at work and experienced incapacitating pain within one to one and a half hours after claimant arrived at home following claimant's shift, where there was medical testimony that emotional or physical stress could have been the precipitating factor in heart pain up to one hour after the stressful event occurred, and where there was medical testimony that the claimant's heart condition was significantly aggravated by claimant's employment. *Southwire Co. v. Eason*, 181 Ga. App. 708, 353 S.E.2d 567 (1987).

Where the nature of claimant's employment as a long-haul truck driver required long periods of stress without physical exercise, and without the availability of a healthy diet, all exacerbated by time constraints, these "conditions" of the work were causally connected to the heart attack which had its onset when claimant was driving and which fully matured after claimant got the truck to someone who could complete the delivery on time. *A & P Transp. v. Warren*, 213 Ga. App. 60, 443 S.E.2d 857 (1994).

The state board of workers' compensation properly awarded benefits to the widow of a prison guard who died of a cardiac dysrhythmia while on the job since a physician testified that "but for the physical and mental stress [he] experienced at work on that day, he should not have died at that time." *Phillips Correctional Inst. v. Yarbrough*, 248 Ga. App. 693, 548 S.E.2d 424 (2001).

Evidence held insufficient. — The board was authorized to find that the employee had not entered upon the employee's duties at the time of the heart attack and that at that time the employee was not expending any physical energy in the performance of duties for the employer. *Finch v. Evins Amusement Co.*, 80 Ga. App. 457, 56 S.E.2d 489 (1949).

Where the claimant's deceased husband was not authorized to ring in on a time-clock before 7:55 A.M., and was found between 7:35 A.M. and 7:40 A.M. in his street clothes in a portion of the employer's premises not connected with his employment, in a dying condition due to a coronary occlusion, and

at the time of the heart attack was not engaged in any activities either required by or necessary to his employment, a finding was demanded that the deceased's death did not arise out of and in the course of his employment. *General Accident Fire & Life Assurance Corp. v. Johnson*, 83 Ga. App. 227, 63 S.E.2d 296 (1951).

Where there was no direct proof that death from a heart attack was caused by an accidental injury which arose out of the deceased's employment, that is, that there was a causal connection between the conditions under which the work was required to be performed and the resulting injury, and no direct evidence that the deceased was upset or engaging in unusual physical exertion in performing the duties of the deceased's employment, but on the contrary there was evidence that the death could have occurred without any such causal connection, the presumption that the deceased's death arose out of and during the course of employment was rebutted. *Travelers Ins. Co. v. Davis*, 120 Ga. App. 625, 171 S.E.2d 909 (1969).

Where a heart attack was the result of an on-going progressive coronary disease, the disease, even though painful on the job, is not a compensable injury under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Carter v. Kansas City Fire & Marine Ins. Co.*, 138 Ga. App. 601, 226 S.E.2d 755 (1976).

Even assuming that there was sufficient evidence of exertion to warrant application of the "natural inference" rule in the case of a heart attack, an award was nevertheless not demanded by the evidence, where there was competent, credible evidence that the deceased's heart attack was not related to employment. *Gallman v. Coronet Indus., Inc.*, 182 Ga. App. 649, 356 S.E.2d 654 (1987).

A finding that claimant's congestive heart failure was not attributable to claimant's employment was warranted where the medical evidence showed that claimant had multiple risk factors for coronary disease, including hypertension, cigarette abuse, and obesity with adult onset glucose intolerance, and the board was not precluded from considering such preexisting risk factors. *Sutton v. B & L Express*, 215 Ga. App. 394, 450 S.E.2d 859 (1994).

Where facts not supplied to the expert

Injury by Accident Arising Out of and in Course of Employment (Cont'd)

14. Injury Due to Exertion or Aggravation of Condition (Cont'd)

B. Heart Attacks (Cont'd)

witnesses concerning deceased worker's family history of cardiovascular problems resulted in hypothetical questions that were not just insufficient but misleading, the testimony provided in the expert depositions was not competent and credible evidence, and must be disregarded. *Kines v. City of Rome*, 220 Ga. App. 732, 470 S.E.2d 311 (1996).

C. Cerebral Hemorrhages

Time lapse. — Cases involving cerebral hemorrhage have frequently been held compensable in spite of the fact that there has been a lapse of time, extending from a few minutes to several days, between the exertion which precipitated the cerebral accident and the ultimate death or disability. *Springfield Ins. Co. v. Harris*, 106 Ga. App. 422, 126 S.E.2d 920 (1962).

Evidence in general. — While there was no expert opinion to the effect that the deceased's exertion contributed to a cerebral hemorrhage, unless and until some method is developed to ascertain with some degree of certainty that such an attack is not contributed to by exertion, knowledge from human experience, including medical caution against exertion in such cases and the admitted opinion of experts that exertion might contribute to such an attack, authorized a finding, on the weight of reasonable probabilities, that the amount of exertion contributed to the cerebral hemorrhage which caused the deceased's death. *Hartford Accident & Indem. Co. v. Waters*, 87 Ga. App. 117, 73 S.E.2d 70 (1952).

Where an injury to an employee's head was found to have a causal relation to the employee's death by subarachnoid hemorrhage, it did not matter whether the employee's fall was strictly accidental or was the result of the employee's own condition, provided the employee's injury was not the result of the employee's willful misconduct, intoxication, or an assault by another employee for personal reasons; if the fall that occurred before the stroke from which the employee died was accidental, aggravated

the employee's previous condition, and precipitated the employee's fatal hemorrhage, then the employee's death would be considered to have been the result of an accidental injury and would be compensable. *American Mut. Liab. Ins. Co. v. King*, 88 Ga. App. 176, 76 S.E.2d 81 (1953).

Where there is some medical opinion evidence, although disputed, that the exertion of an employee is a contributing precipitating factor in the onset of a cerebral thrombosis or hemorrhage (stroke), an award in favor of claimant will not be disturbed by the court. *Springfield Ins. Co. v. Harris*, 106 Ga. App. 422, 126 S.E.2d 920 (1962).

Injury result of disease. — Where the claimant suffered a cerebral hemorrhage at claimant's place of employment, the injury and resulting paralysis did not arise "in the course of and out of his employment" where it was shown that the injury was a result of disease and not of exertion on the job. *Bussey v. Globe Indem. Co.*, 81 Ga. App. 401, 59 S.E.2d 34 (1950).

Evidence held sufficient. — Where there was evidence that claimant pharmacist was working longer hours than usual while a coemployee was on vacation, that claimant's work involved some physical exertion which contributed to a cerebral hemorrhage, and that the claimant, as the result of the stroke, lost mental powers and became permanently disabled, an award of compensation was authorized. *Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Gilliam*, 88 Ga. App. 451, 76 S.E.2d 834 (1935).

Paralysis due to cerebral hemorrhage in one suffering from arteriosclerosis, because of continuous exertion for 40 minutes in lifting sacks of cement, is within the operation of provision for compensation for injury resulting from accident. *Griggs v. Lumbermens Mut. Cas. Co.*, 61 Ga. App. 448, 6 S.E.2d 180 (1939), *aff'd*, 190 Ga. 277, 9 S.E.2d 84 (1940).

Where, immediately after assisting another employee in unloading 600 sacks of cement weighing 94 pounds each, an employee became ill and suffered a stroke permanently paralyzing the employee's left limbs, and a doctor testified that the exertion of the work caused a rupture of a blood vessel, resulting in paralysis, finding that the injury was accidental and compensable un-

der this section, even though the employee was doing the usual work of employment in the usual way, and that the employee was at the time suffering with arteriosclerosis or high blood pressure, was authorized. *Lumbermens Mut. Cas. Co. v. Griggs*, 190 Ga. 277, 9 S.E.2d 84 (1940) (see O.C.G.A. § 34-9-1).

Where a deceased employee suffered a cerebral hemorrhage resulting in death, which condition was brought about or contributed to by exertion in doing the employee's work, and was not the result of or caused by drinking of iced tea, an award of compensation was authorized. *Bituminous Cas. Corp. v. Powell*, 84 Ga. App. 235, 65 S.E.2d 825 (1951).

An award granting compensation for the death of a state revenue agent who died as the result of a cerebral hemorrhage precipitated or brought on by excitement incurred in the course of employment, while the individual was engaged in the discharge of their duty as a revenue agent, was proper. *State Dep't of Revenue v. Snelling*, 84 Ga. App. 238, 65 S.E.2d 822 (1951).

A showing that the cause of an employee's death is cerebral hemorrhage or some other disease with which exertion on the part of the employee may be expected to concur in precipitating an attack, and that the employee, so suffering, exerted oneself in the course of employment, is sufficient to authorize an award in the employee's favor; both disease and exertion must be shown, however. *Shelby Mut. Cas. Co. v. Huff*, 87 Ga. App. 463, 74 S.E.2d 251 (1953).

Where the cause of death is cerebral hemorrhage or some other disease with which exertion on the part of the employee, as shown by the evidence, may be expected to concur in precipitating an attack, and where such employee, so suffering, exerts oneself in the course of employment, the facts are sufficient to authorize an award in the claimant's favor. *Orkin Exterminating Co. v. Wright*, 92 Ga. App. 224, 88 S.E.2d 205 (1955).

Evidence held insufficient. — Since there was conflicting testimony of two doctors as to whether a blow on the head sufficient to cause an intracranial hemorrhage would leave an external trauma, a finding that in view of the fact that the deceased had no external trauma or evidence of a blow the

deceased did not strike the deceased's head in a fall suffered on the job sufficiently to cause intracranial hemorrhage from which the deceased died was authorized. *Butler v. Hartford Accident & Indem. Co.*, 87 Ga. App. 113, 73 S.E.2d 86 (1952).

D. Other Illnesses

Heat stroke. — Evidence on behalf of the claimant which only inferentially established that claimant was actually engaging in the duties of employment at or near the time when the claimant was prostrated by a heat stroke, and which failed to establish that exertion on the claimant's part, or excessive heat constituting a hazard of the employment, in any way contributed to the seizure, was insufficient to support an award. *Globe Indem. Co. v. Simonton*, 88 Ga. App. 694, 76 S.E.2d 837 (1953).

Cause of death unknown. — Since there was no evidence as to the cause of death of an employee who collapsed and almost immediately died while engaged in the course of the employee's normal and daily employment, there was nothing upon which a finding of fact that such employee sustained an "accident arising out of" employment might be predicated, and an award in favor of dependent claimant of such employee was unauthorized. *Shelby Mut. Cas. Co. v. Huff*, 87 Ga. App. 463, 74 S.E.2d 251 (1953).

Atherosclerosis. — Evidence showing that the claimant, after promotion to a supervisory position, began regularly working long hours, underwent a personality change involving extreme worry and nervousness, and experienced chest pains, coupled with expert testimony that stress can be a contributing factor to atherosclerosis, was sufficient to support the board's conclusion that the claimant's coronary bypass operation was a result of job-related stress and thus compensable. *Zippy Mart, Inc. v. Fender*, 170 Ga. App. 617, 317 S.E.2d 575 (1984).

Arteriosclerosis. — Where an employee afflicted with arteriosclerosis and heart disease was engaged at work in a narrow, deep ditch calking a pipe, in a cramped and stooped-over position, with a calking hammer, and was suddenly and unexpectedly stricken and died, it could be said as a matter of law that the employee died as the result of an accidental injury while engaged in the course and in the performance of an act

Injury by Accident Arising Out of and in Course of Employment (Cont'd)
14. Injury Due to Exertion or Aggravation of Condition (Cont'd)
D. Other Illnesses (Cont'd)

connected with employment. *Williams v. Maryland Cas. Co.*, 67 Ga. App. 649, 21 S.E.2d 478 (1942).

Where an employee is afflicted with arteriosclerosis and is seized with an attack while in the course of employment, which attack causes the employee injury, such injury was a compensable accident arising out of and in the course of the employment, regardless of whether or not the attack was precipitated or induced by excessive exertion peculiar to the ailment of the employee. *Standard Accident Ins. Co. v. Handspike*, 76 Ga. App. 67, 44 S.E.2d 704 (1947).

Vascular disease. — Where an employee fell from a scaffold and fractured both heel bones in an accident in the course of and arising out of employment, and was continuously disabled for six weeks from the time of injury until the employee died of vascular disease, a finding that the employee's death was the result of an accidental injury was authorized, there being only opinion testimony to the contrary. *Lockheed Aircraft Corp. v. Marks*, 88 Ga. App. 167, 76 S.E.2d 507 (1953), overruled on other grounds, *Fowler v. City of Atlanta*, 116 Ga. App. 352, 157 S.E.2d 306 (1967), for comment, see 16 Ga. B.J. 215 (1953).

Back injury. — Where an accident aggravated an employee's previous back injury, a disability later resulting therefrom was just as compensable as if such accident had produced an entirely new back injury and resulted in immediate disability. *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952).

Tuberculosis. — The denial of compensation for the death of an employee, where the evidence was that death resulted from tuberculosis which the employee had in a latent

stage, but which flared into activity as a result of an injury arising out of and in the course of employment, was properly set aside by the superior court. *United States Fid. & Guar. Co. v. Maddox*, 52 Ga. App. 416, 183 S.E. 570 (1935).

Diabetic condition. — Truck driver's injuries arose out of employment and not out of the driver's pre-existing diabetic condition, where the driver experienced dizziness and nausea and pulled off the road, and medical testimony showed that the driver's injuries were the result of exposure to cold, and not the result of a diabetic coma. *H & H Trucking Co. v. Davis*, 190 Ga. App. 754, 380 S.E.2d 301 (1989).

Psychological disability. — A claimant is entitled to benefits under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., for mental disability and psychological treatment which, while not necessarily precipitated by a physical injury, arose out of an accident in which a compensable physical injury was sustained, and that injury contributes to the continuation of the psychological trauma. The physical injury need not be the precipitating cause of the psychic trauma; it is compensable if the physical injury contributes to the continuation of the psychic trauma. *Southwire Co. v. George*, 266 Ga. 739, 470 S.E.2d 865 (1996); *Atlas Automotive, Inc. v. Wilson*, 225 Ga. App. 631, 484 S.E.2d 669 (1997).

Hernias. — O.C.G.A. § 34-9-266 created an exception to O.C.G.A. § 34-9-1(4), which allowed employees to obtain medical benefits when they had a pre-existing condition that was aggravated by a work-related injury, and the trial court erred by ordering the Georgia board of workers' compensation, appellate division, to award medical benefits to an employee who obtained treatment for hernias the employee developed before beginning work for the employer, after the employee aggravated the medical condition in a work-related accident. *Union City Auto Parts v. Edwards*, 263 Ga. App. 799, 589 S.E.2d 351 (2003).

OPINIONS OF THE ATTORNEY GENERAL

Coverage of only part of workforce. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) does not permit an employer to become a subscriber to an

insurance policy as to one part of its employees and to remain a nonsubscriber as to the remainder of its employees. 1945-47 Op. Att'y Gen. p. 654.

"Employee" defined. — In substance, the term "employee" includes every person in service of another under any contract of hire or apprenticeship. 1945-47 Op. Att'y Gen. p. 658.

Interpretation of "employer." — The term "employer" as used in former Code 1933, § 114-716 (see O.C.G.A. § 34-9-12) must be interpreted to have the same meaning as set out in former Code 1933, §§ 114-101 and 114-102 (see O.C.G.A. § 34-9-1). 1980 Op. Att'y Gen. No. 80-55.

County employees. — County employees have been included under workers' compensation since 1958, such coverage having been financed through general county tax funds. 1968 Op. Att'y Gen. No. 68-240.

Extension of coverage to county officers. — If the governing body of a county passes a resolution to extend workers' compensation coverage to various elected officers, that resolution must include all elected county officers. 1974 Op. Att'y Gen. No. U74-20.

Employees of county board of health. — The county board of health exists as an operating arm of the county, and its employees would therefore be classified as county employees for workers' compensation purposes. 1960-61 Op. Att'y Gen. p. 590.

County deputy sheriff. — Counties are employers within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), and a deputy sheriff of a county injured in the course of the deputy's employment would be covered by the terms thereof. 1962 Op. Att'y Gen. p. 613.

School board personnel. — As to the applicability of workers' compensation to school board personnel, see 1968 Op. Att'y Gen. No. 68-240.

County boards of education. — Members of county boards of education are ordinarily county officers, and elected county officers are included as "employees" covered by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) where proper provision is made therefor by the county governing authority. 1971 Op. Att'y Gen. No. U71-37.

Head start programs. — Inasmuch as counties must provide workers' compensation benefits for all county school board employees working a full work week, whatever the duration of employment, such coverage must be provided in connection with head start programs administered by the

county board of education; where, however, the head start program is administered by a private, nonprofit organization, there is no requirement that workers' compensation be provided. 1968 Op. Att'y Gen. No. 68-240.

Compensation of former school system employee. — In determining whether a self-insured school system under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is required to expend funds to compensate and rehabilitate a former employee, the operative question is whether the employee received a compensable injury at a time when the person was an employee of the school system; if it is determined that the employee received a compensable injury which arose out of and in the course of employment, in effect, then the person's workers' compensation benefits, established by law, vested at that point. 1977 Op. Att'y Gen. No. 77-38.

Independent school systems. — An independent school system is subject to the provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) relative to injuries sustained by the employees of that independent school system. 1952-53 Op. Att'y Gen. p. 67.

Multi-county planning commissions. — Multi-county planning commissions created by participating counties and cities under Ga. L. 1957, p. 420, as amended, were not "employers" as defined in former Code 1933, §§ 114-101 and 114-102 (see O.C.G.A. § 34-9-1) for workers' compensation purposes. 1968 Op. Att'y Gen. No. 68-361.

Person in service of city under implied contract. — The definition of "employer" and "employee" in this section was broad enough to include a person who is in the service of a city under at least an implied contract in return for which the employee receives as wages quarters furnished to the employee rent free by the city. 1963-65 Op. Att'y Gen. p. 754 (see O.C.G.A. § 34-9-1).

State official/state employee. — There is a difference between a state official and a state employee: an official is one who holds or is invested with an office, while an employee is one employed by another for wages or salary and is customarily in a position below the executive level. 1971 Op. Att'y Gen. No. 71-29.

Under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), an elected

state official is not an employer, nor is the official, in most instances, an employee; however, each case should be determined on the merits. 1971 Op. Att'y Gen. No. 71-29.

Coverage of state departments. — Under this section there can be no doubt that the departments of the state government are subject to the provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) when such departments, or institutions under them come within the definition of "employer"; likewise, all employees of such departments are entitled to the benefits of that law when such employees come within the definition of "employee." 1948-49 Op. Att'y Gen. p. 723 (see O.C.G.A. § 34-9-1).

The State Board of Education is subject to the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). 1954-56 Op. Att'y Gen. p. 284.

The State Department of Defense is an employer subject to the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). 1979 Op. Att'y Gen. No. 79-52.

Board of Regents. — The Board of Regents may carry workers' compensation insurance to cover liability. 1950-51 Op. Att'y Gen. p. 34.

Employee of state Bureau of Investigation. — The widow of an employee of the Georgia Bureau of Investigation whose death arose out of and in the course of the employee's employment is entitled to death benefits under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). 1948-49 Op. Att'y Gen. p. 424.

State employed laborers and mechanics. — All laborers and skilled mechanics employed by the state would be considered employees, and should such a person suffer a total incapacity, that person would be entitled to recover weekly workers' compensation. 1945-47 Op. Att'y Gen. p. 658.

Prison inmates. — A state prison inmate is not an employee of the state. 1945-47 Op. Att'y Gen. p. 656.

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) implies a voluntary relation between the parties as employer and employee, and hence does not include prisoners who are compelled to perform manual labor for punishment of their offenses. 1945-47 Op. Att'y Gen. p. 656.

Instructors at state trade and vocational school. — Laborers and skilled mechanics

employed by the State Board of Education as instructors at a state trade and vocational school are within the protection of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). 1945-47 Op. Att'y Gen. p. 658.

Pupils at state trade and vocational school. — Pupils at a state trade and vocational school are neither employees nor apprentices of the school, and the state would not be liable for accidental injury sustained by them. 1945-47 Op. Att'y Gen. p. 658.

Agricultural students. — Students at an agricultural school working with a farm machinery dealer as part of their curriculum, with course credits given for work, are not employees within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). 1962 Op. Att'y Gen. p. 616.

Beauty queens. — Nonpaid "beauty queens" of the various agricultural commodity commissions are not subject to the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) under any circumstances; however, Peach Queen, who receives a per diem salary, would be covered, provided that the law's various criteria are met. 1973 Op. Att'y Gen. No. 73-68.

Volunteer firefighters. — Volunteer firefighters are not entitled to workers' compensation from the State Forestry Commission. 1954-56 Op. Att'y Gen. p. 351.

Regional Forest Fire Protection Compact. — A Regional Forest Fire Protection Compact does not extend the definition of "employee" for the purpose of workers' compensation. 1954-56 Op. Att'y Gen. p. 353.

Coverage of Neighborhood Youth Corps program. — Under the Neighborhood Youth Corps program, the local organization which supervises and controls the youths is their employer for workers' compensation purposes during the period of control. 1973 Op. Att'y Gen. No. 73-134.

Newspaper dealers. — Newspaper dealers are employers within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) and would be subject to the requirements thereof unless exempt because of having less than ten (now three) employees. 1962 Op. Att'y Gen. p. 613.

Newspaper delivery boy. — If an injured newspaper delivery boy is employed by an independent contractor, the newspaper company is not liable for workers' compensation. 1962 Op. Att'y Gen. p. 613.

Compensable injury prerequisite to compensation. — Workers' compensation benefits should not be paid unless an injured employee has in fact sustained a compensable injury under this section. 1971 Op. Att'y Gen. No. 71-136 (see O.C.G.A. § 34-9-1).

Injury during recuperation from covered accident. — A state employee injured in an automobile accident during a period while at home recuperating from an injury for which workers' compensation was being paid was not entitled to compensation for the second injury since it did not arise out of and in course of employment. 1962 Op. Att'y Gen. p. 615.

Lunch, coffee, or rest breaks. — Employees who eat lunch and take coffee breaks or rest periods on the premises of the employer are not under the coverage of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) when they stop work and start making preparations to eat their lunch or to take their coffee or rest breaks; however, if they leave the immediate premises of the employer for lunch, and could be expected to leave such premises, they remain within the

scope of their employment for coverage under the law for a reasonable time in which to ingress and egress from their immediate work area. 1965-66 Op. Att'y Gen. No. 66-192.

Record-keeping requirements. — Since the State of Georgia was specifically included in former Code 1933, §§ 114-101 and 114-102 (see O.C.G.A. § 34-9-1) it was, by implication, included in former Code 1933, §§ 114-716 (see O.C.G.A. § 34-9-12), and the State of Georgia and all departments, instrumentalities, and authorities thereof must comply with the record-keeping provisions of former Code 1933, § 114-716. 1980 Op. Att'y Gen. No. 80-55.

AIDS. — If an employee suffers an accident arising out of and in the course of employment and subsequently develops AIDS and can show that the disease is causally related to the accident, the condition would be compensable under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., so long as the claim was filed within the statutory period. 1988 Op. Att'y Gen. No. U88-7.

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 1 et seq.

Am. Jur. Pleading and Practice Forms. — 25B Am. Jur. Pleading and Practice Forms, Workers' Compensation, § 2.

C.J.S. — 99 C.J.S., Workers' Compensation, § 1 et seq.

ALR. — Workmen's compensation: liability of general or special employer for compensation to injured employee, 3 ALR 1181; 34 ALR 768, 58 ALR 1467, 152 ALR 816.

Workmen's compensation: compensation to workmen injured through smoking, 5 ALR 1521.

Insanity as affecting right of employee to compensation, 6 ALR 570.

Compensation for injuries during lunch hour on employer's premises, 6 ALR 1151.

Workmen's compensation: compensation for death or injury from overexertion and excitement, 6 ALR 1256.

Injury from fumes or gases as accident or occupational disease within the meaning of the compensation statutes, 6 ALR 1466; 23 ALR 335, 90 ALR 619.

Workmen's compensation: injuries received while performing service for employer before or after hours as arising out of and in the course of employment, 7 ALR 1078.

Workmen's compensation: injury through curiosity as arising out of and in the course of employment, 7 ALR 1305.

Workmen's compensation: compensation for death of or injury to peace officer employed in private plant, 8 ALR 190.

Workmen's compensation: injury while making delivery as arising out of and in the course of employment, 8 ALR 935; 23 ALR 403.

Workmen's compensation: workman representing employees, or public, 8 ALR 1064.

Workmen's compensation: compensation for loss or impairment of eyesight within Workmen's Compensation Acts, 8 ALR 1324.

Workmen's compensation: provision denying compensation for injury through willful failure to use guard, or safety appliance, 9 ALR 1377.

Workmen's compensation: operation of

automobile or automobile truck as a hazardous occupation, 9 ALR 1382.

Workmen's compensation: injury while riding to or from work in employer's conveyance as arising out of or in the course of employment, 10 ALR 169; 21 ALR 1223; 24 ALR 1233; 62 ALR 1438; 145 ALR 1033.

Right of firemen and policemen to recover under workmen's compensation acts, 10 ALR 201; 81 ALR 478.

Workmen's compensation: injury to employee who is resting during working hours as arising out of and in the course of his employment, 10 ALR 1488; 55 ALR 981

Workmen's compensation: right to compensation for results of exposure to contagious disease, 11 ALR 790; 57 ALR 631.

Workmen's compensation: hemorrhage as an accident, 13 ALR 438.

Workmen's compensation: right to compensation in case of injuries sustained through horseplay, or fooling, 13 ALR 540; 20 ALR 882; 36 ALR 1469; 43 ALR 492; 159 ALR 319.

Workmen's compensation: injury from burning due to matches carried by employee, 14 ALR 278.

Applicability and effect of workmen's compensation acts in case of injuries to minors, 14 ALR 818; 33 ALR 337; 49 ALR 1435; 60 ALR 847; 83 ALR 416; 142 ALR 1018.

Workmen's compensation: injury from assault, 15 ALR 588; 21 ALR 758; 29 ALR 437; 40 ALR 1122; 72 ALR 110; 112 ALR 1258; 172 ALR 997.

Workmen's compensation: what is casual employment, 15 ALR 735; 33 ALR 1452; 60 ALR 1195; 107 ALR 934.

Workmen's compensation: interest in the business or in corporation or firm owning the business as affecting right to compensation, 15 ALR 1288; 81 ALR 644.

Workmen's compensation: injury while leaving place of employment at unusual time for purposes not connected with the employment, 16 ALR 1169.

Workmen's compensation: injury to employee while using an instrumentality of the employer for benefit of himself or third person, 16 ALR 1364.

Workmen's compensation: injury to employee while away from plant, primarily to serve a purpose of his own or of another employee, but which may incidentally benefit employer, 18 ALR 525.

Workmen's compensation: injury or death to which preexisting physical condition of employee causes or contributes, 19 ALR 95; 28 ALR 204; 60 ALR 1299.

Workmen's compensation: death from heart disease, 19 ALR 110; 28 ALR 204; 60 ALR 1299.

Workmen's compensation: injury from fumes or gases as accident or occupational disease, 23 ALR 335; 90 ALR 619.

Workmen's compensation: injury or death due to elements, 25 ALR 146; 40 ALR 400; 46 ALR 1218; 53 ALR 1084; 83 ALR 234.

Workmen's Compensation Act: applicability of state compensation act to injury within admiralty jurisdiction, 25 ALR 1029; 31 ALR 518; 56 ALR 352.

Workmen's compensation: injury received while doing prohibited act, 26 ALR 166; 58 ALR 197; 83 ALR 1211; 119 ALR 1409.

Workmen's compensation: injury to local solicitor, collector, or outside salesman as arising out of and in the course of the employment, 29 ALR 120; 36 ALR 474.

Workmen's compensation: injury from imprudence in eating or drinking, or mistake as to substance taken, as arising out of and in course of employment, 29 ALR 433.

Injury to muscles or nerves attributable to occupation, but not due to a sudden event, as within Workmen's Compensation Act, 29 ALR 510.

Lead or other occupational poisoning as within Workmen's Compensation Act, 29 ALR 691; 44 ALR 371.

Workmen's compensation: applicability to charitable institutions, 30 ALR 600.

Workmen's compensation: injury after stopping work for reason not personal to employee as arising out of and in the course of employment, 30 ALR 972.

Workmen's compensation: one employed concurrently or jointly by several, 30 ALR 1000; 58 ALR 1395.

Workmen's compensation: injury as a result of labor trouble, 31 ALR 1085.

Workmen's compensation: injury to servant who lives on employer's premises as arising out of or in the course of the employment, 31 ALR 1251; 56 ALR 512; 158 ALR 606.

Workmen's compensation: injury to employee temporarily leaving car or vehicle of employer for reasons personal to himself, 32 ALR 806.

Workmen's compensation: kinship or family relationship between employer and claimant or employee, as affecting right to compensation, 33 ALR 585.

Workmen's Compensation Act as affecting master's duty and liability under contract to furnish medical treatment to employees, 33 ALR 1204.

Workmen's compensation: injury to employee while engaged on employer's work, but outside the scope of his usual duty, as arising out of and in the course of the employment, 33 ALR 1335; 82 ALR 1251.

Workmen's compensation: specific provisions exempting liability for injury caused by willful act directed against an employee for reasons personal to him or because of his employment, 35 ALR 563.

Presumption against suicide in workmen's compensation cases, 36 ALR 397.

Accident and disability insurance: when insured deemed to be totally and continuously unable to transact all business duties, 37 ALR 151; 39 ALR 1026; 69 ALR 397; 41 ALR 1376; 51 ALR 1048; 79 ALR 857; 98 ALR 789.

Workmen's compensation: aggravation by particular condition or equipment of plant of injury which in its inception was not connected with the employment, 37 ALR 771.

Workmen's compensation: external infection as accident or an accidental injury, 39 ALR 871.

Workmen's compensation: external infection as accident or an accidental injury, 39 ALR 871.

Workmen's compensation: illness or injury due to artificial temperature as compensable, 41 ALR 1124; 53 ALR 1095; 61 ALR 218.

Workmen's compensation: neurasthenia as compensable, 44 ALR 500; 86 ALR 961.

Public officer as within Workmen's Compensation Act, 44 ALR 1477.

Workmen's compensation: injury to teamster or truckman before or after hours of work, 48 ALR 1400.

Workmen's compensation: injuries while entering or leaving place of employment as arising out of or in course of employment, 49 ALR 424; 82 ALR 1043.

Workmen's compensation: death or injury while traveling as arising out of or in the course of employment, 49 ALR 454; 63 ALR 469; 100 ALR 1053.

Convict or prisoner as within Workmen's Compensation Act, 49 ALR 1381.

Workmen's compensation: right of employee to compensation for injuries received while acting in an emergency, 50 ALR 1148.

Ownership of leased or rented property as constituting business, trade, occupation, etc., within workmen's compensation acts, 50 ALR 1176.

Municipal corporation as an employer within Workmen's Compensation Act, 54 ALR 788.

Injury during earthquake as within Workmen's Compensation Act, 54 ALR 1396.

Workmen's compensation: injury after discharge, 56 ALR 859; 69 ALR 1121.

Workmen's compensation: injury due to eating tainted food as one arising out of and in the course of employment, 57 ALR 614.

Construction and effect of provisions as to age, or employment as affected by age, in policy insuring employer against liability, 59 ALR 300.

Workmen's compensation: employee temporarily engaged in personal business, 59 ALR 370; 66 ALR 756.

Workmen's compensation: injury accidentally inflicted on employee while on employer's premises by one who was not an employee and had no connection with the work, 60 ALR 1401.

Workmen's compensation: who are within provisions of act in relation to clerical work, 62 ALR 348.

Condition of bodily organs due to particles of dust or other material incident to work as compensable within Workmen's Compensation Act not covering occupational diseases, 62 ALR 1460; 97 ALR 1412.

Right of one, other than employer of his insurer, liable under Workmen's Compensation Act, to indemnity or contribution from the employer of his insurer, 66 ALR 1433.

Workmen's compensation: rights and remedies where employee was injured by a third person's negligence, 67 ALR 249; 88 ALR 665; 106 ALR 1040.

Workmen's compensation: injury to or incapacity of employee as result of vaccination, inoculation, or other medical or surgical treatment as compensable, 69 ALR 863.

Juror as within Workmen's Compensation Act, 70 ALR 1248.

Workmen's compensation: injury from assault, 72 ALR 110; 112 ALR 1258; 112 ALR 1258.

Construction, application, and effect of provisions of workmen's compensation and employers' liability policy as regards employees not within operation of compensation acts, 73 ALR 86; 117 ALR 1299; 117 ALR 1299.

Necessity and sufficiency of evidence that disease contracted by applicant for workmen's compensation is attributable to employment, 73 ALR 488.

Workmen's compensation: deviation on personal errand as affecting question whether injury to employee on street or highway arose out of and in the course of employment, 76 ALR 356.

Mingling of employer's purpose and employee's personal purpose in taking trip as affecting right to compensation under a Workmen's Compensation Act, 78 ALR 684.

Workmen's compensation: street risk incurred in course of employment, 80 ALR 126.

Helper, assistant, or substitute for an employee as himself an employee within contemplation of workmen's compensation act, 80 ALR 522.

Workmen's compensation: interest in business, or in corporation or firm owning business, as affecting right to compensation, 81 ALR 644.

Workmen's compensation: construction of provisions of acts regarding "waiting period," 81 ALR 1261.

Mandamus to compel consideration, allowance, or payment of claim under workmen's compensation acts, 82 ALR 1073.

Workmen's compensation: damage or injury to artificial member or other personal property of employee as compensable, 82 ALR 1174.

Time to be considered in determining whether a case is within the earlier or later provisions of the workmen's compensation act, as regards compensation recoverable, 82 ALR 1244.

Workmen's compensation: injuries incident to performance of employer's work in whole or in part at employee's home, 83 ALR 216; 92 ALR 1036.

Who are within provisions of workmen's compensation acts relating to hazardous employments or occupations, 83 ALR 1018.

Workmen's compensation: injury to employee while in street in front of employer's premises when going to or coming from work, 85 ALR 97.

Use by employee of his own motor vehicle as affecting question whether injury or death was within Workmen's Compensation Act, 85 ALR 978; 96 ALR 467.

Right to compensation for injury while going to or from work as affected by fact that compensation covers the time involved or cost of transportation, or both, 87 ALR 250.

Construction, application, and effect of provisions of workmen's compensation acts that make one's status as employee dependent upon amount of earnings, 87 ALR 958.

Workmen's compensation: accident as a necessary condition of compensation for injury in absence of explicit provision of statute in that regard, 94 ALR 584.

Use by employee of his own motor vehicle as affecting question whether injury or death was within Workmen's Compensation Act, 95 ALR 467.

Needy persons put to work by municipality or other public body as means of extending aid to them as within protection of Workmen's Compensation Act, 96 ALR 1154; 127 ALR 1483.

Injury to employee while being transported to or from work by fellow employee not obligated to do so arising out of and in the course of employment, 97 ALR 555.

Workmen's compensation: compensation as affected by external infection from original injury or subsequent accident, 102 ALR 790.

Workmen's compensation: termination of employment before occurrence of disability or disease attributable to employment as affecting right to compensation, 104 ALR 1210.

Status of independent contractor as distinguished from employee for purposes of workmen's compensation act as affected by intention to evade or avoid the requirements of that act, 107 ALR 855.

Workmen's compensation: what is casual employment, 107 ALR 934.

Workmen's compensation: application to employees engaged in farming, 107 ALR 977; 140 ALR 399.

"Accidental injury" within workmen's compensation act as predicable upon sudden shock or fright without physical impact with person or employee, 109 ALR 892.

Implied consent of nonresident or foreign corporation to jurisdiction in proceedings under Workmen's Compensation Act as

predicable upon facts which subject him or it to the substantive provisions of the act, 110 ALR 1426.

Rights and obligations under Workmen's Compensation Act in respect of claims by employees of corporation during receivership or conservatorship of employer, 111 ALR 328.

Status of gasoline and oil distributor or dealer as agent, employee, independent contractor, or independent dealer as regards responsibility for injury to person or damage to property, 116 ALR 457; 83 ALR2d 1282.

Workmen's compensation: compensation for disfigurement, 116 ALR 712.

Teamster or truckman as independent contractor or employee under workman's compensation acts, 120 ALR 1031.

Gradual occurrence of bruise or other traumatic injury or condition as accident within workmen's compensation act, 122 ALR 839.

Injury to employee while engaged in an effort beyond the scope of his duties to increase his value to employer as one arising out of and in the course of his employment, 123 ALR 1176.

What constitutes "continuous employment" within provision of group insurance policy prescribing condition of disability benefits, 124 ALR 1494.

Status of one as employee within Workmen's Compensation Act as affected by violation of statute in connection with his employment, 128 ALR 1310.

Who are "workmen" or "operatives" within workmen's compensation act, 129 ALR 990.

Workmen's compensation: responsibility of seller or purchaser of business or plant in respect of employee's claims under act for injury, 131 ALR 1362.

Status of minor employed by parent as regards provision of workmen's compensation act relating to compensation thereunder or precluding action at law for injury, 132 ALR 1030.

Status as employee or servant as affected by misrepresentations in obtaining employment, 136 ALR 1124.

Insurance soliciting agent as employee or independent contractor within workmen's compensation acts, 138 ALR 1122.

Injury to employee in course of employment but away from employer's place of

business, due to a cause or risk to which others are also subject, as arising out of the employment, within Workmen's Compensation Act, 139 ALR 1472.

Schoolteacher as an employee within workmen's compensation acts, 140 ALR 1383.

Workmen's compensation as covering disease contracted by employee while on street or in traveling, 141 ALR 806.

Workmen's compensation: injury to employee away from employer's premises during lunch hour, 141 ALR 862.

Workmen's compensation: illness or injury from contaminated water, 141 ALR 1490.

One temporarily impressed into public service in emergency, as within workmen's compensation act, 142 ALR 657.

Workmen's compensation: injury while on way to or from work sustained by employee who does not work regular hours or is subject to call, 142 ALR 885.

Workmen's compensation act as applicable to employee of concessionaire in department store, 142 ALR 1400.

Industrial homeworkers as within social security, unemployment compensation, fair labor standards or workmen's compensation act, 143 ALR 418.

Workmen's compensation: award with respect to operation performed to make use of corrective appliance possible or more effective, 143 ALR 581.

Workmen's compensation: person in military or naval service, 143 ALR 1532.

Workmen's compensation: death or injury incident to effort of employee or others for his relief in case of illness, 144 ALR 361.

Workmen's compensation: person in military or naval service, 144 ALR 1516.

Liability for injury to person or damage to property as result of "blackout," 147 ALR 1442; 148 ALR 1401; 150 ALR 1448; 153 ALR 1433; 154 ALR 1459; 155 ALR 1458; 158 ALR 1463.

Workmen's compensation: injury or death of employee resulting from conduct of one to whom he had delegated performance of his duty, 148 ALR 708.

Workmen's compensation: injury due to character or quality of material or equipment for cleansing or for other personal conveniences of employees, 148 ALR 1017.

Transfer of business as affecting

common-law remedy or workmen's compensation in respect of injuries subsequently sustained by employee, 150 ALR 1166.

Workmen's compensation: person in military or naval service, 150 ALR 1456.

Workmen's compensation: injury to servant who lives on employer's premises as arising out of and in the course of the employment, 158 ALR 606.

Musicians or other entertainers as employees of establishment in which they perform, within meaning of workmen's compensation, social security, and unemployment insurance acts, 158 ALR 915; 172 ALR 325; 172 ALR 325.

Workmen's compensation: injury to employee while in automobile parking lot, 159 ALR 1395.

Accidental injury to employee while doing private work for his own benefit, following a continued practice in that regard, in employer's plant, 161 ALR 1461.

Disability from use of intoxicants or drugs as within meaning of disability provision of insurance policy, 166 ALR 833.

Workmen's compensation: coverage of industrial or business employee when performing, under orders, services for private benefit of employer or superior, or officer, representative, or stockholder of corporate employer, 172 ALR 378.

Status of gasoline and oil distributor or dealer as agent, employee, independent contractor, or independent dealer as regards responsibility for injury to person or damage to property, 83 ALR2d 1282.

Taxicab driver as employee of owner of cab, or independent contractor, within social security and unemployment insurance statutes, 10 ALR2d 369.

Rupture of blood vessel following exertion or exercise as within terms of accident provision of insurance policy, 35 ALR2d 1105.

Repeated absorption of poisonous substance as "accident" within coverage clause of comprehensive general liability policy, 49 ALR2d 1263.

Route driver or salesman as independent contractor or employee of merchandise producer or processor, for purposes of respondent superior doctrine, 53 ALR2d 183.

Liability insurance: "accident" or "accidental" as including loss resulting from ordinary negligence of insured or his agent, 7 ALR3d 1262.

Suicide as compensable under Workmen's Compensation Act, 15 ALR3d 616.

Mental incapacity or disease as constituting total or permanent disability within insurance coverage, 22 ALR3d 1000.

Construction and application of provision of liability policy, other than automobile liability, excluding from coverage injury or death of employee of insured, 34 ALR3d 1397.

Workmen's compensation: injury sustained while attending employer-sponsored social affair as arising out of and in the course of employment, 47 ALR3d 566.

Admissibility of opinion evidence as to employability on issue of disability in health and accident insurance and worker's compensation cases, 89 ALR3d 783.

What conduct in willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct, 96 ALR3d 1064.

Mental disorders as compensable under workmen's compensation acts, 97 ALR3d 161.

Modern status of effect of state workmen's compensation act on right of third-person tort-feasor to contribution or indemnity from employer of injured or killed workman, 100 ALR3d 350.

Unemployment compensation: trucker as employee or independent contractor, 2 ALR4th 1219; 37 ALR Fed. 95.

Liability of urban redevelopment authority or other state or municipal agency or entity for injuries occurring in vacant or abandoned property owned by governmental entity, 7 ALR4th 1129.

Willful, wanton, or reckless conduct of coemployee as ground of liability despite bar of workers' compensation law, 57 ALR4th 888.

Workers' compensation: student athlete as "employee" of college or university providing scholarship or similar financial assistance, 58 ALR4th 1259.

Workers' compensation: injuries incurred during labor activity, 61 ALR4th 196.

Workers' compensation: effect of allegation that injury was caused by, or occurred during course of, worker's illegal conduct, 73 ALR4th 270.

Workers' compensation statute as barring illegally employed minor's tort action, 77 ALR4th 844.

Ownership interest in employer business as affecting status as employee for workers' compensation purposes, 78 ALR4th 973.

Workers' compensation: coverage of injury occurring in parking lot provided by employer, while employee was going to or coming from work, 4 ALR5th 443.

Workers' compensation: compensability of injury during tryout, employment test, or similar activity designed to determine employability, 8 ALR5th 798.

Right to workers' compensation for injuries suffered after termination of employment, 10 ALR5th 245.

Jurors as within coverage of workers' compensation acts, 13 ALR5th 444.

Workers' compensation: Lyme disease, 22 ALR5th 246.

Workers' compensation: law enforcement officer's recovery for injury sustained during exercise or physical recreation activities, 44 ALR5th 569.

Presumption or inference that accidental death of employee engaged in occupation of manufacturing or processing arose out of and in course of employment, 47 ALR5th 801.

Employee's injuries sustained in use of employer's restroom as covered by workers' compensation, 80 ALR5th 417.

Right to workers' compensation for emotional distress or like injury suffered as result of sudden stimuli involving nonpersonnel action, 83 ALR5th 103.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of sudden stimuli involving nonpersonnel action — compensability under particular circumstances, 84 ALR5th 249.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of nonsudden stimuli—Right to compensation under particular statutory provisions, 97 ALR5th 1.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of nonsudden stimuli — Requisites of, and factors affecting, compensability, 106 ALR5th 111.

Right to workers' compensation for phys-

ical injury or illness suffered by claimant as result of sudden mental stimuli — Compensability under particular circumstances, 107 ALR5th 441.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of nonsudden stimuli — Compensability under particular circumstances, 108 ALR5th 1.

Right to workers' compensation for physical injury or illness suffered by claimant as result of sudden mental stimuli — Right to compensation under particular statutory provisions and requisites of, and factors affecting, compensability, 109 ALR5th 161.

Award of workers' compensation benefits to professional athletes, 112 ALR5th 365.

Right to workers' compensation for physical injury or illness suffered by claimant as result of nonsudden mental stimuli — Compensability of particular physical injuries or illnesses, 112 ALR5th 509.

Compensability under occupational disease statutes of emotional distress or like injury suffered by claimant as result of nonsudden stimuli, 113 ALR5th 115.

Application of workers' compensation laws to illegal aliens, 121 ALR5th 523.

Right to workers' compensation for physical injury or illness suffered by claimant as result of nonsudden mental stimuli — Right to compensation under particular statutory provisions, 122 ALR5th 653.

Application of the "mutual benefit" doctrine to workers' compensation cases, 11 ALR6th 351.

Right to workers' compensation for physical injury or illness suffered by claimant as result of nonsudden mental stimuli — Requisites of, and factors affecting, compensability, 13 ALR6th 209.

Right to workers' compensation for injury suffered by worker en route to or from worker's home where home is claimed as "work situs", 15 ALR6th 633.

Right to workers' compensation for physical injury or illness suffered by claimant as result of sudden mental stimuli — compensability of particular injuries and illnesses, 20 ALR6th 641.

34-9-2. Applicability of chapter to employers and employees — Generally.

(a)(1) As used in this subsection, the term “farm laborer” shall include, without limitation, any person employed by an employer in connection with the raising and feeding of and caring for wildlife, as such term is defined in paragraph (77) of Code Section 27-1-2.

(2) This chapter shall not apply to common carriers by railroad engaged in intrastate trade or commerce; nor shall this chapter be construed to lessen the liability of such common carriers or take away or diminish any right that any employee of such common carrier or, in case of his or her death, the personal representative of such employee may have under the laws of this state; nor shall this chapter apply to employees whose employment is not in the usual course of trade, business, occupation, or profession of the employer or not incidental thereto; nor to farm laborers or domestic servants; nor to employers of such employees; nor to any person, firm, or private corporation, including any public service corporation, that has regularly in service less than three employees in the same business within this state, unless such employees and their employers voluntarily elect to be bound; nor to any person performing services as a licensed real estate salesperson or associate broker who has a written contract of employment providing that he or she shall perform all services as an independent contractor.

(b) This chapter shall not apply to any common carrier by railroad engaging in commerce between any of the several states or territories or between the District of Columbia and any of the states or territories and any foreign nation or nations nor to any person suffering injury or death while he is employed by such carrier in such commerce; nor shall this chapter be construed to lessen the liability of such common carrier or to diminish or take away in any respect any right that any person so employed or the personal representative, kindred, relation, or dependent of such person may have under the act of Congress approved April 22, 1908, relating to the liability of common carriers by railroad to their employees in certain cases.

(c) Notwithstanding the provisions of subsection (a) of this Code section, this chapter shall apply to employees of the Department of Corrections who are engaged in farm and livestock operations.

(d) This chapter shall not apply to persons who perform services pursuant to a written contract stating that the provider is an independent contractor and such person buys a product and resells it, receiving no other compensation; or to independent contract carriers who perform services for an employer who is a publisher or distributor of printed materials in transporting, assembling, delivering, or distributing printed materials and in maintaining any facilities or equipment incidental thereto, provided that:

(1) The independent contract carrier has with the employer a written contract as an independent contractor;

(2) Remuneration for the independent contract carrier is on the basis of the number of deliveries accomplished;

(3) With exception to providing the area or route which an independent contract carrier may or may not service, or providing materials or direction for the packaging or assembly of printed materials, the employer exercises no general control regarding the method of transporting, assembling, delivering, or distributing the printed materials; and

(4) The contract entered by the independent contract carrier for such services does not prohibit it from the transportation, delivery, assembly, or distribution of printed materials for more than one employer.

(e) A person or entity shall otherwise qualify as an independent contractor and not an employee if such person or entity meets all of the following criteria:

(1) Is a party to a contract, written or implied, which intends to create an independent contractor relationship;

(2) Has the right to exercise control over the time, manner, and method of the work to be performed; and

(3) Is paid on a set price per job or a per unit basis, rather than on a salary or hourly basis.

A person who does not meet all of the above listed criteria shall be considered an employee unless otherwise determined by an administrative law judge to be an independent contractor.

(f)(1) As used in this subsection, the term "sports official" means any person who is a neutral participant in a sports event, including without limitation an umpire, referee, judge, linesman, scorekeeper, or timekeeper. The term "sports official" does not include any person, otherwise employed by an organization or entity sponsoring a sports event, who performs services as a sports official as a part of his or her regular employment.

(2) Notwithstanding any other provision of this chapter, a person shall qualify as an independent contractor and not an employee if such person performs services as a sports official for an entity sponsoring an interscholastic or intercollegiate sports event or if such person performs services as a sports official for a public entity or a private, nonprofit organization which sponsors an amateur sports event. (Ga. L. 1920, p. 167, § 15; Ga. L. 1925, p. 282, § 1; Code 1933, §§ 114-107, 114-108; Ga. L. 1937, p. 528; Ga. L. 1973, p. 232, § 2; Ga. L. 1974, p. 1143, § 2; Ga. L. 1975, p. 190, § 3; Ga. L. 1983, p. 700, § 3; Ga. L. 1984, p. 22, § 34; Ga. L. 1988, p. 936, § 1; Ga. L. 1993, p. 323, § 2; Ga. L. 1994, p. 97, § 34; Ga. L. 1996, p. 1291, § 2; Ga. L. 1997, p. 726, § 1; Ga. L. 2007, p. 616, § 1/HB 424.)

The 2007 amendment, effective July 1, 2007, added present paragraph (a)(1), re-designated former subsection (a) as present paragraph (a)(2), and inserted "his or her" near the middle of paragraph (a)(2).

Cross references. — Liability of railroad employers for injuries to employees, § 34-7-40 et seq.

Code Commission notes. — Pursuant to § 28-9-5, in 1988, a comma was deleted following "foreign nation or nations" near the beginning of subsection (b).

Pursuant to Code Section 28-9-5, in 1993, the paragraph designations (1) through (4) in subsection (d) were substituted for the designations (A) through (D).

U.S. Code. — The Act of Congress approved April 22, 1908, referred to in subsection (b), is commonly known as the Federal

Employers' Liability Act and is codified as 45 U.S.C. §§ 51-60.

Law reviews. — For article surveying Georgia cases in the area of workers' compensation from June 1979 through May 1980, see 32 Mercer L. Rev. 261 (1980). For article surveying developments in Georgia workers' compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981). For article, the historical origins and economic structure of workers' compensation law, see 16 Ga. L. Rev. 775 (1982). For annual survey article discussing workers' compensation law, see 52 Mercer L. Rev. 505 (2000). For article, "Workers' Compensation," see 53 Mercer L. Rev. 521 (2001). For annual survey of workers' compensation law, see 57 Mercer L. Rev. 419 (2005).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

USUAL COURSE OF BUSINESS

FARM LABORERS

FEWER THAN THREE EMPLOYEES REGULARLY IN SERVICE

General Consideration

Proper construction of O.C.G.A. § 34-9-2(a) is as an exemption from eligibility for compensation of those persons who are initially employed for the specific purpose of engaging in activity that is not in the usual course of business of the employer. It cannot be used to exclude employees employed for the purpose of performing work in the usual business of the employer who happened to be, at the time of the accident, engaged in work outside the usual course of the employer's business, at the direction of the employer. *Echo Enters., Inc. v. Aspinwall*, 194 Ga. App. 444, 390 S.E.2d 867 (1990).

No presumption of coverage from fact of relationship. — The mere fact that the relationship of employer and employee existed raises no presumption that the parties are subject to the workers' compensation law, O.C.G.A. Ch. 9, T. 34. *Echo Enters., Inc. v. Aspinwall*, 194 Ga. App. 444, 390 S.E.2d 867, cert. denied, 194 Ga. App. 911, 390 S.E.2d 867 (1990).

Receiver, trustee, or personal representative as "employer." — The word "employer" is applicable to a receiver or trustee of an

individual, firm, association, or corporation engaged in any business operated for gain or profit, or to legal representatives of a deceased employer, not only where the injuries to an employee took place before their becoming such representative, but as well to injuries arising during the tenure of their status as such representatives. *Minchew v. Huston*, 93 Ga. 272, 18 S.E.2d 487 (1942); *Minchew v. Huston*, 66 Ga. App. 856, 19 S.E.2d 422 (1942).

Executor, administrator, or trustee who operates during official tenure a business employing more than 10 (now three or more) employees for gain or profit to the estate represented by the executor is subject in that representative capacity to the provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), assuming that the deceased would have been so liable and that in other respects the injury is one to which the employee is entitled to compensation under those provisions. *Minchew v. Huston*, 193 Ga. 272, 18 S.E.2d 487 (1942); *Minchew v. Huston*, 66 Ga. App. 856, 19 S.E.2d 422 (1942).

Insurer contesting coverage. — The fact that an insurance carrier mailed to an em-

ployer a general form for the purpose of filing a report containing information as to the number of employees would not estop the carrier from contesting the coverage of a subsequently acquired cotton gin business in a policy which was obtained to cover an oil and gas business. *Hardware Mut. Cas. Co. v. Collier*, 69 Ga. App. 235, 25 S.E.2d 136 (1943).

Employer's agent liable for failure to procure workers' compensation insurance. —

Under Georgia law, an employee is entitled to sue an agent of a former employer for damages resulting from the agent's failure to procure workers' compensation insurance. *Bailey v. Chatham*, 171 Bankr. 703 (Bankr. N.D. Ga. 1994).

Proof of negligence in failing to procure workers' compensation insurance is not required before employers can be held personally liable for payment of workers' compensation benefits. *Sheehan v. Delaney*, 238 Ga. App. 662, 521 S.E.2d 585 (1999).

Corporate officer. — A corporate officer is an employee for determining whether the employer has three or more employees, unless the officer files a written declaration of exemption. *Dennison v. G & M Quality Bldrs., Inc.*, 178 Ga. App. 548, 343 S.E.2d 786 (1986), rev'd on other grounds, 256 Ga. 617, 351 S.E.2d 622 (1987).

Individual's mere status as an employer of a roofer at the time the individual fell off a roof was not determinative of the individual's liability to the roofer for workers' compensation, where the issue of employment remained to be resolved and the individual contested the applicability of the workers' compensation act pursuant to O.C.G.A. § 34-9-2(a). *Hopkins v. Martin*, 185 Ga. App. 752, 365 S.E.2d 544 (1988).

Cited in *Vandergriff v. Shepard*, 39 Ga. App. 791, 148 S.E. 596 (1929); *Bartlett v. American Mut. Liab. Ins. Co.*, 47 Ga. App. 504, 170 S.E. 822 (1933); *Campbell v. Dixie Gravel Co.*, 55 Ga. App. 747, 191 S.E. 274 (1937); *Hall v. Georgia Milk Producers Confederation*, 61 Ga. App. 676, 7 S.E.2d 330 (1940); *Hooper v. Harvey*, 62 Ga. App. 224, 8 S.E.2d 456 (1940); *Liberty Mut. Ins. Co. v. Ragan*, 191 Ga. 811, 14 S.E.2d 88 (1941); *Flint Elec. Membership Corp. v. Posey*, 78 Ga. App. 597, 51 S.E.2d 869 (1949); *Fowler v. Holloway*, 87 Ga. App. 453, 74 S.E.2d 376 (1953); *Burnett v. King*, 88 Ga. App. 771, 77

S.E.2d 772 (1953); *Churchwell Bros. Constr. Co. v. Archie R. Briggs Constr. Co.*, 89 Ga. App. 550, 80 S.E.2d 212 (1954); *Commissioners of Rds. & Revenues v. Davis*, 213 Ga. 792, 102 S.E.2d 180 (1958); *Thompson v. Walker*, 99 Ga. App. 748, 109 S.E.2d 833 (1959); *Newsome v. Loper*, 101 Ga. App. 90, 112 S.E.2d 781 (1960); *Southern Ry. v. Overnite Transp. Co.*, 223 Ga. 825, 158 S.E.2d 387 (1967); *American Mut. Liab. Ins. Co. v. Rozier*, 117 Ga. App. 178, 160 S.E.2d 236 (1968); *McCluskey v. AMOCO*, 224 Ga. 253, 161 S.E.2d 271 (1968); *Ledford v. J.M. Muse Corp.*, 119 Ga. App. 244, 166 S.E.2d 623 (1969); *Harper v. Smith*, 128 Ga. App. 707, 197 S.E.2d 759 (1973); *Aetna Cas. & Sur. Co. v. Barber*, 128 Ga. App. 894, 198 S.E.2d 352 (1973); *Security Ins. Group v. Plank*, 133 Ga. App. 815, 212 S.E.2d 471 (1975); *St. Paul Fire & Marine Ins. Co. v. Walters*, 141 Ga. App. 579, 234 S.E.2d 157 (1977); *Haygood v. Home Transp. Co.*, 149 Ga. App. 229, 253 S.E.2d 805 (1979); *Haygood v. Home Transp. Co.*, 244 Ga. 165, 259 S.E.2d 429 (1979); *Hensel Phelps Constr. Co. v. Johnson*, 161 Ga. App. 631, 295 S.E.2d 843 (1982); *Warren v. Mansfield Enters., Inc.*, 163 Ga. App. 785, 295 S.E.2d 864 (1982); *Scogin v. Georgia Power Co.*, 165 Ga. App. 2, 299 S.E.2d 84 (1983); *Manning v. Georgia Power Co.*, 252 Ga. 404, 314 S.E.2d 432 (1984); *Howell v. Parker*, 171 Ga. App. 101, 318 S.E.2d 811 (1984); *G & M Quality Bldrs., Inc. v. Dennison*, 256 Ga. 617, 351 S.E.2d 622 (1987); *Dennison v. G & M Quality Bldrs., Inc.*, 182 Ga. App. 574, 356 S.E.2d 678 (1987); *Southern Guar. Ins. Co. v. Union Timber Co.*, 708 F. Supp. 1314 (M.D. Ga. 1989); *Gray Bldg. Sys. v. Trine*, 260 Ga. 252, 391 S.E.2d 764 (1990); *Southern Guar. Ins. Co. v. Union Timber Co.*, 741 F. Supp. 223 (M.D. Ga. 1990); *Hester v. Saturday*, 138 Bankr. 132 (Bankr. S.D. Ga. 1991); *Walters v. Betts*, 174 Bankr. 636 (Bankr. N.D. Ga. 1994); *Riley v. Taylor Orchards*, 226 Ga. App. 394, 486 S.E.2d 617 (1997).

Usual Course of Business

"Employee" construed. — The definition of "employee" in former Code 1933, §§ 114-101 and 114-102 (see O.C.G.A. § 34-9-1) must be construed in connection with former Code 1933, §§ 114-107 and 114-108 (see O.C.G.A. § 34-9-2). *Continen-*

Usual Course of Business (Cont'd)

tal Cas. Co. v. Haynie, 182 Ga. 608, 186 S.E. 683 (1936).

The definition of "employee" in former Code 1933, §§ 114-101 and 114-102 (see O.C.G.A. § 34-9-1) and the provision in former Code 1933, §§ 114-107 and 114-108 (see O.C.G.A. § 34-9-2) that workers' compensation law shall not apply to employees whose employment was not in the usual course of the trade, business, occupation, or profession of the employer, or not incidental thereto, must be construed together. *Wender & Roberts, Inc. v. Jones*, 95 Ga. App. 82, 97 S.E.2d 160, cert. dismissed, 213 Ga. 375, 99 S.E.2d 142 (1957).

Exclusion of employees. — Any person whose employment is not in the usual course of a trade, business, profession, or occupation of that person's employer, or is not incidental thereto, is excluded from the right to compensation under the express provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Continental Cas. Co. v. Haynie*, 51 Ga. App. 650, 181 S.E. 126 (1935), aff'd, 182 Ga. 608, 186 S.E. 683 (1936).

When employment incidental to usual course of trade or business. — Employment of the employee is incidental to the usual course of the trade or business of the employer when it is being performed upon premises and buildings essential to the successful carrying on of such trade or business in an efficient and modern manner, the test being whether an employment is in furtherance of the business of the employer, and not in the manner or method adopted in the performance, and whether it is in furtherance of the employer's gain or profit, and is related or incidental to such employment. *Wender & Roberts, Inc. v. Jones*, 95 Ga. App. 82, 97 S.E.2d 160, cert. dismissed, 213 Ga. 375, 99 S.E.2d 142 (1957).

Test of employment. — The test of employment under this section was whether an employment was in furtherance of the business of the employer, and not in the manner or method adopted in the performance of such employment; the character of the work being done, not the contract of employment, was determinative of the question. *Lee v. Claxton*, 70 Ga. App. 226, 28 S.E.2d 87 (1943) (see O.C.G.A. § 34-9-2).

Carpenter engaged in remodeling of offices. — A carpenter who is engaged with others to aid in the alteration, repair, and enlargement of the offices of a corporation doing a dairy business, which offices are essential to the successful carrying on of such trade or business in an efficient and modern manner, and who will not be retained after the completion of such carpenter work, is an "employee" in the service of the dairy corporation, whose employment is "incidental" to the usual course of the trade or business of the employer. *Continental Cas. Co. v. Haynie*, 51 Ga. App. 650, 181 S.E. 126 (1935), aff'd, 182 Ga. 608, 186 S.E. 683 (1936).

Caretaker on estate used for business entertainment. — The evidence was sufficient to authorize a finding that at the time of death the claimant's husband who worked as a caretaker on an estate belonging to the president and majority stockholder of the defendant drug company, which estate was used for business entertainment purposes, was an employee of the drug company. *Wender & Roberts, Inc. v. Jones*, 95 Ga. App. 82, 97 S.E.2d 160, cert. dismissed, 213 Ga. 375, 99 S.E.2d 142 (1957).

Farm Laborers

Meaning of "farm laborers." — The term "farm laborers" means laborers employed in or about the business of farming, and the word "farming," in its ordinary sense, signifies the cultivation of land for the production of agricultural crops, with incidental enterprises. *Pridgen v. Murphy*, 44 Ga. App. 147, 160 S.E. 701 (1931); *Utica Mut. Ins. Co. v. Winters*, 77 Ga. App. 550, 48 S.E.2d 918 (1948).

The term "farm laborers" must be given its ordinary signification, and it signifies the cultivation of agricultural crops. *Oft v. Sims*, 142 Ga. App. 9, 235 S.E.2d 41 (1977).

The focus for determining whether the "farm laborer" exemption applies is the status of the employee, not the total activities of the employer. *Lumber City Egg Marketers, Inc. v. Piercy*, 217 Ga. App. 584, 458 S.E.2d 364 (1995).

Manufacturers of crude gum. — The original manufacturers or producers of crude gum (oleoresin) are "farmers" for all intents and purposes, and the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is not

applicable to them and their employees. *Hamilton Turpentine Co. v. Johnson*, 93 Ga. App. 544, 92 S.E.2d 235 (1956), distinguishing *Pridgen v. Murphy*, 44 Ga. App. 147, 160 S.E. 701 (1931); *Moody v. Tillman*, 45 Ga. App. 84, 163 S.E. 521 (1932); *Meadows v. Dixon*, 61 Ga. App. 607, 7 S.E.2d 329 (1940).

Dairy farm employee. — An individual employed to feed and milk cows on a dairy operation is a "farm laborer." *Oft v. Sims*, 142 Ga. App. 9, 235 S.E.2d 41 (1977).

Retention of status. — If an employer owns a farm and a garage, and sends one of the garage employees on a specific task of cleaning out a well on the employer's farm, such garage hand and employee, who does not till the soil, does not become a "farm laborer," but retains that person's general character as a garage employee. *Utica Mut. Ins. Co. v. Winters*, 77 Ga. App. 550, 48 S.E.2d 918 (1948).

Ditch digger on farm. — An employee of a landowner who was engaged in digging a ditch to prevent the overflow of a creek so as to render land more suitable for cultivation was a "farm laborer", and for an injury caused to the employee's hand while engaged in moving a stump in the course of employment the employee was not entitled to compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Culpepper v. White*, 52 Ga. App. 740, 184 S.E. 349 (1936).

Chicken processor. — Employee of an independent contractor retained by a processor only to catch, box, and transport chickens in the processor's trucks was not a "farm laborer". *J & C Poultry v. Reyes-Guzman*, 227 Ga. App. 731, 489 S.E.2d 853 (1997).

Alligator farm. — Definition in Employment Security Law, O.C.G.A. § 34-8-1, of "farm laborer" was applied to that same term under the Workers' Compensation Act in order to reach the determination that when an employee for an alligator farm cleaned out the pens, the employee was caring for wildlife and thus performing "agricultural labor" pursuant to O.C.G.A. § 34-8-35(m)(2)(A), but as the employer was not a "farm" because alligators were "wildlife" and "game animals" under O.C.G.A. § 27-1-2(34) and not "livestock or fur-bearing animals" pursuant to O.C.G.A. § 34-8-35(m)(3)(A), the employer did not

fall within the exemption provided by O.C.G.A. § 34-9-2(a) with respect to the employee's claim for workers' compensation benefits; the trial court erred in holding that the employer was exempted from the Workers' Compensation Act's coverage. *Gill v. Prehistoric Ponds, Inc.*, 280 Ga. App. 629, 634 S.E.2d 769 (2006).

Because an employer who was in the business of breeding, rearing, and slaughtering alligators to sell the meat, hides, and head was not a farm, as alligators were "wildlife", not livestock or fur-bearing animals, the employer did not fall within the exemption from coverage under the Workers' Compensation Act provided by O.C.G.A. § 34-9-2(a). *Cook v. Prehistoric Ponds, Inc.*, 282 Ga. App. 904, 640 S.E.2d 383 (2006).

Employee of meat packer working on farm land. — If an employee was on the payroll of the employee's employer in connection with its meat packing, the fact that the employee performed this essential work for the employer on land that had once been a dairy farm and was even at the time of the injury producing grain and hay as the result of other labor of the employee, rendered the employee no less an employee of the employer in connection with the employer's meat packing business than the employee would have been had the employee only performed the work essential to the meat packing business at the plant of the employer. *Free v. McEver*, 79 Ga. App. 831, 54 S.E.2d 372 (1949).

Truck farmer, jobber, and broker. — While the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) exempts farming from its operation, a truck farmer who is also a jobber and broker, buying, selling, and hauling farm products and other articles of merchandise and employing trucks and men to operate and care for them, is not, as to this portion of the business, exempt from the provisions of that law. *Ballard v. Butler*, 45 Ga. App. 837, 166 S.E. 220 (1932).

Truck driver delivering farmer's crops. — Where employer was engaged only in the business of farming, raising and marketing its own crops, and employee was hired to drive a truck and deliver employer's crops to its customers, employee, as a truck driver who was engaged in the incidental work of delivering employer's crops, was a "farm laborer" who was excluded from workers'

Farm Laborers (Cont'd)

compensation coverage pursuant to O.C.G.A. § 34-9-2. *Glen Oaks Turf, Inc. v. Butler*, 191 Ga. App. 840, 383 S.E.2d 203 (1989).

Notation "farmer" on death certificate of caretaker. — Where there was sufficient evidence to authorize a finding that the county estate on which the decedent was a caretaker was not used for farm purposes, a finding was not demanded that the employee was excluded from the provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) by reason of being a "farm employee", despite the listing of the deceased's occupation on a death certificate as a "farmer". *Wender & Roberts, Inc. v. Jones*, 95 Ga. App. 82, 97 S.E.2d 160, cert. dismissed, 213 Ga. 375, 99 S.E.2d 142 (1957).

Fewer Than Three Employees Regularly in Service

Legislative intent. — The intent of the legislature in striking the provision excluding "casual employees" contained in Ga. L. 1920, p. 167, § 15 was to remove from the exceptions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) those temporary employments which under the original language might have been deemed merely "casual", and to differentiate the language of this section from the acts and decisions of other states where the employee must be a person in constant and continuous service for however brief a period of time. *Maloney v. Kirby*, 48 Ga. App. 252, 172 S.E. 683 (1934) (see O.C.G.A. § 34-9-2).

Meaning of "regularly in service." — The phrase "regularly in service", as used in this section, referenced such employment as was more or less permanently adapted to the business of the employer at the particular time, and continues through a reasonably definite period of time, and possesses the characteristic as applied to the business of being unvarying in practice, and steady or uniform in course and steadily pursued, and as contradistinguished from an employment that was merely casual or for a particular occasion, and which did not have the characteristics of permanency. *Jones v. Cochran*, 46 Ga. App. 360, 167 S.E. 751 (1933); *Russell C. House Transf. Co. v. Hamilton*, 63 Ga.

App. 632, 11 S.E.2d 703 (1940) (see O.C.G.A. § 34-9-2).

The 10 (now three) employees required to be "regularly in service" to render the employer and employees subject to the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) are employees of the character entitled to compensation as employees under those provisions. *Chandler v. Harris*, 47 Ga. App. 535, 171 S.E. 174 (1933).

Employees "regularly in service" refers to persons performing work to carry on the ordinary or established custom, mode, or plan in the operation of the business, though the work may be recurrent or intermittent rather than constant or continuous. *Baratta's Italian Restaurant v. Mason*, 107 Ga. App. 240, 129 S.E.2d 578 (1963).

"Regularly" construed. — It is not necessary that an employee work exclusively for an employer to be "regularly in service". *Empire Glass & Decoration Co. v. Bussey*, 33 Ga. App. 464, 126 S.E. 912 (1925).

The word "regularly" refers to whether an occurrence is in an established mode or plan in the operation of the business, and has no reference to the constancy of the occurrence. *Employers Liab. Assurance Corp. v. Hunter*, 184 Ga. 196, 190 S.E. 598 (1937); *McDonald v. Seay*, 62 Ga. App. 519, 8 S.E.2d 796 (1940); *Russell C. House Transf. Co. v. Hamilton*, 63 Ga. App. 632, 11 S.E.2d 703 (1940).

The word "regularly" is not synonymous with "constancy", as there are businesses of importance which employ numbers of people regularly, which employ none of them continuously, or businesses which require a large number of employees, nearly all or a large number of whom are employed only periodically, for the reason that the needs of the business require their services only at intervals or periods, whenever the business is in active operation. *Employers Liab. Assurance Corp. v. Hunter*, 184 Ga. 196, 190 S.E. 598 (1937).

The word "regularly" is not synonymous with "constantly" or "continuously"; work may be intermittent and yet regular, and people may be regularly but not continuously employed. *McDonald v. Seay*, 62 Ga. App. 519, 8 S.E.2d 796 (1940).

The word "regularly" is not synonymous with "constancy". *Russell C. House Transf. Co. v. Hamilton*, 63 Ga. App. 632, 11 S.E.2d 703 (1940).

Less than minimum number of workers.

— The fact that on the day of injury less than the minimum number of people are working will not prevent the operation of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), if it was shown that under the ordinary course of conducting the business such number of people were "regularly" employed, as defined in this section. *McDonald v. Seay*, 62 Ga. App. 519, 8 S.E.2d 796 (1940) (see O.C.G.A. § 34-9-2).

If employment of the minimum number of employees continues through a reasonable, definite period, and is not casual or incidental, the workers' compensation law applies, even though at times less than the minimum number are actually working. *McDonald v. Seay*, 62 Ga. App. 519, 8 S.E.2d 796 (1940).

Adding total number of employees of two or more separate businesses. — It is not permissible to add the total number of employees of two or more separate businesses in order to come up with the required number of employees. *Allen v. Clein*, 99 Ga. App. 133, 108 S.E.2d 291 (1959).

It is not permissible, in order to ascertain whether three or more persons are regularly employed, to add the total number of employees of two or more separate businesses, even though both are owned by the same person, if they are in fact separate and distinct, and if the operation of the two businesses is not a scheme or device to avoid the payment of workers' compensation, even though both may be operated from the same address. *Butler v. Lee*, 97 Ga. App. 184, 102 S.E.2d 498 (1958).

Adding total number of employees over a period of time. — Fact that employer over a period of time employs a total equaling or exceeding requisite number of employees does not bring an employer within the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.); the employer comes within the law only if the employer has "regularly in service" the requisite number at any one time. *Fowler v. Gilmer County Comm'rs of Rds. & Revenues*, 164 Ga. App. 1, 294 S.E.2d 708 (1982).

Employment for several weeks each year.

— An employer who is compelled, regularly each year, for the duration of several weeks, on account of an increase in the volume of business done during that season of the year,

to employ 10 (now three) or more persons, is, relative to an employee who during such period of time sustains an accidental injury which arose out of and during the course of the employee's employment, subject to the provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) as having "regularly in service" 10 (now three) or more employees in the same business within the state. *Russell C. House Transf. Co. v. Hamilton*, 63 Ga. App. 632, 11 S.E.2d 703 (1940).

Intermittent employment of requisite number of employees. — Employer who for 14 weeks preceding an accident intermittently employed 10 (now three) employees during a week in the ordinary or established mode or plan in the operation of its business, though in some weeks it employed less than 10 employees, is held to have regularly in service 10 employees and to be covered by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Baratta's Italian Restaurant v. Mason*, 107 Ga. App. 240, 129 S.E.2d 578 (1963).

Employee of one of two separate businesses. — Where, under the evidence, a cotton gin and a planning mill were not parts of the same business, within the meaning of this section, although they were each operated with power from the same boiler and engine and were owned and controlled by the same persons, and the decedent was employed only at the gin, at which less than 10 (now three) employees were regularly employed, and no election had been made by the employee and the employers to become bound by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), its provisions were inapplicable. *Carswell v. Woodward Bros.*, 38 Ga. App. 152, 142 S.E. 907 (1928) (see O.C.G.A. § 34-9-2).

The evidence authorized a finding that, irrespective of whether or not the defendant owned and operated a lodge and camp, each was operated as a separate and distinct business, and that the accident for which compensation was claimed arose out of and in the course of the employment of the claimant's son while in the sole employ of the lodge, in which less than 10 (now three) employees were regularly employed, and that, as it did not appear that there was any agreement by which the defendant and the employees came under the workers' com-

Fewer Than Three Employees Regularly in Service (Cont'd)

pensation law (see O.C.G.A. § 34-9-1 et seq.), the claimant was not entitled to compensation. *Murray v. McConnell*, 66 Ga. App. 868, 19 S.E.2d 318 (1942).

Partner or corporate president. — To afford coverage, this section requires a certain number of employees regularly in service and of the character entitled to compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.); it cannot include a partner, even though the partner may do work for which the partner receives compensation in the nature of wages, nor can the president or others in the management of a corporate employer, whose duties are those of management, be counted, as these persons are in the position of employers. *Sanders Truck Transp. Co. v. Napier*, 117 Ga. App. 561, 161 S.E.2d 440 (1968) (see O.C.G.A. § 34-9-2).

Exemptions by corporate officers are ineffective to reduce the employee count for determining applicability of the Workers Compensation Act (see O.C.G.A. § 34-9-1 et seq.) except where the exemptions reduce the employee count to zero. Once an "additional employee" is hired, corporate officers must be included in the total employee count regardless of whether they are personally exempt from the act. *Hitchcock v. Jack Wiggins, Inc.*, 249 Ga. App. 845, 549 S.E.2d 806 (2001).

Corporate officer performing nonexecutive work. — Unless there is such identity between an alleged employee and corporation that it deprives the latter of the power to control the relationship of employer and employee, as where the employee practically is the corporation or owns enough stock to dictate its policy and prudential affairs, it is generally held that a corporate officer performing nonexecutive work attended with the normal incidents of employment is an employee. *Denis Aerial Ag-Plicators, Inc. v. Swift*, 154 Ga. App. 742, 269 S.E.2d 890 (1980).

Applicability to principal contractor or subcontractor. — A statutory employer under O.C.G.A. § 34-9-8 is by law subject to the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., and is required by law to comply with its requirements and the num-

ber of employees engaged by a statutory employer need not be affirmatively shown in order for such employer to take advantage of tort immunity offered by the Act. *Hensel Phelps Constr. Co. v. Johnson*, 161 Ga. App. 631, 295 S.E.2d 843 (on motion for rehearing), rev'd on other grounds, 250 Ga. 83, 295 S.E.2d 841 (1982).

Contractor/subcontractors. — To sustain a workers' compensation award entered against a principal contractor in favor of an employee of a subcontractor as permitted by O.C.G.A. § 34-9-8, the principal contractor must have the minimal number of employees required by O.C.G.A. § 34-9-2. *Bradshaw v. Glass*, 252 Ga. 429, 314 S.E.2d 233 (1984); *G & M Quality Bldrs., Inc. v. Dennison*, 173 Ga. App. 578, 327 S.E.2d 773 (1985); *Smith v. Cornette*, 173 Ga. App. 577, 327 S.E.2d 774 (1985).

Fluctuating employment in bakery operation. — Where the volume of a bakery business, products of which were sold through traveling salesmen, fluctuated periodically, and the number of employees in the business fluctuated accordingly under and above 10 (now three), the 10 or more employees working during a period when the volume of business and the demand for the product had increased, whose services were necessary to the operation of the business during the period of increased volume, and who were likely to be retained in service for a reasonably definite period of time during which the work for which they were employed was unvarying and steadily pursued, were "regularly in service", and the employer, unless otherwise exempt from the operations of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) during this period, was subject to these provisions. *Jones v. Cochran*, 46 Ga. App. 360, 167 S.E. 751 (1933).

Rotation of laborers on public works projects for city. — Where a city by resolution made an appropriation for unemployment relief under the direction of the city manager, and administered the fund by employing laborers on its public property at the rate of 15¢ an hour on a 10-hour day and 5 ½ day week, rotating such laborers for a week's employment at a time so as to give employment to as many as possible, an employee engaged in such work for the city at the time of the employee's injury, whose

work consisted in tearing down a shed which housed city mules, trucks, and wagons, and was to be replaced with another building, was subject to the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), as was the employee's employer. *City of Waycross v. Hayes*, 48 Ga. App. 317, 172 S.E. 756 (1934).

Voluntary payments to employee after injury. — An employer's voluntary payments to an employee after an injury did not establish that the employer voluntarily elected to bring the employer under the broad provisions of the Workers' Compensation Act (see O.C.G.A. § 34-9-1 et seq.) where there was no evidence which established that the employee was ever told or led in any way to believe that the employee was covered by workers' compensation, nor that the employee detrimentally relied on such a representation. *Horne v. Exum*, 204 Ga. App. 337, 419 S.E.2d 147 (1992).

Presumptions. — There is no presumption that an employer and an employee are operating under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) where it does not appear that the employer regularly had in service as many as 10 (now three) employees in the same business within this state. *Bussell v. Dannenberg Co.*, 34 Ga. App. 792, 132 S.E. 230 (1925).

There is no presumption that an employer has a sufficient number of employees to bring the employer under the provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Sanders Truck Transp. Co. v. Napier*, 117 Ga. App. 561, 161 S.E.2d 440 (1968).

Number of employees as question of fact. — Whether or not the defendant employed 10 (now three) or more people within the purview of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) was a question of fact to be determined by the jury, and there was sufficient evidence to authorize the finding that the requisite number was not so employed. *Critchfield v. Aikin*, 33 Ga. App. 668, 127 S.E. 816 (1925).

Burden of showing requisite number of employees. — The burden of showing the employer-employee relationship and of showing that the employer was subject to the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) by virtue of having the requisite number of employees or that the employer had voluntarily accepted its provisions rests upon the claimant. *Goolsby v. Wilson*, 150 Ga. App. 611, 258 S.E.2d 216 (1979).

If the purported employer has no express knowledge that a claim is brought against the employer in an individual capacity and when so apprised does not controvert the basic fact that the employer is or was an employer of the alleged employee, then the employer need not file the form prescribed by rule promulgated under O.C.G.A. § 34-9-221 to controvert right to benefits nor would the employer be subject to an adverse presumption from the employer's failure to file such form, but rather the burden of showing the employer-employee relationship and of showing that the employer was subject to provisions of the Workers' Compensation Act (see O.C.G.A. § 34-9-1 et seq.) by virtue of having the requisite number of employees rests upon the claimant. *Fowler v. Gilmer County Comm'rs of Rds. & Revenues*, 164 Ga. App. 1, 294 S.E.2d 708 (1982).

Statements on record. — After a hearing of a compensation case an attorney for the claimant stated, "I think that the defense will also agree that he had ten or more employees, regularly," director replying, "He has already agreed to that," and the record did not show that any objection or exception was taken to such statements by the employer or the employer's counsel, who were present at the hearing, the court would presume that such was the agreement of the parties or their counsel, and would accept such statements, appearing in the record, as sufficient to support a finding that the employer was subject to the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) at the time the employee was injured. *Hood v. Jackson*, 81 Ga. App. 465, 59 S.E.2d 45 (1950).

Evidence held sufficient. — Evidence that the employer, owner of a motel, employed the claimant who supplied janitorial services, a night manager, and a secretary whose office was located at the motel, was sufficient to find employment of the requisite number of employees, notwithstanding the employer's claim that the secretary was paid through a separate corporation. *Cox v. Advoni*, 222 Ga. App. 413, 474 S.E.2d 290 (1996).

Evidence held insufficient. — Where there was no evidence in the record to show

Fewer Than Three Employees Regularly in Service (Cont'd)

that there was any periodic employment of as many as 10 (now three) people due to seasonal demands, nor any evidence that it was the plan, method, or custom of the employer to employ as many as 10 (now three) people, nor that as many as 10 (now three) people were employed after the accident, the evidence was insufficient to justify a holding that the employer had 10 (now three) or more employees "regularly in ser-

vice." *Martin v. Veal*, 66 Ga. App. 702, 18 S.E.2d 776 (1942).

Genuine issue bars summary judgment. —

The trial court erred in granting summary judgment for a recreation club against the parents of a lifeguard who was electrocuted on club property where a genuine issue of material fact existed as to whether the club employed the requisite number of employees to qualify for workers' compensation. *Molton v. Lizella Recreation Club, Inc.*, 172 Ga. App. 154, 322 S.E.2d 354 (1984).

OPINIONS OF THE ATTORNEY GENERAL

Benefits payable by bankrupt self-insured employer. — The State board of workers' compensation may permit payment of benefits to injured workers when a self-insured employer files for relief under Chapter 7 or 11 of the Bankruptcy Code, provided those benefits are not collected directly from the self-insured employer's bankrupt estate. 1989 Op. Att'y Gen. 89-50.

Newspaper dealers. — Newspaper dealers are employers within the meaning of the

workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), and would be subject to the requirements thereof, unless exempt therefrom because of having less than three employees, as provided therein. 1962 Op. Att'y Gen. p. 613.

Superior court judges. — Since superior court judges are elected officials, they are not covered by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). 1980 Op. Att'y Gen. No. 80-71.

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 120 et seq.

C.J.S. — 99 C.J.S., Workers' Compensation, §§ 114, 205 et seq.

ALR. — Extraterritorial operation of Workmen's Compensation Statutes; conflict of laws, 3 ALR 1351; 18 ALR 292; 28 ALR 1345; 35 ALR 1414; 45 ALR 1234; 59 ALR 735; 82 ALR 709; 90 ALR 119.

Workmen's compensation: application to employees engaged in farming, 7 ALR 1296; 13 ALR 955; 35 ALR 208; 43 ALR 954; 107 ALR 977; 140 ALR 399.

Workmen's compensation: compensation for death of or injury to peace officer employed in private plant, 8 ALR 190.

Applicability of state Anti-trust Act to interstate transaction, 24 ALR 787.

Workmen's Compensation Act: applicability of state compensation act to injury within admiralty jurisdiction, 25 ALR 1029; 31 ALR 518; 56 ALR 352.

Workmen's compensation: liability of general or special employer for compensation to

injured employee, 34 ALR 768; 58 ALR 1467; 152 ALR 816.

Teamster as independent contractor under workmen's compensation acts, 42 ALR 607; 43 ALR 1312; 120 ALR 1031.

Convict or prisoner as within Workmen's Compensation Act, 49 ALR 1381.

Ownership of leased or rented property as constituting business, trade, occupation, etc., within workmen's compensation acts, 50 ALR 1776.

Workmen's compensation: what is casual employment, 60 ALR 1195; 107 ALR 934.

One transporting children to or from school as independent contractor, 66 ALR 724.

Applicability of state workmen's compensation acts to intrastate employee where railroad company is engaged in both interstate and intrastate commerce, 80 ALR 1418.

Workmen's compensation: continuity and duration of employment required by provision of act making its applicability depend on number of persons employed, 81 ALR 1232.

Construction, application, and effect of provisions of workmen's compensation acts that make one's status as employee dependent upon amount of earnings, 87 ALR 958.

Needy persons put to work by municipality or other public body as means of extending aid to them as within protection of Workmen's Compensation Act, 96 ALR 1154; 127 ALR 1483.

Workmen's compensation: employer taking out insurance covering employees not otherwise within act as an election to accept the act, 103 ALR 1523.

Who are "workmen" or "operatives" within workmen's compensation act, 129 ALR 990.

State Workmen's Compensation Act as applicable to motor carriers and their employees engaged in interstate commerce, 133 ALR 956; 148 ALR 873.

Workmen's compensation: what amounts to acceptance or election to come within act by employer as to whom act is not mandatory, 136 ALR 899.

Insurance soliciting agent as employee or independent contractor within Workmen's Compensation Acts, 138 ALR 1122.

Constitutionality of provisions of Workmen's Compensation Acts which are limited to residents of state, 147 ALR 925.

Application for, or award, denial, or acceptance of, compensation under state Workmen's Compensation Act as precluding action under Federal Employers' Liability Act by one engaged in interstate commerce within that act, 6 ALR2d 581.

What constitutes total or permanent disability within the coverage of disability insurance coverage issued to farmer or agricultural worker, 26 ALR3d 714.

Liability of owner or operator of premises for injury to meter reader or similar employee of public service corporation coming to premises in course of duties, 28 ALR3d 1344.

Homeowner's or personal liability insurance as providing coverage for liability under workmen's compensation laws, 41 ALR3d 1306.

Unemployment compensation: trucker as employee or independent contractor, 2 ALR4th 1219.

Workers' compensation: injuries incurred during labor activity, 61 ALR4th 196.

What constitutes "agricultural" or "farm" labor within social-security or unemployment-compensation acts, 60 ALR5th 459.

Application of workers' compensation laws to illegal aliens, 121 ALR5th 523.

34-9-2.1. Exemption of corporate officers; limitation.

(a) A corporate officer or a member of a limited liability company who elects to be exempt from coverage under this chapter shall make such election by giving written certification to the insurer or, if there is no insurer, to the State Board of Workers' Compensation. The right of any corporation or limited liability company to exempt its officers or members from coverage under this chapter is limited as follows:

(1) A corporation shall not be allowed to exempt more than five corporate officers and a limited liability company shall not be allowed to exempt more than five members; and

(2) In order for the written certification of exemption to be in effect, the corporate officer must be identified by name as well as by the office held at the time of certification and the member of the limited liability company must be identified by name; and

(3) Any employer subject to this chapter pursuant to subsection (a) of Code Section 34-9-2 before the filing of any exemptions shall remain subject to this chapter without regard to the number of exemptions filed. However, in the event that there shall be no covered employees once

exemptions are elected, no coverage shall be required unless and until additional employees are employed.

(b) A corporate officer or a member of the limited liability company who has exempted himself or herself by proper certification from coverage under this chapter may at any time revoke such exemption and thereby accept coverage under this chapter by giving certification to such effect in the same manner as provided in subsection (a) of this Code section relative to exemption from coverage.

(c) No certification given pursuant to subsection (a) or (b) of this Code section shall become effective until it is filed with the proper entity. (Code 1933, § 114-201, enacted by Ga. L. 1982, p. 2360, § 2; Code 1981, § 34-9-2.1, enacted by Ga. L. 1982, p. 2360, § 4; Ga. L. 1988, p. 1679, § 1; Ga. L. 1995, p. 642, § 1; Ga. L. 1996, p. 1291, § 3.)

Cross references. — Employees covered under this chapter generally, § 34-9-1.

Editor's notes. — Ga. L. 1995, p. 642,

§ 13, not codified by the General Assembly, provides for severability.

JUDICIAL DECISIONS

Exemptions by corporate officers are ineffective to reduce the employee count for determining applicability of the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., except where the exemptions reduce the employee count to zero. Once an "additional employee" is hired, corporate officers

must be included in the total employee count regardless of whether they are personally exempt from the act. *Hitchcock v. Jack Wiggins, Inc.*, 249 Ga. App. 845, 549 S.E.2d 806 (2001).

Cited in *Chandler v. Hancock Bldrs., Inc.*, 205 Ga. App. 303, 422 S.E.2d 206 (1992).

34-9-2.2. Eligibility of sole proprietor or partner for workers' compensation insurance.

Any sole proprietor or partner of a business whose employees are eligible for benefits under this chapter may elect to be included as an employee under the workers' compensation insurance coverage of such business if he is actively engaged in the operation of the business and if the insurer is notified of his election to be so included. Any such sole proprietor or partner shall, upon such election, be entitled to the employee benefits and be subject to the employee responsibilities prescribed in this chapter. (Code 1981, § 34-9-2.2, enacted by Ga. L. 1984, p. 1218, § 1.)

Law reviews. — For article, "Workers' Compensation," see 53 Mercer L. Rev. 521 (2001).

JUDICIAL DECISIONS

Purpose of Workers' Compensation Act. — The Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., is in derogation of common law. However, because it is highly

remedial in nature, it should be liberally construed with a view of applying the beneficent purposes of the Act, so as to effectuate its humane objectives and its purpose, and to extend them to every class of worker and employee that can fairly be brought within its provisions. *Subsequent Injury Trust Fund v. Lumley Drywall*, 200 Ga. App. 703, 409 S.E.2d 254, cert. denied, 200 Ga. App. 897, 409 S.E.2d 254 (1991).

Reimbursement from Subsequent Injury Trust Fund. — A sole proprietor who elects workers' compensation coverage as an "employee" under O.C.G.A. § 34-9-2.2 is an "employer" for purposes of reimbursement from the Subsequent Injury Trust Fund established by O.C.G.A. § 34-9-350. *Subsequent Injury Trust Fund v. Lumley Drywall*, 200 Ga. App. 703, 409 S.E.2d 254, cert. denied, 200 Ga. App. 897, 409 S.E.2d 254 (1991).

Knowledge of preexisting permanent impairment. — If the evidence shows to the satisfaction of the board that a sole proprietor/employer hired oneself with knowledge of the proprietor's own preexisting permanent impairment, the terms of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) are satisfied. *Subsequent Injury Trust Fund v. Lumley Drywall*, 200 Ga. App. 703, 409 S.E.2d 254, cert. denied, 200 Ga. App. 897, 409 S.E.2d 254 (1991).

No coverage absent premium and notification. — Where there was evidence that the agency which handled the insurance included a sole proprietor as an insured employee as a matter of course, but no premium based on the proprietor's salary was charged, and there was no evidence that the sole proprietor elected to be so insured or notified the insurer of the proprietor's decision, the proprietor was not covered because the proprietor was not an employee. *King v.*

James King Cleaners & Laundry, 199 Ga. App. 796, 405 S.E.2d 909 (1991).

Exempt employer as covered employee of another employer. — An employer in the employer's own business who had exempted oneself from workers' compensation coverage the employer procured for the employer's own employees could be a covered employee of another employer. *Peters v. Kevin Moody Constr.*, 223 Ga. App. 133, 476 S.E.2d 772 (1996).

Employer who expressly exempted oneself from coverage under O.C.G.A. § 34-9-2.2 was barred from making a claim against the employer's own company and the employer could not claim under O.C.G.A. § 34-9-8(a) to be an employee injured while employed by the employer's company in its capacity as a subcontractor. *Greg Fisher, Ltd. v. Samples*, 238 Ga. App. 825, 520 S.E.2d 280 (1999).

In an action for injuries against a principle contractor, because the plaintiff was not a subcontractor of the defendant, the contractor's election to protect oneself under O.C.G.A. § 34-9-2.2 would not be treated as a forfeiture of the employer's common law rights when O.C.G.A. § 34-9-11(a) does not mandate such loss of the right to sue a third party tortfeasor and when O.C.G.A. § 34-9-8 affords the employer no benefits or protection. *Kaplan v. Pulte Home Corp.*, 245 Ga. App. 286, 537 S.E.2d 727 (2000).

Workers' compensation claimant, who elected not to be included in a partnership's workers' compensation coverage under O.C.G.A. § 34-9-2.2, could claim coverage under the workers' compensation policy of an employer of the partnership. *Atlas Constr. Co. v. Pena*, 268 Ga. App. 566, 602 S.E.2d 151 (2004).

Cited in *Sherwin-Williams Co. v. Escudra*, 224 Ga. App. 894, 482 S.E.2d 505 (1997); *Cypress Ins. Co. v. Duncan*, 281 Ga. App. 469, 636 S.E.2d 159 (2006).

34-9-2.3. Election to provide workers' compensation coverage to farm laborers.

Notwithstanding the provisions of subsection (a) of Code Section 34-9-2, relative to the exempt status of individuals employed as farm laborers, an employer of farm laborers may elect to provide workers' compensation coverage to individuals employed as farm laborers by giving written notice to the board in such manner and form as provided by rule of the board. Upon the filing of the notice with the board, the employer of farm laborers

shall be deemed an employer for the purposes of this chapter and each individual employed as a farm laborer shall be deemed an employee for the purposes of this chapter. An employer of farm laborers who has filed a notice pursuant to this Code section shall not discontinue the provision of workers' compensation insurance coverage for individuals employed as farm laborers until the notice filed with the board is revoked in a manner to be specified by rule of the board and written notice is given to each affected employee in a manner to be specified by rule of the board. (Code 1981, § 34-9-2.3, enacted by Ga. L. 1990, p. 293, § 1.)

JUDICIAL DECISIONS

Cited in *Riley v. Taylor Orchards*, 226 Ga. App. 394, 486 S.E.2d 617 (1997).

34-9-2.4. Workers' compensation coverage for persons performing voluntary services for Olympic Games; repealer.

Repealed by Ga. L. 1995, p. 852, § 1, effective December 31, 1997.

Editor's notes. — This Code section was based on Code 1981, § 34-9-2.4, enacted by Ga. L. 1995, p. 852, § 1.

34-9-3. Applicability of chapter to employers and employees — Public employees generally.

Neither any municipal corporation within the state, nor any political subdivision of the state, nor any employee of any such corporation or subdivision shall have the right to reject the provisions of this chapter relative to payment and acceptance of compensation; and Code Section 34-9-7 shall not apply to them. (Ga. L. 1920, p. 167, § 8; Code 1933, § 114-109.)

Law reviews. — For comment on *City of Brunswick v. Edenfield*, 87 Ga. App. 434, 74 S.E.2d 133 (1953), see 15 Ga. B.J. 499 (1953).

JUDICIAL DECISIONS

Constitutionality. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), insofar as it applies to municipal corporations, is not unconstitutional as authorizing municipal corporations to appropriate money for an association for non-charitable purposes. *City of Atlanta v. Pickens*, 176 Ga. 833, 169 S.E. 99 (1933).

This section was not invalid as being in violation of the due process clauses of the state and federal Constitutions, nor did it

deny to the defendant the equal protection of the laws. *City of Macon v. Benson*, 175 Ga. 502, 166 S.E. 26 (1932) (see O.C.G.A. § 34-9-3).

Municipal corporations. — Municipal corporations and employees come under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), irrespective of the number of employees in the service of the corporation. *Carruthers v. City of Hawkinsville*, 46 Ga. App. 607, 168 S.E. 120 (1933); *City of*

Brunswick v. Edenfield, 87 Ga. App. 434, 74 S.E.2d 133 (1953), for comment, see 15 Ga. B.J. 499 (1953).

Under this section, any municipality within the state, as well as the employees of such subdivisions, must operate under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.); they are subject to its provisions involuntarily. *Bartram v. City of Atlanta*, 71 Ga. App. 313, 30 S.E.2d 780 (1944) (see O.C.G.A. § 34-9-3).

This section, relating to the exclusivity of rights and remedies, applied to municipalities, and employees thereof. *Bartram v. City of Atlanta*, 71 Ga. App. 313, 30 S.E.2d 780 (1944) (see O.C.G.A. § 34-9-3).

A municipal corporation may be liable for compensation for injuries or death of employees under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) in a proper case. *City of Brunswick v. Edenfield*, 87 Ga. App. 434, 74 S.E.2d 133 (1953), for comment, see 15 Ga. B.J. 499 (1953).

A municipal corporation is not given the right to accept or reject provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), but is automatically placed in the category of an "employer". *City Council v. Young*, 218 Ga. 346, 127 S.E.2d 904 (1962).

A municipality is an employer for the purposes of workers' compensation and thus liable for benefits to which city employees are entitled. *Cotton States Mut. Ins. Co. v. Smith*, 173 Ga. App. 95, 325 S.E.2d 408 (1984).

Tort recovery from municipality. — A provision that employees of municipal corporations are entitled to compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) for injuries arising out of and in the course of employment, and that they cannot reject the provisions of the law, prevents any recovery at common law or

by statute from the municipal corporation for homicide of an employee resulting from a violation by the employer of any duty owed to the employee arising out of a master and servant relationship. *Carruthers v. City of Hawkinsville*, 46 Ga. App. 607, 168 S.E. 120 (1933).

Since municipalities and their employees are under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) by operation of law rather than acceptance or rejection, rights and liabilities as applied to municipalities and employees thereof are the same as those which apply to employees and employers who come under the provisions of the law by acceptance. *Bartram v. City of Atlanta*, 71 Ga. App. 313, 30 S.E.2d 780 (1944).

Policemen. — Where an insurance company insures a city under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) and the policy expressly covers policemen employed by the city, the salaries of the policemen being taken into consideration in fixing the premium, the policemen, insofar as the insurance company is concerned, are employees of the city and are entitled to compensation under the policy. *Maryland Cas. Co. v. Wells*, 35 Ga. App. 759, 134 S.E. 788 (1926).

Employer's insolvency. — An employer's insolvency provides no defense to its liability for workers' compensation. *Cotton States Mut. Ins. Co. v. Smith*, 173 Ga. App. 95, 325 S.E.2d 408 (1984).

Cited in *Employers Liab. Assurance Corp. v. Henderson*, 37 Ga. App. 238, 139 S.E. 688 (1927); *City Council v. Reynolds*, 50 Ga. App. 482, 178 S.E. 485 (1935); *Petty v. Mayor of College Park*, 63 Ga. App. 455, 11 S.E.2d 246 (1940); *Fortson v. Clarke County*, 97 Ga. App. 410, 103 S.E.2d 597 (1958); *Polk County v. Lincoln Nat'l Life Ins. Co.*, 262 F.2d 486 (5th Cir. 1959); *Yancey v. Green*, 129 Ga. App. 705, 201 S.E.2d 162 (1973).

OPINIONS OF THE ATTORNEY GENERAL

Counties. — A county is a political subdivision of the state. 1958-59 Op. Att'y Gen. p. 404.

Continuation of order requiring hearing and award. — Although the budget bureau may in its discretion alter its policies regard-

ing expenditure control, the Governor's informal 1945 order requiring a hearing and an award by the state board of workers' compensation before any compensation can be paid to employees of the various departments of the state under the workers' com-

pensation law (see O.C.G.A. § 34-9-1 et seq.) continues in force and effect. 1969 Op. Att'y Gen. No. 69-52.

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 155 et seq.

C.J.S. — 99 C.J.S., Workers' Compensation, § 231.

ALR. — Remedy for enforcement of award made under Workmen's Compensation Act in case of injury to public officer or employee, 10 ALR 190.

Right of firemen and policemen to recover under Workmen's Compensation Acts, 81 ALR 478.

Needy persons put to work by municipality or other public body as means of extending aid to them as within protection of Work-

men's Compensation Act, 96 ALR 1154; 127 ALR 1483.

Who are "workmen" or "operatives" within Workmen's Compensation Act, 129 ALR 990.

Schoolteacher as an employee within Workmen's Compensation Acts, 140 ALR 1383.

Liability of urban redevelopment authority or other state or municipal agency or entity for injuries occurring in vacant or abandoned property owned by governmental entity, 7 ALR4th 1129.

34-9-4. Applicability of chapter to employers and employees — Employees of planning commissions.

All planning commissions created pursuant to Ga. L. 1957, p. 420, as amended, relating to the creation of planning commissions by certain political subdivisions, are authorized to provide workers' compensation insurance coverage for their employees. Before any such planning commission can provide any such insurance coverage, it shall adopt an appropriate resolution, at any public meeting of the commission, setting forth the procedure for furnishing and maintaining such insurance coverage. From the date of the adoption of such resolution, the planning commission shall be deemed to be an employer and each of its employees to be an employee within the meaning of this chapter; provided, however, that the planning commission may, by appropriate notice to employees and by proper resolution, elect to withdraw from coverage under this chapter. (Ga. L. 1970, p. 196, § 1; Ga. L. 1975, p. 190, § 1.)

34-9-5. Applicability of chapter to employers and employees — Pilots under contract to Georgia Forestry Commission.

Notwithstanding Code Section 34-9-1 or any other provision of law, this chapter shall not be deemed to apply to any airplane pilots or their assistants flying patrols for the Georgia Forestry Commission or for any county or counties participating in the forest fire protection program, where the flying services were procured by contracts awarded pursuant to bid. The state does not consent to be sued in any respect, whether at common law or otherwise, with respect to such pilots or contractors employing them. However, nothing in this Code section shall be construed as relieving the contractor from any workers' compensation or other

liability which may be owing to such pilot or his beneficiaries under law. (Ga. L. 1957, p. 594, § 1.)

Cross references. — Forest fire prevention and control generally, § 12-6-80 et seq.

RESEARCH REFERENCES

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| <p>ALR. — Workmen's compensation: injury or death due to elements, 25 ALR 146; 40 ALR 400; 46 ALR 1218; 53 ALR 1084; 83 ALR 234.</p> | <p>Workmen's compensation: applicability of, to injuries sustained while flying, 62 ALR 228.</p> |
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34-9-6. Retroactive inclusion of state and departments in definition of “employer”; resumption of payments of awards previously discontinued.

So far as concerns the State of Georgia or any department thereof which has been operating under the terms of this chapter, the state and such departments thereof shall be deemed to have been included in the original Act under the definition of “employer.” Any payments heretofore made under awards of the Industrial Board to state employees are ratified and confirmed and any payments of awards which were being made by the state or any of its departments on or before February 1, 1943, but discontinued because of exclusion of the state and its departments from the definition of “employer” shall be resumed as of the date of discontinuance; and compensable accidents which occurred prior to the passage of this chapter for which awards were not made but for which awards are hereafter made shall be paid by the state or the departments thereof in the same manner as other awards heretofore or hereafter made. (Code 1933, § 114-101.1, enacted by Ga. L. 1943, p. 401, § 2.)

JUDICIAL DECISIONS

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| <p>Constitutionality. — As to the constitutionality of this section, see State Hwy. Dep’t v.</p> | <p>Bass, 197 Ga. 356, 29 S.E.2d 161 (1944) (see O.C.G.A. § 34-9-6).</p> |
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34-9-7. Presumption of applicability of chapter to contracts between employers and employees covered by chapter.

Every contract of service between an employer and an employee covered by this chapter, whether such contract is written, oral, or implied, shall be presumed to have been made subject to this chapter except contracts of service between those employers and employees listed in Code Section 34-9-2. (Ga. L. 1920, p. 167, § 6; Code 1933, § 114-110; Ga. L. 1972, p. 929, § 2.)

JUDICIAL DECISIONS

Editor's notes. — The 1972 amendment to this section, Ga. L. 1972, p. 929, § 2, substantially amended this section to provide for a conclusive presumption of coverage. Hence, cases decided prior thereto should be consulted with care.

Presumption of coverage. — Former Code 1933, §§ 114-110 and 114-111 (see O.C.G.A. §§ 34-9-7 and 34-9-10) create a conclusive presumption of coverage unless otherwise specifically provided in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Fox v. Stanish*, 150 Ga. App. 537, 258 S.E.2d 190 (1979), rev'd on other grounds, 247 Ga. 71, 274 S.E.2d 327 (1981).

Scope of coverage. — The 1972 repeal of a former "opt-out" provision determining what state had jurisdiction over a workers' compensation claim broadens and does not narrow the class of employees who are covered, so that all employees who work or sign a contract of employment in the state are covered regardless of their place of employment. *Guinn v. Conwood Corp.*, 185 Ga. App. 41, 363 S.E.2d 271 (1987), cert. denied, 185 Ga. App. 910, 363 S.E.2d 271 (1988).

Chapter provisions prevail. — The provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) prevail over all agreements not clearly in accord therewith, even in a case of agreement between the employer and employee approved by the board, since not only the employer and employee have a real interest in the principles and policies underlying this legislation, but it is affected with the public interest. *Hartford Accident & Indem. Co. v. Welker*, 75 Ga. App. 594, 44 S.E.2d 160 (1947).

Chapter exacting in provisions relating to rejection. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is far-reaching and liberal in its coverage and protection of employees, but is strict, definite, and exacting in its provisions relating to its rejection. *Hartford Accident & Indem. Co. v. Welker*, 75 Ga. App. 594, 44 S.E.2d 160 (1947).

Coverage while employed outside state. — As to employees who have agreed to be bound by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) by the method prescribed in this section and who have not engaged in any work within this

state, it was essential that the contract of employment be executed within this state, in order that such employees may receive compensation for injuries sustained while employed outside of the state. *Slaten v. Travelers Ins. Co.*, 197 Ga. 1, 28 S.E.2d 280, answer conformed to, 70 Ga. App. 665, 29 S.E.2d 98 (1943), cert. dismissed, 197 Ga. 856, 30 S.E.2d 822 (1944); *Fidelity & Cas. Co. v. Swain*, 90 Ga. App. 615, 83 S.E.2d 345 (1954) (see O.C.G.A. § 34-9-7).

Jurisdiction. — The State Board of Workers' Compensation had jurisdiction to award compensation in a case in which a Georgia employer employed a Georgia resident in Ohio, through an agent of the Georgia employer, to drive a truck loaded with freight from Ohio to Georgia, and the employee was killed in the course of employment in Kentucky while en route to Georgia. *Martin v. Bituminous Cas. Corp.*, 215 Ga. 476, 111 S.E.2d 53 (1959).

Under this section, the state acquired jurisdiction only by act of the parties in coming within the state to execute the contract of employment; in the absence of making of a contract within the state, the parties thereto could not be subjected to the terms of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Slaten v. Travelers Ins. Co.*, 197 Ga. 1, 28 S.E.2d 280, answer conformed to, 70 Ga. App. 665, 29 S.E.2d 98 (1943), cert. dismissed, 197 Ga. 856, 30 S.E.2d 822 (1944) (see O.C.G.A. § 34-9-7).

The state acquires jurisdiction only by the act of parties in coming within this state to execute a contract of employment; in the absence of making of a contract within the state, where no work thereunder in the state is required, the parties thereto could not be subjected to the terms of the law of this state, for to do so would be to deny to them due process of law, as guaranteed by the state and federal Constitutions. *Cramer v. American Mut. Liab. Ins. Co.*, 77 Ga. App. 236, 47 S.E.2d 925 (1948).

Employee can invoke jurisdiction for workers' compensation either: (1) where the injury occurred; (2) where the employment was principally located; or (3) where the contract of employment was entered. *Guinn v. Conwood Corp.*, 185 Ga. App. 41, 363 S.E.2d 271 (1987), cert. denied, 185 Ga. App. 910, 363 S.E.2d 271 (1988).

Agreement to be bound by foreign law. —

An agreement by an employee that all claims for injuries arising out of and in the course of employment would be governed by workers' compensation laws of Illinois, where the employee was never located in Illinois as an employee, and where the employee's territory as an employee did not include any part of Illinois, but in the main part was located within this state, would not operate to divest the Georgia board of jurisdiction, where the employee's injury was in this state in the course of the employee's employment. *Hartford Accident & Indem. Co. v. Welker*, 75 Ga. App. 594, 44 S.E.2d 160 (1947).

An agreement providing that the law of Illinois would apply to an employment contract, where Illinois did not at the time

provide protection similar in principle to that provided in this state, would not be upheld by the courts of this state, nor would such an agreement be upheld if it was intended to relate to employment wholly or in the main in this state and entirely outside of Illinois. *Hartford Accident & Indem. Co. v. Welker*, 75 Ga. App. 594, 44 S.E.2d 160 (1947).

Cited in *Georgia Power & Light Co. v. Patterson*, 46 Ga. App. 7, 166 S.E. 255 (1932); *Employers Liab. Assurance Corp. v. Hunter*, 184 Ga. 196, 190 S.E. 598 (1937); *Grice v. United States Fid. & Guar. Co.*, 187 Ga. 259, 200 S.E. 700 (1938); *Slaten v. Travelers Ins. Co.*, 70 Ga. App. 665, 29 S.E.2d 98 (1944); *Johnson v. Great S. Trucking Co.*, 101 Ga. App. 472, 114 S.E.2d 209 (1960).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 1.

C.J.S. — 100 C.J.S., Workers' Compensation, §§ 765, 782 et seq.

ALR. — Workmen's Compensation Act as affected by intention to evade or avoid the requirements of that act, 107 ALR 855.

Jurisdiction to consider, and grounds of, attack upon employee's acceptance or rejection of Workmen's Compensation Act, 137 ALR 747.

Applicability and effect of Workmen's Compensation Act in cases of injury to minors, 142 ALR 1018.

34-9-8. Liability of principal contractor or subcontractor for employee injuries.

(a) A principal, intermediate, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of his subcontractors engaged upon the subject matter of the contract to the same extent as the immediate employer.

(b) Any principal, intermediate, or subcontractor who shall pay compensation under subsection (a) of this Code section may recover the amount paid from any person who, independently of this Code section, would have been liable to pay compensation to the injured employee or from any intermediate contractor.

(c) Every claim for compensation under this Code section shall be in the first instance presented to and instituted against the immediate employer, but such proceedings shall not constitute a waiver of the employee's right to recover compensation under this chapter from the principal or intermediate contractor. If such immediate employer is not subject to this chapter by reason of having less than the required number of employees as prescribed in subsection (a) of Code Section 34-9-2 and Code Section 34-9-124 does not apply, then such claim may be directly presented to and instituted against the intermediate or principal contractor. However, the collection of

full compensation from one employer shall bar recovery by the employee against any others, and the employee shall not collect a total compensation in excess of the amount for which any of the contractors is liable.

(d) This Code section shall apply only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or which are otherwise under his control or management. (Ga. L. 1920, p. 167, § 20; Code 1933, § 114-112; Ga. L. 1969, p. 671, § 1.)

Cross references. — Liability of employer for negligence of contractor generally, § 51-2-5.

Law reviews. — For article surveying developments in Georgia workers' compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981). For annual survey of insurance law, see 35 Mercer L. Rev. 177 (1983). For article, "New Restrictions on the Statutory Employer Rule: Workers' Compensation Benefits and Immunity Curtailed," see 21 Ga. St. B.J. 94 (1985). For article, "Worker's Compensation and the Statutory Employer," see 27 Ga. St. B.J. 24 (1990). For article, "As to Leased Employment and Workers' Compensation Liabil-

ity," see 28 Ga. L. Rev. 683 (1994). For article, "Workers' Compensation," see 53 Mercer L. Rev. 521 (2001). For survey article on construction law for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 85 (2003). For annual survey of workers' compensation law, see 57 Mercer L. Rev. 419 (2005).

For note, "Workmen's Compensation: Who Is the Employer?," see 2 Mercer L. Rev. 390 (1951).

For comment on Churchwell Bros. Constr. Co. v. Archie R. Briggs Constr. Co., 89 Ga. App. 550, 80 S.E.2d 212 (1954), see 16 Ga. B.J. 465 (1954).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION LIABILITY

1. IN GENERAL
2. TORT LIABILITY

ILLUSTRATIVE EXAMPLES PRACTICE AND PROCEDURE

General Consideration

Purpose of section. — The purpose of O.C.G.A. § 34-9-8 is to ensure that employees in construction and other industries are covered by workers' compensation; in order to do so, the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) places an increased burden, in the form of potential liability for workers' compensation benefits, on the statutory employer, thus encouraging the statutory employer to require subcontractors to carry workers' compensation insurance. Wright Assocs. v. Rieder, 247 Ga. 496, 277 S.E.2d 41 (1981); Franks v. Avila, 200 Ga. App. 733, 409 S.E.2d 564 (1991).

Legislative intent. — It was evidently the

intention of the legislature that claims should be filed against some party; simply to set out that one has been injured and that somebody owes compensation is not sufficient. McCormick v. Kitchens, 59 Ga. App. 376, 1 S.E.2d 57 (1939).

"Employer" construed. — Under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), the word "employer" means a principal, an intermediate, or a subcontractor. Georgia Power Co. v. Diamond, 130 Ga. App. 268, 202 S.E.2d 704 (1973).

"Statutory employer" of subcontractor's employee. — By O.C.G.A. § 34-9-8, the principal or intermediate contractor is made the

"statutory employer" of the subcontractor's employee. *Wright Assocs. v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981).

The principal contractor is the statutory employer of the employee of a subcontractor who is an independent contractor. *Haygood v. Home Transp. Co.*, 149 Ga. App. 229, 253 S.E.2d 805, aff'd, 244 Ga. 165, 259 S.E.2d 429 (1979); *Wright Assocs. v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981).

A contractor two levels "up the ladder", not in contractual privity with the worker's immediate employer, was the worker's statutory employer and was entitled to statutory immunity. *England v. Beers Constr. Co.*, 224 Ga. App. 44, 479 S.E.2d 420 (1996).

Liability of individual employees of "statutory employer." — In an action for breach of duty to manage or supervise a construction project, individual employees of a general contractor are not entitled to the immunity from liability granted to their employer as the "statutory employer". *Paz v. Marvin M. Black Co.*, 200 Ga. App. 607, 408 S.E.2d 807, cert. denied, 200 Ga. App. 896, 408 S.E.2d 807 (1991).

Who are "contractors." — A mere contract for the sale of goods does not make a buyer, or a seller, or both, a "contractor" within the meaning of this section, but when the contract to sell was accompanied by an undertaking by either party to render substantial services in connection with the goods sold, that party was a "contractor." *Evans v. Hawkins*, 114 Ga. App. 120, 150 S.E.2d 324 (1966) (see O.C.G.A. § 34-9-8).

In order to make a party to the contract for the sale of goods a "contractor", as used in O.C.G.A. § 34-9-8, the contract to sell must be accompanied by an undertaking by either party to render substantial services in connection with the goods sold. The fact that an injured employee's employer fabricated the parts sold on the construction site does not, in and of itself, make the employer a subcontractor of the contractor. *Gray Bldg. Sys. v. Trine*, 260 Ga. 252, 391 S.E.2d 764 (1990).

Who are "principal contractors." — The "enterprise" theory whereby an "owner" who is not also a "contractor" may nevertheless be held liable for workers' compensation benefits and immune from tort liability is inconsistent with the concept of "principal contractor" in O.C.G.A. § 34-9-8. A mere

owner to whom the contractual obligation of performance is owed and from whom no contractual obligation of performance is due is not a "principal contractor" under that section. *Yoho v. Ringier of Am., Inc.*, 263 Ga. 338, 434 S.E.2d 57 (1993).

In a personal injury action brought against a public utility by an independent contractor's employee who was injured while doing work at the utility during a shutdown, the genuine issue of material fact as to whether the utility was acting as a contractor at the time the employee was injured precluded summary judgment on the grounds the utility was the employee's statutory employer. *Guillman v. Georgia Power Co.*, 211 Ga. App. 690, 440 S.E.2d 83 (1994).

Coverage. — Since secondary liability imposed under this section was predicated upon the existence of a principal contractor-subcontractor relationship, that section was not intended to cover all employers who let out work on contract, but was limited to those who contract to perform certain work, such as the furnishing of goods and services, for another, and then sublet in whole or in part such work. *Evans v. Hawkins*, 114 Ga. App. 120, 150 S.E.2d 324 (1966); *American Mut. Liab. Ins. Co. v. Fuller*, 123 Ga. App. 585, 181 S.E.2d 876 (1971) (see O.C.G.A. § 34-9-8).

Other rights excluded. — The rights and remedies granted under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) to an employee exclude all other rights and remedies of such employee, the employee's personal representative, parents, dependents, or next-of-kin, or otherwise, on account of injury, loss of service, or death, other than the employee's right to bring an action against a third-party tort-feasor. *Haygood v. Home Transp. Co.*, 149 Ga. App. 229, 253 S.E.2d 805, aff'd, 244 Ga. 165, 259 S.E.2d 429 (1979).

Applicability to owners. — O.C.G.A. § 34-9-8 applies to contractors and not owners, unless the owner also serves as a contractor. *Modlin v. Black & Decker Mfg. Co.*, 170 Ga. App. 477, 317 S.E.2d 255 (1984); *Rickets v. Tri-State Sys.*, 177 Ga. App. 509, 339 S.E.2d 732 (1986).

Owners or entities merely in possession or control of the premises would not be subject to workers' compensation liability as statutory employers, except in the isolated situa-

General Consideration (Cont'd)

tion where that party also serves as a contractor for yet another entity and hires another contractor to perform the work on the premises. *R.E. Thomas Erectors, Inc. v. Brunswick Pulp & Paper Co.*, 171 Ga. App. 903, 321 S.E.2d 412 (1984).

The law does not grant tort immunity to owners, who are not contractors, even though they are in control of premises and are actively involved in the enterprise in which an employee was injured. *Dye v. Trussway, Inc.*, 211 Ga. App. 139, 438 S.E.2d 194 (1993).

"Premises" construed. — The word "premises" as used in O.C.G.A. § 34-9-8 does not include the premises of a shipper's customer to which goods are delivered. *Gramling v. Sunshine Biscuits, Inc.*, 162 Ga. App. 863, 292 S.E.2d 539 (1982).

Premises where section applicable. — O.C.G.A. § 34-9-8 is applicable only where an injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work, or which are otherwise under the principal's control or management. *Wright Assocs. v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981).

Cited in United States Fid. & Guar. Co. v. Corbett, 31 Ga. App. 7, 119 S.E. 921 (1923); *Aetna Life Ins. Co. v. Palmer*, 33 Ga. App. 522, 126 S.E. 862 (1925); *Davis v. Menefee*, 34 Ga. App. 813, 131 S.E. 527 (1926); *Ocean Accident & Guarantee Corp. v. Council*, 35 Ga. App. 632, 134 S.E. 331 (1926); *Zurich Gen. Accident & Liab. Ins. Co. v. Lee*, 36 Ga. App. 248, 136 S.E. 173 (1926); *Irving v. Home Accident Ins. Co.*, 36 Ga. App. 551, 137 S.E. 105 (1927); *Ocean Accident & Guarantee Corp. v. Wilson*, 36 Ga. App. 784, 138 S.E. 246 (1927); *Maryland Cas. Co. v. Radney*, 37 Ga. App. 286, 139 S.E. 832 (1927); *Employers Liab. Assurance Corp. v. Treadwell*, 37 Ga. App. 759, 142 S.E. 182 (1928); *Cooper v. Dixie Constr. Co.*, 45 Ga. App. 420, 165 S.E. 152 (1932); *Liberty Mut. Ins. Co. v. Ragan*, 191 Ga. 811, 14 S.E.2d 88 (1941); *Blackshear v. Liberty Mut. Ins. Co.*, 69 Ga. App. 790, 26 S.E.2d 793 (1943); *Blair v. Smith*, 201 Ga. 747, 41 S.E.2d 133 (1947); *Liberty Mut. Ins. Co. v. Fricks*, 81 Ga. App. 727, 59 S.E.2d 671 (1950); *Employer's Liab. Assurance Corp. v. Smith*, 86 Ga. App. 230,

71 S.E.2d 289 (1952); *Smith v. Maryland Cas. Co.*, 93 Ga. App. 222, 91 S.E.2d 188 (1956); *Chevrolet Div., GMC v. Dempsey*, 212 Ga. 560, 93 S.E.2d 703 (1956); *Hale v. Kendrick*, 95 Ga. App. 348, 98 S.E.2d 65 (1957); *Mosley v. George A. Fuller Co.*, 250 F.2d 686 (5th Cir. 1957); *Benefield v. McDonough Constr. Co.*, 106 Ga. App. 194, 126 S.E.2d 704 (1962); *Corbitt v. McClurd*, 107 Ga. App. 113, 129 S.E.2d 389 (1962); *American Mut. Liab. Ins. Co. v. Rozier*, 117 Ga. App. 178, 160 S.E.2d 236 (1968); *Bli Constr. Co. v. Knowles*, 123 Ga. App. 588, 181 S.E.2d 879 (1971); *Lyons v. Employers Mut. Liab. Ins. Co.*, 127 Ga. App. 268, 193 S.E.2d 244 (1972); *Simpkins v. Unigard Mut. Ins. Co.*, 130 Ga. App. 535, 203 S.E.2d 742 (1974); *Greyhound Van Lines v. Collins*, 132 Ga. App. 806, 209 S.E.2d 250 (1974); *Nationwide Mut. Ins. Co. v. Davis*, 146 Ga. App. 68, 245 S.E.2d 322 (1978); *Arthur Pew Constr. Co. v. Bryan Constr. Co.*, 148 Ga. App. 114, 251 S.E.2d 105 (1978); *Goolsby v. Wilson*, 150 Ga. App. 611, 258 S.E.2d 216 (1979); *Haygood v. Home Transp. Co.*, 244 Ga. 165, 259 S.E.2d 429 (1979); *Farmer v. Ryder Truck Lines*, 245 Ga. 734, 266 S.E.2d 922 (1980); *Mimms v. Sisk Decorating Co.*, 156 Ga. App. 572, 275 S.E.2d 148 (1980); *Cleckley v. Batson-Cook Co.*, 160 Ga. App. 831, 288 S.E.2d 573 (1982); *Long v. Marvin M. Black Co.*, 163 Ga. App. 633, 294 S.E.2d 641 (1982); *Long v. Marvin M. Black Co.*, 250 Ga. 621, 300 S.E.2d 150 (1983); *Manning v. Georgia Power Co.*, 252 Ga. 404, 314 S.E.2d 432 (1984); *Seckinger & Co. v. Foreman*, 252 Ga. 540, 314 S.E.2d 891 (1984); *Howell v. Parker*, 171 Ga. App. 101, 318 S.E.2d 811 (1984); *Massey v. United States*, 733 F.2d 760 (11th Cir. 1984); *McCorkle v. United States*, 737 F.2d 957 (11th Cir. 1984); *International Indem. Co. v. White*, 174 Ga. App. 773, 331 S.E.2d 37 (1985); *Gunn v. Sims Crane Serv., Inc.*, 182 Ga. App. 24, 354 S.E.2d 653 (1987); *Carver v. Jasper Constr. Co.*, 183 Ga. App. 485, 359 S.E.2d 183 (1987); *Capitol Fish Co. v. Tanner*, 192 Ga. App. 251, 384 S.E.2d 394 (1989); *Brown v. Advantage Eng'g, Inc.*, 732 F. Supp. 1163 (N.D. Ga. 1990); *Murph v. Maynard Fixturecraft, Inc.*, 252 Ga. App. 483, 555 S.E.2d 845 (2001); *C. Brown Trucking, Inc. v. Rushing*, 265 Ga. App. 676, 595 S.E.2d 346 (2004).

Liability

1. In General

Liability of principal contractor. — In order to recover under this section, it was not necessary that the principal contractor have control, or right of control, of the time, manner, and method of performance of either the immediate employer or the claimant. *American Mut. Liab. Ins. Co. v. Fuller*, 123 Ga. App. 585, 181 S.E.2d 876 (1971) (see O.C.G.A. § 34-9-8).

Pursuant to O.C.G.A. § 34-9-8 (a), a general contractor is liable for payment of workers' compensation benefits to the employee of a subcontractor to the same extent as the subcontractor. *Franks v. Avila*, 200 Ga. App. 733, 409 S.E.2d 564 (1991).

Liability where immediate employer unable to pay award. — Where the immediate employer was insolvent and unable to pay an award, and a return of nulla bona was entered to fi. fa. which was issued against such employer, the claimant receiving no sums to which the claimant was entitled, the intermediate contractor was liable for injuries sustained by the claimant while working on work which had been subcontracted to the immediate employer. *Churchwell Bros. Constr. Co. v. Archie R. Briggs Constr. Co.*, 89 Ga. App. 550, 80 S.E.2d 212 (1954), for comment, see 16 Ga. B.J. 465 (1954).

Liability of property owner. — A manufacturer which had a contract with an employer to repair and replace tires on the manufacturer's equipment was merely the "owner" of the property and was not the "statutory employer" of the employee dispatched to the manufacturer's plant to change a flat tire, who was injured when the new tire exploded, and, therefore, did not have immunity from tort liability. *McCrimmons v. Cornell-Young Co.*, 171 Ga. App. 561, 320 S.E.2d 398 (1984).

Liability of general liability insurer. — An injured employee of a subcontractor could not recover a Workers' Compensation Board award against the general liability insurance policy of a general contractor (neither contractor having obtained workers' compensation insurance) where the policy excluded "any obligation which the insured . . . may be held liable under any workers' compensation . . . law". *Williams v. Lumbermens*

Mut. Cas. Co., 164 Ga. App. 435, 297 S.E.2d 345 (1982).

Subrogation rights under uninsured motorist coverage. — Payments made to an insured under uninsured motorist coverage of a liability insurance policy are not payments by one liable to pay damages to the injured party on account of the occurrence causing the injury, and thus do not come within the provision of this section giving an employer or its compensation carrier subrogation rights against one liable to pay damages on account of the injury or death of the employee. *State Farm Mut. Auto. Ins. Co. v. Board of Regents*, 266 Ga. 310, 174 S.E.2d 920 (1970) (see O.C.G.A. § 34-9-8).

Liability of special employer. — Irrespective of this section, a special, as opposed to a general, employer would be liable to a workers' compensation claimant without the claimant being required to first institute a claim against the general employer. *St. Paul-Mercury Indem. Co. v. Alexander*, 84 Ga. App. 207, 65 S.E.2d 694 (1951) (see O.C.G.A. § 34-9-8).

Employer who expressly exempted oneself from coverage under O.C.G.A. § 34-9-2.2 was barred from making a claim against the employer's own company and the employer could not claim under O.C.G.A. § 34-9-8 (a) to be an employee injured while employed by the company in its capacity as a subcontractor. *Greg Fisher, Ltd. v. Samples*, 238 Ga. App. 825, 520 S.E.2d 280 (1999).

2. Tort Liability

Principal contractor entitled to tort immunity. — An employee of a subcontractor may not collect workers' compensation from a general contractor under this section, and then sue the general contractor in tort based on the same injury for which workers' compensation payments were received. *Clements v. Georgia Power Co.*, 148 Ga. App. 745, 252 S.E.2d 635 (1979) (see O.C.G.A. § 34-9-8).

The collection of compensation from a statutory employer bars recovery against any others, including the "principal". *Haygood v. Home Transp. Co.*, 149 Ga. App. 229, 253 S.E.2d 805, aff'd, 244 Ga. 165, 259 S.E.2d 429 (1979).

As a statutory employer liable to pay workers' compensation benefits under O.C.G.A. § 34-9-8, a principal contractor should re-

Liability (Cont'd)**2. Tort Liability (Cont'd)**

ceive the correlative benefit of tort immunity. *Wright Assocs. v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981).

An employee of an independent subcontractor may not recover in tort against the principal contractor. *Wright Assocs. v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981).

Under O.C.G.A. §§ 34-9-8 and 34-9-11, a statutory employer is immune to any action in negligence by an employee of a subcontractor or an independent contractor who has already paid the employee workers' compensation benefits. *Hensel Phelps Constr. Co. v. Johnson*, 161 Ga. App. 631, 295 S.E.2d 843, rev'd on other grounds, 250 Ga. 83, 295 S.E.2d 841 (1982).

Where an employee of a subcontractor who fell from a ladder at the employee's place of work recovers workers' compensation benefits from the employee's immediate employer, the subcontractor, the prime contractor as a statutory employer is not liable to pay workers' compensation benefits under O.C.G.A. § 34-9-8 and the prime contractor should receive the correlated benefit of tort immunity under O.C.G.A. § 34-9-11. *Kitchens v. Winter Co. Bldrs.*, 161 Ga. App. 701, 289 S.E.2d 807 (1982).

The widow of the employee of a subcontractor could not bring a wrongful death action against the general contractor that was liable to pay workers' compensation benefits as the statutory employer. *Warden v. Hoar Constr. Co.*, 269 Ga. 715, 507 S.E.2d 428 (1998).

An injured worker could not sue a statutory employer in tort after that employer successfully defeated a claim for workers' compensation benefits based upon the worker's failure to follow proper procedures. *Maguire v. Dominion Dev. Corp.*, 241 Ga. App. 715, 527 S.E.2d 575 (1999).

General contractor was considered a statutory employer under O.C.G.A. § 34-9-8(a) and therefore immune from liability in a subcontractor's action against it seeking recovery of personal injuries sustained in a work accident; accordingly, summary judgment pursuant to O.C.G.A. § 9-11-56 was properly granted to the contractor. *Reynolds v. McKenzie-Perry Homes, Inc.*, 261 Ga. App. 379, 582 S.E.2d 534 (2003).

In a personal injury action filed by a subcontractor's employee against the general contractor, the trial court properly concluded that the general contractor was a principal contractor that hired the subcontractor to aid it in the completion of its contract to supply wood chips to a paper company; accordingly, the general contractor was a statutory employer entitled to tort immunity in the employee's suit. *Patterson v. Bristol Timber Co.*, 286 Ga. App. 423, 649 S.E.2d 795 (2007).

Company as employer and contractor immune. — Regardless of fact that decedent's employer was independent contractor and death occurred in performance of independent contract, evidence established defendant was both a principal contractor and decedent's statutory employer under O.C.G.A. § 34-9-8. Thus, defendant was entitled to tort immunity pursuant to O.C.G.A. § 34-9-11. *International Leadburning Co. v. Forrister*, 213 Ga. App. 558, 445 S.E.2d 546 (1994).

Only secondarily liable entity has immunity. — Only an entity who is secondarily liable for workers' compensation benefits under O.C.G.A. § 34-9-8 (a) is consequently entitled to tort immunity under O.C.G.A. § 34-9-11. *Yoho v. Ringier of Am., Inc.*, 263 Ga. 338, 434 S.E.2d 57 (1993); *Southern Ry. v. Hand*, 216 Ga. App. 370, 454 S.E.2d 217 (1995).

Owner who is merely in possession or control. — An owner who is merely in possession or control of the premises would not be subject to workers' compensation liability as a statutory employer and would not be immune from tort liability. *Yoho v. Ringier of Am., Inc.*, 263 Ga. 338, 434 S.E.2d 57 (1993).

Voluntary contribution to tort settlement by employer. — Where a statutory employer enjoyed tort immunity at the time it contributed to a tort settlement, its payment constituted a voluntary payment, and the employer was not entitled to credit for funds it contributed to the settlement. *Travelers Ins. Co. v. McNabb*, 201 Ga. App. 297, 410 S.E.2d 788, cert. denied, 201 Ga. App. 904, 410 S.E.2d 788 (1991), overruled on other grounds, *Yoho v. Ringier of Am., Inc.*, 263 Ga. 338, 434 S.E.2d 57 (1993).

General contractor and subcontractors, all of whom owed a contractual obligation of performance, were statutory employers po-

tentially liable for workers' compensation benefits and immune from tort liability. *Redd v. Stanfield*, 217 Ga. App. 573, 458 S.E.2d 394 (1995).

Subcontractor's liability to another subcontractor's employee. — A subcontractor does not enjoy tort immunity from suit by the injured employee of a different independent subcontractor. *Cleveland Elec. Constructors, Inc. v. Craven*, 167 Ga. App. 274, 306 S.E.2d 364 (1983).

Joint tortfeasor subject to contribution. — Once a contractor has been determined to be a statutory employer, such an employer cannot be a joint tortfeasor subject to contribution. *Modlin v. Swift Textiles, Inc.*, 180 Ga. App. 726, 350 S.E.2d 273 (1986).

Right to indemnification. — The quid pro quo for the statutory employer's potential liability is immunity from tort liability, and the fact that the statutory employer has a right to indemnification, statutory or contractual, does not strip the employer of tort immunity. *Wright Assocs. v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981).

When defense of tort immunity to be raised. — O.C.G.A. § 9-11-8(c) does not require that the statutory employer's defense of O.C.G.A. §§ 34-9-8 and 34-9-11 be affirmatively raised in the defendant's answer. *Wright Assocs. v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981).

"Third-party tort-feasor" construed. — A products liability claim pursuant to O.C.G.A. § 51-1-11, against a general contractor in its capacity as designer and manufacturer of a new paper-making process, as opposed to its capacity as statutory employer, is not an action against a "third-party tort-feasor" which avoids the immunity provided under O.C.G.A. § 34-9-11. *Porter v. Beloit Corp.*, 194 Ga. App. 591, 391 S.E.2d 430 (1990).

Illustrative Examples

Owner of premises not "contractor." — Since an owner of premises on which a temporary worker assigned to the owner was injured in an on-the-job accident did not owe any contractual duty of performance to another, the owner was not a "contractor" secondarily liable for workers' compensation benefits, and thus was not entitled to tort immunity. *Dye v. Trussway, Inc.*, 211 Ga. App. 139, 438 S.E.2d 194 (1993).

An "owner" does not attain "contractor"

status under O.C.G.A. § 34-9-8 by its active involvement in the enterprise, but only in the isolated situation where it also serves as a contractor for yet another entity and hires another contractor to perform the work on the premises. *Southern Ry. v. Hand*, 216 Ga. App. 370, 454 S.E.2d 217 (1995).

Partner of subcontractor not statutory employee of intermediate contractor. — Administrative law judge erred in finding that a workers' compensation claimant, who was a partner of a partnership hired by an intermediate contractor as a subcontractor, was a statutory employee of an intermediate contractor under O.C.G.A. § 34-9-8(a) as the claimant was a principal, rather than an employee, of the subcontractor partnership. *Atlas Constr. Co. v. Pena*, 268 Ga. App. 566, 602 S.E.2d 151 (2004).

Injury at subcontractor's shop. — A general contractor was not the statutory employer of a subcontractor's employee who was injured at the subcontractor's shop and not the actual project site. *Beers Constr. Co. v. Doyle*, 230 Ga. App. 593, 496 S.E.2d 921 (1998).

Finding of contractor and subcontractor relationship upheld. — Where the defendant contracted to furnish pulpwood to a company, and employed the claimant's immediate employer to cut pulpwood from a tract of land owned by the defendant and to deliver such pulpwood to the company's plant, the evidence authorized a finding that the defendant was a principal contractor and the claimant's employer, the subcontractor, within the meaning of this section. *Evans v. Hawkins*, 114 Ga. App. 120, 150 S.E.2d 324 (1966) (see O.C.G.A. § 34-9-8).

Borrowed servant rule applied. — At the time of plaintiff's injuries, allegedly due to the negligence of employees loaned to plaintiff's employer, the loaned employees were under the exclusive control and direction of plaintiff's, employer; therefore, the lending employer was entitled to tort immunity. *Berry v. Davis Feed & Seed, Inc.*, 237 Ga. App. 768, 516 S.E.2d 812 (1999).

Sole proprietors. — A sole proprietor of a business which operated as a subcontractor could not be considered an "employee" of the subcontractor because there was no evidence that the proprietor notified the proprietor's agent or insurer of the election to be treated as an employee under the work-

Illustrative Examples (Cont'd)

ers' compensation coverage on the business. *Sherwin-Williams Co. v. Escuadra*, 224 Ga. App. 894, 482 S.E.2d 505 (1997).

In an action for injuries against a principal contractor, because the plaintiff was not a subcontractor of the defendant, the contractor's election to protect oneself under O.C.G.A. § 34-9-2.2 would not be treated as a forfeiture of the contractor's common law rights when O.C.G.A. § 34-9-11(a) does not mandate such loss of the right to sue a third party tortfeasor and when O.C.G.A. § 34-9-8 affords plaintiff no benefits or protection. *Kaplan v. Pulte Home Corp.*, 245 Ga. App. 286, 537 S.E.2d 727 (2000).

Highways as "premises." — A principal contractor (supply company) had the use and control of the highways for the purpose of the contract and, to the extent necessary for the performance of a hauling contract, the highways were "premises" on which the principal contractor had undertaken to execute work. *American Mut. Liab. Ins. Co. v. Fuller*, 123 Ga. App. 585, 181 S.E.2d 876 (1971).

City subcontracting sewage system. — A city which subcontracted the construction of a sewage system met the definition of a "principal contractor" under this section, and was therefore liable for compensation to any employee injured in the employ of the subcontractor. *Aetna Cas. & Sur. Co. v. Barber*, 128 Ga. App. 894, 198 S.E.2d 352 (1973) (see O.C.G.A. § 34-9-8).

Chapter held exclusive remedy. — Where a power company, through its project superintendent, had the right to control the time, manner, and method of executing work, a contract between a power company and a contractor created a master-servant relationship, and the employee of such contractor, which was itself a servant of the power company, was, under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), an employee of the power company, whose exclusive remedy was before the state board of workers' compensation. *Blackwell v. Taylor*, 497 F. Supp. 351 (M.D. Ga. 1980).

Owner of premises not statutory employer of vending machine operator. — Where the appellant entered into a contract with the appellee's employer, permitting the latter to place its vending machines on the appel-

lant's premises and stock them with food snacks and similar items, this contract was not a part of the business in which the appellant was engaged; thus, the appellee's employer was not a "subcontractor" of any essential part of that enterprise, and the appellant was not a statutory employer of the appellee in its business activity, and consequently was not insulated from tort suit by the fact that the appellee received compensation from the employer. *Western Elec. Co. v. Capes*, 164 Ga. App. 353, 296 S.E.2d 381 (1982), cert. vacated, 250 Ga. 890, 302 S.E.2d 108 (1983).

Employee of owner-operator could recover benefits from the statutory employer. — Because the workers' compensation exclusion for owner-operators was clearly stated in O.C.G.A. § 34-9-1(2), with no mention of the employees of such owner-operators, the employee of the owner-operator could recover benefits from the statutory employer. *C. Brown Trucking, Inc. v. Rushing*, 265 Ga. App. 676, 595 S.E.2d 346 (2004).

Shipper not statutory employer of carrier's employee. — The relationship between shipper and carrier did not afford the shipper the status of statutory employer for the purposes of tort immunity from action by the carrier's employee for injury sustained while unloading a trailer upon delivery to the shipper's customer. *Gramling v. Sunshine Biscuits, Inc.*, 162 Ga. App. 863, 292 S.E.2d 539 (1982).

Common carrier was statutory employer. — State board of workers' compensation did not err in ruling that the motor common carrier was the employee's statutory employer because common carriers were not explicitly exempted from providing coverage to leased-operators. *C. Brown Trucking, Inc. v. Rushing*, 265 Ga. App. 676, 595 S.E.2d 346 (2004).

Affirmative showing of total of employees by statutory employer. — A statutory employer under O.C.G.A. § 34-9-8 is by law subject to the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., and is required by law to comply with its requirements and the number of employees engaged by a statutory employer need not be affirmatively shown in order for such employer to take advantage of tort immunity offered by Act. *Hensel Phelps Constr. Co. v. Johnson*, 161 Ga. App. 631,

295 S.E.2d 843, (on motion for rehearing), rev'd on other grounds, 250 Ga. 83, 295 S.E.2d 841 (1982).

Installation of gas mains by natural gas supplier. — Where a subcontractor company is under contract with a principal company to furnish labor and materials for the installation of gas mains, and the principal is in the business of supplying natural gas, the principal is a statutory employer. *Williams v. Atlanta Gas Light Co.*, 168 Ga. App. 208, 308 S.E.2d 553 (1983).

Cement plant operator statutory employer of self-employed mechanic. — Cement plant operator was statutory employer of self-employed mechanic who was called to correct an obstruction in a cement silo where operator supervised the project and mechanic was injured while rendering substantial service in connection with operator's manufacturing equipment. *Fowler-Flemister Concrete, Inc. v. Sumner*, 209 Ga. App. 312, 433 S.E.2d 329 (1993).

Power company responsibility of contracting for maintenance. — Power company that had the responsibility of contracting for the performance of maintenance work at a plant was the statutory employer of an employee of the maintenance subcontractor and, thus, was entitled to immunity from the employee's tort claims. *Holton v. Georgia Power Co.*, 228 Ga. App. 135, 491 S.E.2d 207 (1997).

Seller and cutter of wood not statutory employers. — Two companies were not statutory employers under O.C.G.A. § 34-9-8 of a truck driver who was injured while hauling lumber to a customer's mill; the companies, one of which sold the wood to the customer and the other of which cut the wood and had hired the trucking company to haul it, did not have control over the customer's premises. *Axson Timber Co. v. Wilson*, 286 Ga. App. 482, 649 S.E.2d 609 (2007).

Minimum employee requirement prior to liability. — To sustain a workers' compensation award entered against a principal contractor in favor of an employee of a subcontractor as permitted by O.C.G.A. § 34-9-8, the principal contractor must have the minimal number of employees required under O.C.G.A. § 34-9-2. *Bradshaw v. Glass*, 252 Ga. 429, 314 S.E.2d 233 (1984); *G & M Quality Bldrs., Inc. v. Dennison*, 173 Ga. App. 578, 327 S.E.2d 773 (1985); *Smith v.*

Cornette, 173 Ga. App. 577, 327 S.E.2d 774 (1985).

Practice and Procedure

Claim against immediate employer prerequisite to recovery. — Whatever the evidence as to the existence of the relation of master and servant, where a provision that every claim for compensation under this section shall be in the first instance presented to and instituted against the immediate employer, has not been complied with, no recovery can be had against a principal employer who is not the immediate employer. *Zurich Gen. Accident & Liab. Ins. Co. v. Lee*, 36 Ga. App. 248, 136 S.E. 173 (1926) (see O.C.G.A. § 34-9-8).

Recovery by general contractor. — The language of O.C.G.A. § 34-9-8 (c) does not require the institution of a formal claim against the immediate employer before the general contractor is entitled to recover under O.C.G.A. § 34-9-8 (b). *Travelers Ins. Co. v. Southern Elec., Inc.*, 209 Ga. App. 718, 434 S.E.2d 507 (1993).

Hearing to ascertain proper parties. — It is the claimant's duty to file a claim against the one whom the claimant contends is the claimant's employer, and it is not the duty of the board to make a special investigation, before a hearing, to ascertain who the proper parties are. *McCormick v. Kitchens*, 59 Ga. App. 376, 1 S.E.2d 57 (1939).

Failure to grant hearing unconstitutional. — The failure to grant a hearing on a statutory employer's motion to dismiss it from the case was an obvious violation of the claimant's right of due process, where the claimant timely instituted a claim against the immediate employer, as required by O.C.G.A. § 34-9-8 (c), and thus, also preserved the claimant's right to recover compensation against a statutory employer. *Scott v. Tremco, Inc.*, 199 Ga. App. 606, 405 S.E.2d 347 (1991), cert. denied, 199 Ga. App. 907, 405 S.E.2d 347 (1991).

Statutory employee issue mixed law/fact question. — Under the "owner plus" or "circumstances of the case" test, the issue of whether an entity is a statutory employer under Georgia law is a mixed question of law and fact. *Fennell v. Max Rittenbaum, Inc.*, 199 Ga. App. 619, 405 S.E.2d 546 (1991), cert. denied, 199 Ga. App. 906, 405 S.E.2d 546 (1991), overruled on other grounds,

Practice and Procedure (Cont'd)

Yoho v. Ringier of Am., Inc., 263 Ga. 338, 434 S.E.2d 57 (1993).

Affirmative defense. — A claim of statutory immunity under Georgia's workers' compensation scheme is an affirmative defense and subject to waiver under Rule 8(c), Fed. R. Civ. P., in federal diversity of citizenship actions. *Troxler v. Owens-Illinois, Inc.*, 717 F.2d 530 (11th Cir. 1983).

Statutory employer defense. — Where a defendant is not a principal contractor as required by O.C.G.A. § 34-9-8, the statutory employer defense is no longer available to it; and the injured plaintiff can still pursue the plaintiff's common-law remedies against the defendant as a third-party tort-feasor. *Dross v. Southern Airways, Inc.*, 170 Ga. App. 481, 317 S.E.2d 300 (1984).

Res judicata. — Where an issue as to whether a contractor had a secondary liability under workers' compensation because of the insolvency of the immediate employer of an injured employee was not raised in prior litigation, the fact that the appellate court in that case reversed the award against the contractor, which award had been entered upon an erroneous theory that it was primarily liable as the initial employer, was not such an adjudication of nonliability as would relieve such contractor in any event, and did not constitute a defense against the present award entered against it as a subcontractor or intermediate contractor for its own subcontractor's unpaid liability. *Churchwell Bros. Constr. Co. v. Archie R. Briggs Constr. Co.*, 89 Ga. App. 550, 80 S.E.2d 212 (1954), for comment, see 16 Ga. B.J. 465 (1954).

OPINIONS OF THE ATTORNEY GENERAL**Ultimate responsibility for payment of medical services for work release inmate.**

— A private employer is primarily responsible for the payment of medical bills arising from injuries, fatal or otherwise, received by a

work release inmate while on the job, but, upon a default by the employer, the Department of Offender Rehabilitation is ultimately responsible for paying for those medical services. 1981 Op. Att'y Gen. No. 81-27.

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 194 et seq.

C.J.S. — 100 C.J.S., Workers' Compensation, § 759 et seq.

ALR. — Circumstances under which the existence of the relationship of employer and independent contractor is predictable, 19 ALR 1168.

Elements bearing directly upon the quality of a contract as affecting the character of one as independent contractor, 20 ALR 684.

Independent contractor: remedial rights in respect of injuries caused by breaches of positive duties correlative to corporate franchises, 28 ALR 122.

Workmen's compensation: injury to employee temporarily leaving car or vehicle of employer for reasons personal to himself, 32 ALR 806.

Truckman as independent contractor under Workmen's Compensation Act, 43 ALR 1312; 120 ALR 1031.

Construction and effect of specific provisions of Workmen's Compensation Acts in

relation to employees of independent contractors or subcontractors, 58 ALR 872; 150 ALR 1214; 151 ALR 1359; 166 ALR 813.

Nurse as independent contractor or servant, 60 ALR 303.

Independent contractors and Workmen's Compensation Acts, 78 ALR 493.

Use by employee of his own motor vehicle as affecting question whether injury or death was within Workmen's Compensation Acts, 95 ALR 467.

Construction and effect of specific provisions of Workmen's Compensation Acts in relation to employees of independent contractors or subcontractors, 105 ALR 580.

Teamster or truckman as independent contractor or employee under Workmen's Compensation Acts, 120 ALR 1031.

Workmen's Compensation Act as exclusive of remedy by action against employer for injury or disease not compensable under act, 121 ALR 1143.

Tests of independent contractor relationship in the field of Workmen's Compensation

tion and Social Security Acts, 134 ALR 1029; 147 ALR 828.

Insurance soliciting agent as employee or independent contractor within Workmen's Compensation Acts, 138 ALR 1122.

Injury to employee in course of employment but away from employer's place of business, due to a cause or risk to which others are also subject, as arising out of the employment, within Workmen's Compensation Act, 139 ALR 1472.

Workmen's Compensation Act as applicable to employee of concessionaire in department store, 142 ALR 1400.

Liability of insurance carrier under Workmen's Compensation Act in respect of personal injury to or death of employee where because of relationship between employee and employer recovery would inure in whole or in part to employer, 147 ALR 115.

Test of independent contractor relationship in the field of workmen's compensation and social security, including unemployment compensation acts, 147 ALR 828.

Transfer of business as affecting common-law remedy or workmen's compensation in respect of injuries subsequently sustained by employee, 150 ALR 1166.

What work of independent contractor or subcontractor is so related to the trade, business, or occupation of principal employer as to satisfy the condition in that regard of provisions of Workmen's Compensation or Unemployment Compensation

Acts, which make the employer responsible to, or in respect of, employees of the contractor, 150 ALR 1214.

Workmen's compensation insurance premiums as within coverage of contractor's bond, 164 ALR 1468.

Common-law remedy against general employer by employee of independent contractor or against [principal] contractor by employee of subcontractor, as affected by specific provisions of Workmen's Compensation Act relating to employees of such persons, 166 ALR 813.

Workmen's compensation: remedy as between subcontractor and principal contractor (or independent contractor and contractee) in respect of compensated injury to employee of one due to negligence of other, where injured employee had no remedy apart from the act, 166 ALR 1221.

Workmen's compensation: coverage of industrial or business employee when performing, under orders, services for private benefit of employer or superior, or officer, representative, or stockholder of corporate employer, 172 ALR 378.

Workmen's compensation: injury while crossing or walking along railroad or street railway tracks, going to or from work, as arising out of and in the course of employment, 50 ALR2d 363.

Modern status: "Dual capacity doctrine" as basis for employee's recovery from employer in tort, 23 ALR4th 1151.

34-9-9. Relief from penalty for failure or neglect to perform statutory duty.

Nothing in this chapter shall be construed to relieve any employer or employee from any penalty for failure or neglect to perform any statutory duty. (Ga. L. 1920, p. 167, § 13; Code 1933, § 114-104.)

JUDICIAL DECISIONS

Applicability. — Former Code 1933, § 114-104 (see O.C.G.A. § 34-9-9) applied solely to penalties and did not limit or qualify former Code 1933, § 114-103 (see O.C.G.A. § 34-9-11) so as to provide any greater remedy to the employee. *Reid v.*

Lummas Cotton Gin Co., 58 Ga. App. 184, 197 S.E. 904 (1938); *Southern Wire & Iron, Inc. v. Fowler*, 217 Ga. 727, 124 S.E.2d 738 (1962).

Cited in *Hayes v. Consolidated Freightways*, 131 Ga. App. 77, 205 S.E.2d 40 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, §§ 504, 583, 624, 629, 632.

C.J.S. — 99 C.J.S., Workers' Compensation, § 607 et seq.

ALR. — State Workmen's Compensation Act as precluding action based on noncompliance with Federal Safety Appliance Act to

recover for death or injury to railroad employee while engaged in intrastate commerce, 98 ALR 511; 104 ALR 839.

What conduct is willful, intentional, or deliberate within Workmen's Compensation Act provision authorizing tort action for such conduct, 96 ALR3d 1064.

34-9-10. Relief of employer from obligations under chapter.

No contract or agreement, written, oral, or implied, nor any rule, regulation, or other device shall in any manner operate to relieve any employer in whole or in part from any obligation created by this chapter except as otherwise expressly provided in this chapter. (Ga. L. 1920, p. 167, § 7; Code 1933, § 114-111.)

JUDICIAL DECISIONS

Presumption of coverage. — O.C.G.A. §§ 34-9-7 and 34-9-10 create a conclusive presumption of coverage unless otherwise specifically provided in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Fox v. Stanish*, 150 Ga. App. 537, 258 S.E.2d 190, overruled on other grounds, *Samuel v. Baitcher*, 247 Ga. 71, 274 S.E.2d 327 (1981).

Scope of chapter. — The provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) prevail over all agreements not clearly in accord therewith, even in a case of an agreement between the employer and employee approved by the board, since not only the employer and employee have a real interest in the principles and policies underlying this legislation, but it is affected with the public interest. *Hartford Accident & Indem. Co. v. Welker*, 75 Ga. App. 594, 44 S.E.2d 160 (1947).

Contracts releasing employer from obligations. — This section deprived an employer of the right to make any contract to relieve oneself in whole or in part from the obligations created by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Tillman v. Moody*, 181 Ga. 530, 182 S.E. 906 (1935) (see O.C.G.A. § 34-9-10).

Right to compensation. — The right of dependents to compensation is not subject to restriction or extinguishment by an employee during the employee's lifetime. *Georgia Power & Light Co. v. Patterson*, 46 Ga. App. 7, 166 S.E. 255 (1932).

Approval of agreements by board. — Where the Department of Industrial Relations (now Board of Workers' Compensation), on hearing a claim for compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), made an award in favor of the claimant for compensation payable in a certain amount weekly during disability, the judge of the superior court, considering the case on appeal, had no authority or jurisdiction to render a judgment against the insurance carrier and in favor of the claimant for a lump sum, in full and final settlement of the claim, pursuant to an agreement of the insurance carrier and the claimant, not approved by the department. *Department of Indus. Relations v. Travelers' Ins. Co.*, 177 Ga. 669, 170 S.E. 883, answer conformed to, 47 Ga. App. 553, 171 S.E. 169 (1933).

No agreement between an insurance carrier and a claimant, dealing with the obligation of such a carrier to pay a claimant compensation, which affects the amount of compensation, is binding until approved by the Board of Workers' Compensation. *Maryland Cas. Co. v. Stephens*, 76 Ga. App. 723, 47 S.E.2d 108 (1948).

Approval of final settlement receipts. — As a matter of practice, the board does not approve final settlement receipts, nor is

there any provision for such a method of disposing of a claim in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *GMC v. Harrison*, 107 Ga. App. 667, 131 S.E.2d 234 (1963).

Release not submitted to board. — A worker's release of an employer from various claims, which release was never submitted to or approved by the board, was void and had no effect as to any claim for benefits, regardless of whether a claim was pending or contemplated when the settlement was attempted. *Caldwell v. Perry*, 179 Ga. App. 682, 347 S.E.2d 286 (1986).

Agreement as to coverage by law of foreign state. — An agreement providing that the law of Illinois would apply to the contract of employment, where Illinois did not at that time provide protection similar in principal to that provided in this state, would not be upheld by the courts of this state, nor would the court uphold such an agreement if it was intended to relate to employment wholly or in the main in this state and entirely outside of Illinois. *Hartford Accident & Indem. Co. v. Welker*, 75 Ga. App. 594, 44 S.E.2d 160 (1947).

An agreement by an employee that any and all claims for injuries arising out of and in the course of employment would be governed by the workers' compensation laws of Illinois, where the employee was never located in Illinois as an employee, and where the employee's territory as an employee did not include any part of Illinois, but in the main part was located within this state, would not operate to divest the board of this state of jurisdiction to award compensation for an injury occurring in this state. *Hartford Accident & Indem. Co. v. Welker*, 75 Ga. App. 594, 44 S.E.2d 160 (1947).

Cited in *National Union Ins. Co. v. Mills*, 99 Ga. App. 697, 109 S.E.2d 830 (1959); *Sears, Roebuck & Co. v. Wilson*, 215 Ga. 746, 113 S.E.2d 611 (1960); *Fireman's Fund Ins. Co. v. Crowder*, 123 Ga. App. 469, 181 S.E.2d 530 (1971); *Hayes v. Consolidated Freightways*, 131 Ga. App. 77, 205 S.E.2d 40 (1974); *Fountain v. Shoney's Big Boy, Inc.*, 168 Ga. App. 489, 309 S.E.2d 671 (1983); *Southern Fried Chicken v. Thermo-King Corp.*, 172 Ga. App. 454, 323 S.E.2d 291 (1984); *Rickets v. Tri-State Systems*, 177 Ga. App. 509, 339 S.E.2d 732 (1986).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, §§ 7, 34.

ALR. — Validity of agreement by injured employee that employer shall have benefit of workmen's compensation, 96 ALR 1019.

Statutory provisions regarding action against employer who does not assent to Workmen's Compensation Act as affirmative support for right of action by employee, not otherwise existing, 97 ALR 1297.

Status of independent contractor as distinguished from employee for purposes of Workmen's Compensation Act as affected by intention to evade or avoid the requirements of that act, 107 ALR 855.

Cancellation or attempted cancellation of insurance under Workmen's Compensation Act, 107 ALR 1514.

Rights and obligations under Workmen's Compensation Act in respect of claims by employees of corporation during receivership or conservatorship of employer, 111 ALR 328.

Right to compensation under Workmen's Compensation Act as affected by pension, insurance, gratuities, or other benefits not derived from the act itself, 119 ALR 920.

Transfer of business as affecting common-law remedy or workmen's compensation in respect of injuries subsequently sustained by employee, 150 ALR 1166.

Discharge in bankruptcy as affecting employer's liability for contributions under Workmen's Compensation Act, 161 ALR 217.

34-9-11. Exclusivity of rights and remedies granted to employee under chapter; immunity granted to construction design professionals.

(a) The rights and the remedies granted to an employee by this chapter shall exclude all other rights and remedies of such employee, his personal

representative, parents, dependents, or next of kin, at common law or otherwise, on account of such injury, loss of service, or death; provided, however, that no employee shall be deprived of any right to bring an action against any third-party tort-feasor, other than an employee of the same employer or any person who, pursuant to a contract or agreement with an employer, provides workers' compensation benefits to an injured employee, notwithstanding the fact that no common-law master-servant relationship or contract of employment exists between the injured employee and the person providing the benefits, and other than a construction design professional who is retained to perform professional services on or in conjunction with a construction project on which the employee was working when injured, or any employee of a construction design professional who is assisting in the performance of professional services on the construction site on which the employee was working when injured, unless the construction design professional specifically assumes by written contract the safety practices for the project. The immunity provided by this subsection to a construction design professional shall not apply to the negligent preparation of design plans and specifications, nor shall it apply to the tortious activities of the construction design professional or the employees of the construction design professional while on the construction site where the employee was injured and where those activities are the proximate cause of the injury to the employee or to any professional surveys specifically set forth in the contract or any intentional misconduct committed by the construction design professional or his employees.

(b) As used in subsection (a) of this Code section, the term "construction design professional" means any person who is an architect, professional engineer, landscape architect, geologist, or land surveyor who has been issued a license pursuant to Chapter 4, 15, 19, or 23 of Title 43 or any corporation organized to render professional services in Georgia through the practice of one or more such technical professions as architecture, professional engineering, landscape architecture, geology, or land surveying.

(c) The immunity provided by this subsection shall apply and extend to the businesses using the services of a temporary help contracting firm, as such term is defined in Code Section 34-8-46, or an employee leasing company, as such term is defined in Code Section 34-8-32, when the benefits required by this chapter are provided by either the temporary help contracting firm or the employee leasing company or the business using the services of either such firm or company. A temporary help contracting firm or an employee leasing company shall be deemed to be a statutory employer for the purposes of this chapter. (Ga. L. 1920, p. 167, § 12; Code 1933, § 114-103; Ga. L. 1972, p. 929, § 1; Ga. L. 1974, p. 1143, § 1; Ga. L. 1980, p. 1145, § 2; Ga. L. 1982, p. 3, § 34; Ga. L. 1990, p. 1164, § 1; Ga. L. 1995, p. 352, § 1.)

Law reviews. — For article surveying judicial and legislative developments in Georgia's tort laws, see 31 Mercer L. Rev. 229 (1979). For article surveying Georgia cases in the area of insurance from June 1979 through May 1980, see 32 Mercer L. Rev. 79 (1980). For article surveying Georgia cases in the area of workers' compensation from June 1979 through May 1980, see 32 Mercer L. Rev. 261 (1980). For article surveying developments in Georgia workers' compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981). For article, "New Restrictions on the Statutory Employer Rule: Workers' Compensation Benefits and Immunity Curtailed," see 21 Ga. St. B.J. 94 (1985). For article, "Defending the Lawsuit: A First-Round Checklist," see 22 Ga. St. B.J. 24 (1985). For article, "On Reintegrating Workers' Compensation and Employers' Liability," see 21 Ga. L. Rev. 843 (1987). For article, "Worker's Compensation and the Statutory Employer," see 27 Ga.

St. B.J. 24 (1990). For annual survey article discussing developments in construction law, see 51 Mercer L. Rev. 181 (1999). For article, "Workers' Compensation," see 53 Mercer L. Rev. 521 (2001). For survey article on construction law for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 85 (2003). For survey article on workers' compensation law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For annual survey of law of worker's compensation, see 56 Mercer L. Rev. 479 (2004). For annual survey of workers' compensation law, see 58 Mercer L. Rev. 453 (2006).
For note advocating recognition of third-party tort-feasor's right of contribution against negligent employer covered under workers' compensation, see 29 Mercer L. Rev. 635 (1978). For note "Pardue v. Ruiz: An Extension of Tort Immunity," see 45 Mercer L. Rev. 1449 (1994).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
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General Consideration

Editor's notes. — In light of the similarity of the provisions, decisions under former Code 1933, § 114-403, are included in the annotations for this Code section.
Constitutionality. — The denial of a common-law remedy to the heirs of the decedent does not violate the equal protection clause of the federal Constitution. *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668 (S.D. Ga. 1973).
Taking away the right to an action for loss of consortium of an injured spouse is not a deprivation of due process. *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668 (S.D. Ga. 1973).
An argument by a tort-feasor that foreclosure of recovery from an employer of more

than five (now three) employees, based on indemnity or contribution, was a denial of equal protection, because if an employer had less than five (now three) employees such recovery would not be foreclosed, was without merit. *Coleman v. GMC*, 386 F. Supp. 87 (N.D. Ga. 1974).
This section, which bars an employee's action for negligence against a fellow employee, was not unconstitutional as a denial of due process or equal protection. *Williams v. Byrd*, 242 Ga. 80, 247 S.E.2d 874 (1978) (see O.C.G.A. § 34-9-11).
O.C.G.A. § 34-9-11 is not unconstitutional because it deprives an injured employee of the employee's right to sue a fellow employee. *Stoker v. Wood*, 161 Ga. App. 110, 289 S.E.2d 265 (1982).

General Consideration (Cont'd)

The barring of a wife's action for the loss of consortium against her husband's employer was not a constitutional deprivation of the right of the wife where her husband had no tort claim against his employer under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., as the wife's right was derivative of the husband's right. *Henderson v. Hercules, Inc.*, 253 Ga. 685, 324 S.E.2d 453 (1985).

In creating the statutory balance of rights and privileges under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., the legislature has determined that the employer should not be entitled to subrogation. This the legislature may do absent any constitutional prohibition. *K-Mart Apparel Corp. v. Temples*, 260 Ga. 871, 401 S.E.2d 5 (1991).

The policy of the exclusive remedy provision of the workers' compensation law is served equally whether the employee is injured or killed, and such policy does not violate equal protection when applied to wrongful death actions. *Smith v. Gortman*, 261 Ga. 206, 403 S.E.2d 41 (1991).

The immunity granted employers in the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., does not violate the due process and equal protection provisions of the state and federal Constitutions. *Georgia Dep't of Human Resources v. Joseph Campbell Co.*, 261 Ga. 822, 411 S.E.2d 871 (1992).

Purpose. — The purpose of workers' compensation legislation was to do away with common-law rules governing actions by employees under the law of master and servant and to replace such an antique system with one that provided for the absolute liability of the employer and fixed the compensation for accidental injury or death. *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668 (S.D. Ga. 1973).

Double liability. — While the literal language of this section, merely barred another action by the injured employee or the employee's representative, the section is also designed to protect the compensating employer from double liability. *Scott v. Crescent Tool Co.*, 306 F. Supp. 884 (N.D. Ga. 1969) (see O.C.G.A. § 34-9-11).

Shifting of responsibility. — The workers' compensation law (see O.C.G.A. § 34-9-1 et

seq.) was not intended to shift common-law liability from the person responsible to the employer who is in nowise responsible. *Echols v. Chattooga Mercantile Co.*, 74 Ga. App. 18, 38 S.E.2d 675 (1946).

Legislative intent. — Under this section, it was clear that the legislature intended to confine an employee to the employee's remedies under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) for every accident in cases where the employee comes under those provisions. *Blue Bell Globe Mfg. Co. v. Baird*, 64 Ga. App. 347, 13 S.E.2d 105 (1941) (see O.C.G.A. § 34-9-11).

Jurisdiction of action for violation of fee schedule. — State court did not have jurisdiction of action arising from an alleged violation of a fee schedule by a photocopy company which supplied copies of medical records to institutions for workers' compensation claimants. Claimants' redress was through workers' compensation remedies. *Smart Professional Photocopy Corp. v. Dixon*, 216 Ga. App. 825, 456 S.E.2d 233 (1995).

Action for injury arising from employment barred. — An action for a current or future physical injury by accident due to occupational disease or otherwise (caused by ingestion of or exposure to asbestos fibers) and arising out of the scope of employment is barred by the exclusivity provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Johnson v. Hames Contracting, Inc.*, 208 Ga. App. 664, 431 S.E.2d 455 (1993).

Where claim for psychological injuries is "inextricably linked" to worker's compensation claim for physical injuries or occupational disease, such as where the worker suffers trauma as a result of the worker's exposure to toxic waste, it is within the exclusivity provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Zaytzeff v. Safety-Kleen Corp.*, 222 Ga. App. 48, 473 S.E.2d 565 (1996).

Noncompensable injury may be within chapter's purview. — That an injury is not compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) does not necessarily mean it is not within the purview of that law for purposes of its exclusivity provisions. Thus, merely because an administrative law judge concluded that a plaintiff failed to show that plaintiff suffered

an injury by accident arising out of and in the course of plaintiff's employment, or that plaintiff suffered an occupational disease, did not provide an exception to that law's exclusive remedy provisions. *Zaytzeff v. Safety-Kleen Corp.*, 222 Ga. App. 48, 473 S.E.2d 565 (1996).

Vicarious liability abrogated. — O.C.G.A. § 34-9-11 expressly abrogates the vicarious liability provisions of O.C.G.A. §§ 51-2-2 and 51-2-5 which would otherwise permit the parents of an employee of an independent subcontractor to bring a tort action against a general contractor/statutory employer. *McCorkle v. United States*, 737 F.2d 957 (11th Cir. 1984).

Who are "employers." — The law does not grant tort immunity to owners, who are not contractors, even though they are in control of premises and are actively involved in the enterprise in which an employee was injured. *Dye v. Trussway, Inc.*, 211 Ga. App. 139, 438 S.E.2d 194 (1993).

"Employee of same employer" construed. — The words "employee of the same employer" do not apply when the injured employee is an employee of a subcontractor which paid compensation benefits and the alleged tortfeasor is an employee of the principal contractor. *Long v. Marvin M. Black Co.*, 250 Ga. 621, 300 S.E.2d 150 (1983).

Liability of individual employees of general contractor. — The liability of the general contractor for workers' compensation benefits renders it immune from suit but liable for benefits as the "statutory employer" of its subcontractor's employee. However, employees of the general contractor, sued individually, do not share in that statutory immunity. *Paz v. Marvin M. Black Co.*, 200 Ga. App. 607, 408 S.E.2d 807, cert. denied, 200 Ga. App. 896, 408 S.E.2d 807 (1991).

Premise owner's purchase of "wrap-up" insurance to provide workers' compensation insurance coverage for all on-site contractors and subcontractors did not entitle it to immunity from a tort action by an injured employee of the general contractor. *Pogue v. Oglethorpe Power Corp.*, 267 Ga. 332, 477 S.E.2d 107 (1996).

Section triggered by acceptance of benefits. — The acceptance of workers' compensation benefits for a period of one year or

more is such an affirmative act as to trigger the bar of O.C.G.A. § 34-9-11. *Mann v. Workman*, 181 Ga. App. 211, 351 S.E.2d 680 (1986), *aff'd*, 257 Ga. 70, 354 S.E.2d 831 (1987).

Entire family group within coverage of chapter. — There was a clear legislative intention to bring the entire family group within the purposes and coverage of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Gulf States Ceramic v. Fenster*, 228 Ga. 400, 185 S.E.2d 801 (1971).

Rights of children. — The rights of children under this section were not changed by the divorce and remarriage of their parents. *United States Fid. & Guar. Co. v. Dunbar*, 112 Ga. App. 102, 143 S.E.2d 663 (1965) (see O.C.G.A. § 34-9-11).

Benefits to outsiders. — An outsider does not share the burdens of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) imposed upon an employer, and the outsider is entitled to none of its benefits. *Echols v. Chattooga Mercantile Co.*, 74 Ga. App. 18, 38 S.E.2d 675 (1946).

This section excluded only the employee's "other rights" against the employer, and persons other than the employer were not to have the benefit of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Gay v. Greene*, 91 Ga. App. 78, 84 S.E.2d 847 (1954) (see O.C.G.A. § 34-9-11).

The express language of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), listing those remedies and actions excluded or prohibited, does not exclude those remedies or actions by parties not so listed and not in privity with the employee, whose right of action is not derivative of the employee's common-law cause of action. *Fenster v. Gulf States Ceramic*, 124 Ga. App. 102, 182 S.E.2d 905, *rev'd* on other grounds, 228 Ga. 400, 185 S.E.2d 801 (1971).

Applicability to malpractice claim against one providing services to claimant. — O.C.G.A. § 34-9-11 is not a legal bar to the pursuit of a malpractice claim against a professional who has subsequently provided the professional's services to a previously injured workers' compensation claimant. *Drury v. VPS Case Mgt. Servs., Inc.*, 200 Ga. App. 540, 408 S.E.2d 809, cert. denied, 200 Ga. App. 895, 408 S.E.2d 809 (1991).

Municipalities. — This section applied to municipalities and employees thereof.

General Consideration (Cont'd)

Bartram v. City of Atlanta, 71 Ga. App. 313, 30 S.E.2d 780 (1944) (see O.C.G.A. § 34-9-11).

Effect of amendments. — As to the effect of amendments to the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., on existing and terminated employment relationships, see *Venable v. John P. King Mfg. Co.*, 174 Ga. App. 800, 331 S.E.2d 638 (1985).

Construction with former § 33-34-8. — Former § 33-34-8(a) of the Georgia Motor Vehicle Accident Reparations Act can be construed so as to give effect to the legislative intent without repealing any part of O.C.G.A. § 34-9-11. *Georgia Farm Bureau Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 161 Ga. App. 276, 288 S.E.2d 263 (1982).

Former § 33-34-8(a) protects a plaintiff's rights under plaintiff's own no-fault policy notwithstanding plaintiff's receipt of workers' compensation benefits; however, where the plaintiff receives compensation benefits, O.C.G.A. § 34-9-11 precludes plaintiff's recovery of no-fault benefits from plaintiff's employer. *Georgia Farm Bureau Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 161 Ga. App. 276, 288 S.E.2d 263 (1982).

Applicability of § 34-9-9. — Former Code 1933, § 114-104 (see O.C.G.A. § 34-9-9) applied solely to penalties, and did not limit or qualify former Code 1933, § 114-103 (see O.C.G.A. § 34-9-11) so as to provide any greater remedy to an employee. *Reid v. Lummus Cotton Gin Co.*, 58 Ga. App. 184, 197 S.E. 904 (1938).

Conflicts with other chapters. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) and the Employment Security Act (see O.C.G.A. § 34-8-1 et seq.) do not conflict, as while each chapter seeks the beneficial purpose of insuring the worker from economic insecurity, they seek to remedy economic insecurity stemming from two entirely different sources. *Utica Mut. Ins. Co. v. Pioda*, 90 Ga. App. 593, 83 S.E.2d 627 (1954).

Applicability to corporations. — A corporation is not an "employee" within the meaning of O.C.G.A. § 34-9-11 because the term "employee" as used in that section refers only to individuals and does not protect corporations. *George v. Ashland-Warren, Inc.*, 254 Ga. 95, 326 S.E.2d 744 (1985).

"Borrowed servant" doctrine. — The "borrowed servant" doctrine applies where an employee leaves the control of a general master for a particular occasion. *Pavuk v. Western Int'l Hotels*, 160 Ga. App. 82, 286 S.E.2d 319 (1981).

Where an employer directed an employee to help an independent contractor perform a task, the employee was barred by the borrowed employee doctrine from bringing a personal injury action against the independent contractor for injuries incurred while performing a task. *Jarrard v. Doyle*, 164 Ga. App. 339, 297 S.E.2d 301 (1982).

As to the "loaned servant" doctrine, entitling a third-party tort-feasor to tort immunity under O.C.G.A. § 34-9-11, see *Freeman v. Pumpco, Inc.*, 167 Ga. App. 312, 306 S.E.2d 385 (1983).

Because the employer had the unilateral right to discharge a temporary employee from the particular work the employee was engaged in at the time of the employee's injury, the trial court did not err in holding that the employee was a borrowed servant and that the employee's negligence action against the employer was barred. *Preston v. Georgia Power Co.*, 227 Ga. App. 449, 489 S.E.2d 573 (1997), cert. denied, 525 U.S. 869, 119 S. Ct. 163, 142 L. Ed. 2d 134 (1998).

"Right to control" test. — The "right to control" test is applicable for the purpose of determining whether a doctor is working for a manufacturer as an independent contractor or as an employee. *Bexley v. Southwire Co.*, 168 Ga. App. 431, 309 S.E.2d 379 (1983), aff'd sub nom. *Downey v. Bexley*, 253 Ga. 125, 317 S.E.2d 523 (1984).

Application of estoppel. — The successful continuation of the workers' compensation system requires that studied caution be exercised before the doctrine of estoppel is applied against an injured party who does nothing more than receive compensation benefits voluntarily provided by an employer. *Collins v. Grafton, Inc.*, 263 Ga. 441, 435 S.E.2d 37 (1993).

High-Voltage Safety Act. — The workers' compensation exclusive remedy provisions of O.C.G.A. § 34-9-11 (a) bar the express indemnity provisions of the High-Voltage Safety Act, O.C.G.A. § 46-3-40(b). *Georgia Power Co. v. Franco Remodeling Co.*, 233 Ga. App. 640, 505 S.E.2d 488 (1998).

The indemnity provision of the

High-Voltage Safety Act, O.C.G.A. § 46-3-40, can be enforced without offending the exclusive remedy provision of the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. *Georgia Power Co. v. Franco Remodeling Co.*, 240 Ga. App. 771, 525 S.E.2d 152 (1999), vacating *Georgia Power Co. v. Franco Remodeling Co.*, 233 Ga. App. 640, 505 S.E.2d 488 (1998).

RICO statute does not supersede exclusivity provisions. — Plaintiff's claim for damages stemming from the employers violation of the RICO statute was barred by the exclusivity provisions of the Worker's Compensation Act, O.C.G.A. § 34-9-1 et seq., as there is nothing in the language of the RICO statute which indicates that RICO was intended to supersede the exclusivity provisions of the Act and the Act makes no statutory exception to the exclusivity remedy provision. *Bryant v. Wal-Mart Stores, Inc.*, 203 Ga. App. 770, 417 S.E.2d 688, cert. denied, 203 Ga. App. 905, 417 S.E.2d 688 (1992).

Accident arose in the course of employment. — Action seeking damages for personal injury and loss of consortium filed by an employee and the employee's spouse against a co-worker was barred by the exclusive remedy provisions of O.C.G.A. § 34-9-11(a) of the Georgia Workers' Compensation Act; although the co-worker, a deputy sheriff, was off-duty at the time of the accident giving rise to the action, the co-worker was on call and was therefore in the course of employment at the time of the accident. *Stevenson v. Ray*, 282 Ga. App. 652, 640 S.E.2d 340 (2006).

O.C.G.A. § 34-9-11 was not preempted by provision of federal Labor Management Relations Act creating a cause of action for the violation of provisions of a collective bargaining agreement, where the provisions of the collective bargaining agreement relied upon by the employee did not establish or create an independent legal duty or obligation on the part of the employer not already existing under Georgia law. *Dugger v. Miller Brewing Co.*, 199 Ga. App. 850, 406 S.E.2d 484 (1991), cert. denied, 199 Ga. App. 905, 406 S.E.2d 484 (1991).

Sexual harassment. — Employee's claim for intentional infliction of emotional distress due to alleged sexual harassment by company officers and employees was not barred by the exclusive remedy provision of

O.C.G.A. § 34-9-11. *Rogers v. Carmike Cinemas, Inc.*, 211 Ga. App. 427, 439 S.E.2d 663 (1994).

Cited in *American Mut. Liab. Ins. Co. v. Herring*, 43 Ga. App. 249, 158 S.E. 448 (1931); *Berkeley Granite Corp. v. Covington*, 183 Ga. 801, 190 S.E. 8 (1937); *Connell v. Fisher Body Corp.*, 56 Ga. App. 203, 192 S.E. 484 (1937); *Wall v. J.W. Starr & Sons Lumber Co.*, 68 Ga. App. 552, 23 S.E.2d 452 (1942); *Blair v. Smith*, 201 Ga. 747, 41 S.E.2d 133 (1947); *Mosley v. George A. Fuller Co.*, 250 F.2d 686 (5th Cir. 1957); *Borochoff v. Fowler*, 98 Ga. App. 411, 105 S.E.2d 764 (1958); *New Amsterdam Cas. Co. v. Freeland*, 101 Ga. App. 754, 115 S.E.2d 443 (1960); *New Amsterdam Cas. Co. v. Freeland*, 216 Ga. 491, 117 S.E.2d 538 (1960); *Smith v. Rich's, Inc.*, 104 Ga. App. 883, 123 S.E.2d 316 (1961); *Southern Wire & Iron, Inc. v. Fowler*, 217 Ga. 727, 124 S.E.2d 738 (1962); *McCluskey v. AMOCO*, 224 Ga. 253, 161 S.E.2d 271 (1968); *Ledford v. J.M. Muse Corp.*, 119 Ga. App. 244, 166 S.E.2d 623 (1969); *Mull v. Aetna Cas. & Sur. Co.*, 226 Ga. 462, 175 S.E.2d 552 (1970); *Breitwieser v. KMS Indus., Inc.*, 467 F.2d 1391 (5th Cir. 1972); *Yancey v. Green*, 129 Ga. App. 705, 201 S.E.2d 162 (1973); *Georgia Power Co. v. Diamond*, 130 Ga. App. 268, 202 S.E.2d 704 (1973); *Rickett v. Jones*, 495 F.2d 185 (5th Cir. 1974); *Security Ins. Group v. Plank*, 133 Ga. App. 815, 212 S.E.2d 471 (1975); *Cunningham v. Heard*, 134 Ga. App. 276, 214 S.E.2d 190 (1975); *Stokes v. Peyton's, Inc.*, 526 F.2d 372 (5th Cir. 1976); *Mitchell v. Hercules Inc.*, 410 F. Supp. 560 (S.D. Ga. 1976); *Aretz v. United States*, 503 F. Supp. 260 (S.D. Ga. 1977); *Chambers v. Gibson*, 145 Ga. App. 27, 243 S.E.2d 309 (1978); *McBroom v. Zevallos*, 145 Ga. App. 375, 244 S.E.2d 19 (1978); *Beam v. Fleet Transp. Co.*, 145 Ga. App. 726, 244 S.E.2d 582 (1978); *Arthur Pew Constr. Co. v. Bryan Constr. Co.*, 148 Ga. App. 114, 251 S.E.2d 105 (1978); *Fox v. Stanish*, 150 Ga. App. 537, 258 S.E.2d 190 (1979); *Haygood v. Home Transp. Co.*, 244 Ga. 165, 259 S.E.2d 429 (1979); *White v. Excalibur Ins. Co.*, 599 F.2d 50 (5th Cir. 1979); *Burbank v. Mutual of Omaha Ins. Co.*, 484 F. Supp. 693 (N.D. Ga. 1979); *Harvey v. Fine Prods. Co.*, 156 Ga. App. 649, 275 S.E.2d 732 (1980); *Beck v. Flint Constr. Co.*, 154 Ga. App. 490, 268 S.E.2d 739 (1980); *Harris v. City of Chattanooga*, 507 F. Supp.

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365 (N.D. Ga. 1980); *O'Kelley v. Gates*, 160 Ga. App. 400, 287 S.E.2d 262 (1981); *Cleckley v. Batson-Cook Co.*, 160 Ga. App. 831, 288 S.E.2d 573 (1982); *Utz v. Powell*, 160 Ga. App. 888, 288 S.E.2d 601 (1982); *Long v. Marvin M. Black Co.*, 163 Ga. App. 633, 294 S.E.2d 641 (1982); *Thorn v. Phillips*, 164 Ga. App. 47, 296 S.E.2d 251 (1982); *Lowe v. Chemical Sealing Corp.*, 535 F. Supp. 1280 (N.D. Ga. 1982); *Murphy v. ARA Servs., Inc.*, 164 Ga. App. 859, 298 S.E.2d 528 (1982); *Bryant v. Village Ctrs., Inc.*, 167 Ga. App. 220, 305 S.E.2d 907 (1983); *Williams v. Atlanta Gas Light Co.*, 168 Ga. App. 208, 308 S.E.2d 553 (1983); *Hull v. Merck & Co.*, 576 F. Supp. 616 (N.D. Ga. 1984); *Manning v. Georgia Power Co.*, 252 Ga. 404, 314 S.E.2d 432 (1984); *Singleton v. Georgia Pac. Corp.*, 252 Ga. 557, 315 S.E.2d 876 (1984); *Ponder v. Southern Tea Co.*, 170 Ga. App. 819, 318 S.E.2d 242 (1984); *George v. Ashland-Warren, Inc.*, 171 Ga. App. 556, 320 S.E.2d 586 (1984); *R.E. Thomas Erectors, Inc. v. Brunswick Pulp & Paper Co.*, 171 Ga. App. 903, 321 S.E.2d 412 (1984); *Massey v. United States*, 733 F.2d 760 (11th Cir. 1984); *McFadden Bus. Publications, Inc. v. Guidry*, 177 Ga. App. 885, 341 S.E.2d 294 (1986); *Evans v. Bibb Co.*, 178 Ga. App. 139, 342 S.E.2d 484 (1986); *Adams v. Emory Univ. Clinic*, 179 Ga. App. 620, 347 S.E.2d 670 (1986); *Sams v. United Food & Com. Workers Union*, 835 F.2d 848 (11th Cir. 1988); *National Data Corp. v. Hooper*, 185 Ga. App. 866, 366 S.E.2d 189 (1988); *Busener v. State*, 188 Ga. App. 392, 373 S.E.2d 81 (1988); *Blair v. Georgia Baptist Children's Home & Family Ministries, Inc.*, 189 Ga. App. 579, 377 S.E.2d 21 (1988); *Labelle v. Lister*, 192 Ga. App. 464, 385 S.E.2d 118 (1989); *Brown v. Advantage Eng'g, Inc.*, 732 F. Supp. 1163 (N.D. Ga. 1990); *Eaves v. Hampel*, 110 Bankr. 88 (Bankr. M.D. Ga. 1990); *Hall v. Johnson*, 198 Ga. App. 495, 402 S.E.2d 98 (1991); *Green v. Moreland*, 200 Ga. App. 167, 407 S.E.2d 119 (1991); *Sargent v. Blankmann*, 202 Ga. App. 156, 413 S.E.2d 495 (1991); *Maxwell v. Hospital Auth.*, 202 Ga. App. 92, 413 S.E.2d 205 (1992); *Sykes v. Smolek Grading, Inc.*, 204 Ga. App. 633, 420 S.E.2d 85 (1992); *Maulden v. Liberty Mut. Ins. Co.*, 824 F. Supp. 212 (S.D. Ga. 1992); *Braswell v.*

Walton, 208 Ga. App. 610, 431 S.E.2d 417 (1993); *Fowler-Flemister Concrete, Inc. v. Sumner*, 209 Ga. App. 312, 433 S.E.2d 329 (1993); *Kennedy v. Pineland State Bank*, 211 Ga. App. 375, 439 S.E.2d 106 (1993); *Southern Ry. v. Hand*, 216 Ga. App. 370, 454 S.E.2d 217 (1995); *Pogue v. Oglethorpe Power Corp.*, 82 F.3d 1012 (11th Cir. 1996); *Larraga v. Aetna Cas. & Sur. Co.*, 222 Ga. App. 654, 475 S.E.2d 649 (1996); *Solis v. Lamb*, 244 Ga. App. 8, 534 S.E.2d 582 (2000); *Bayer Corp. v. Lassiter*, 282 Ga. App. 346, 638 S.E.2d 812 (2006).

Employer's Liability

Statutory employer immune regardless of payment of benefits. — Even though the principal contractor has not actually paid workers' compensation benefits, it is still a statutory employer of a subcontractor's employee under O.C.G.A. § 34-9-8 with a potential liability for workers' compensation payments, and therefore, the principal contractor still enjoys tort immunity. *Long v. Marvin M. Black Co.*, 250 Ga. 621, 300 S.E.2d 150 (1983).

The principal contractor is the injured subcontractor's employee's "statutory employer" for workers' compensation purposes, and the statutory immunity from suit includes the statutory employer regardless of whether that statutory employer actually paid the workers' compensation benefits. *Modlin v. Swift Textiles, Inc.*, 180 Ga. App. 726, 350 S.E.2d 273 (1986); *Peavy v. McInvale*, 192 Ga. App. 155, 384 S.E.2d 246 (1989).

Tort immunity to employer providing workers' compensation benefits. — Where an employee fell from a ladder during work and sustained injuries as a result, the employer was entitled to summary judgment on the employee's tort claim as O.C.G.A. § 34-9-11(a) provided tort immunity to the employer who pursuant to a contract provided workers' compensation benefits to the injured employee. *Cowart v. Crown Am. Props.*, 258 Ga. App. 21, 572 S.E.2d 706 (2002).

Pursuant to the exclusive remedy provision of the Workers' Compensation Act, set forth at O.C.G.A. § 34-9-11(a), an employer was entitled to summary judgment against claims by an injured employee who had obtained benefits under the Act and then

sued the employer under independent tort theories of vicarious liability on behalf of medical staff that worked for the employer, a hospital, who rendered treatment to the employee for the injuries; the exclusivity provisions barred the employee's assertion of malpractice by treating physicians against the employer as any consequences of malpractice or delay in treatment were part of the injury and were compensated as such under O.C.G.A. § 34-9-203(b). *Crisp Reg'l Hosp., Inc. v. Oliver*, 275 Ga. App. 578, 621 S.E.2d 554 (2005).

Tort immunity of principal or general contractor. — Having paid compensation for an injury to an employee, an employer cannot be liable again in tort. *O'Steen v. Lockheed Aircraft Corp.*, 294 F. Supp. 409 (N.D. Ga. 1968).

The employee of a subcontractor may not collect workers' compensation payments from the general contractor and also maintain a tort action against the same general contractor based on the same injury for which workers' compensation payments had been made. *Jackson v. J.B. Rush Constr. Co.*, 134 Ga. App. 445, 214 S.E.2d 710 (1975).

The collection of compensation from a statutory employer bars recovery by the plaintiff against any others, including the "principal." *Haygood v. Home Transp. Co.*, 149 Ga. App. 229, 253 S.E.2d 805, *aff'd*, 244 Ga. 165, 259 S.E.2d 429 (1979).

As a statutory employer liable to pay workers' compensation benefits under O.C.G.A. § 34-9-11, a principal contractor should receive the correlative benefit of tort immunity. *Wright Assocs. v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981).

An employee of an independent subcontractor may not recover in tort against the principal contractor. *Wright Assocs. v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981).

The quid pro quo for a statutory employer's potential liability is immunity from tort liability, and the fact that a statutory employer has a right to indemnification, statutory or contractual, does not strip the employer of tort immunity. *Wright Assocs. v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981).

Under O.C.G.A. §§ 34-9-8 and 34-9-11, a statutory employer is immune to any action in negligence by an employee of a subcontractor or an independent contractor who has already paid the employee workers' com-

pensation benefits. *Hensel Phelps Constr. Co. v. Johnson*, 161 Ga. App. 631, 295 S.E.2d 843, *rev'd on other grounds*, 250 Ga. 83, 295 S.E.2d 841 (1982).

Where an employee of a subcontractor who fell from a ladder at the employee's place of work recovers workers' compensation benefits from the employee's immediate employer, the subcontractor; the prime contractor as a statutory employer is not liable to pay workers' compensation benefits under O.C.G.A. § 34-9-8 and the prime contractor should receive the correlated benefit of tort immunity under O.C.G.A. § 34-9-11. *Kitchens v. Winter Co. Bldrs.*, 161 Ga. App. 701, 289 S.E.2d 807 (1982).

A party enjoying tort immunity must have given some quid pro quo, such as liability for workers' compensation benefits. *Cleveland Elec. Constructors, Inc. v. Craven*, 167 Ga. App. 274, 306 S.E.2d 364 (1983).

A products liability claim pursuant to O.C.G.A. § 51-1-11, against the general contractor in its capacity as designer and manufacturer of a new paper-making process, as opposed to its capacity as statutory employer, is not an action against a "third-party tort-feasor" which avoids the immunity provided under O.C.G.A. § 34-9-11. *Porter v. Beloit Corp.*, 194 Ga. App. 591, 391 S.E.2d 430 (1990).

A contractor two levels "up the ladder," not in contractual privity with the worker's immediate employer, was the worker's statutory employer and was entitled to statutory immunity. *England v. Beers Constr. Co.*, 224 Ga. App. 44, 479 S.E.2d 420 (1996).

Power company that had the responsibility of contracting for the performance of maintenance work at a plant was the statutory employer of an employee of the maintenance subcontractor and, thus, was entitled to immunity from the employee's tort claims. *Holton v. Georgia Power Co.*, 228 Ga. App. 135, 491 S.E.2d 207 (1997).

The widow of the employee of a subcontractor could not bring a wrongful death action against the general contractor that was liable to pay workers' compensation benefits as the statutory employer. *Warden v. Hoar Constr. Co.*, 269 Ga. 715, 507 S.E.2d 428 (1998).

General contractor did not come within liability exceptions of O.C.G.A. § 34-9-11(a) in an action for recovery of personal injuries

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sustained by a subcontractor, where it was not an employee of the same employer, it was neither an insurer nor a person who provided workers' compensation benefits under a contract with the employer, nor was it a "construction design professional"; the contractor was deemed to be a statutory employer of the subcontractor, pursuant to the definition of O.C.G.A. § 34-9-1(3), where the subcontractor contracted with a principal, a plumbing company, which was the subcontracting company to the general contractor, for the subcontractor's workers' compensation coverage to be included under the company's workers' compensation coverage and the subcontractor received benefits therefrom. *Reynolds v. McKenzie-Perry Homes, Inc.*, 261 Ga. App. 379, 582 S.E.2d 534 (2003).

In a personal injury action filed by a subcontractor's employee against the general contractor, the trial court properly concluded that the general contractor was a principal contractor that hired the subcontractor to aid it in the completion of its contract to supply wood chips to a paper company; accordingly, the general contractor was a statutory employer entitled to tort immunity in the employee's suit. *Patterson v. Bristol Timber Co.*, 286 Ga. App. 423, 649 S.E.2d 795 (2007).

Independent contractors. — The immunity afforded an employee of the same employer does not extend to independent contractors who nevertheless are deemed to be employees of a statutory employer in a tort action brought against the independent contractor by a direct employee of that statutory employer of the independent contractor. *Rothrock v. Jeter*, 212 Ga. App. 85, 441 S.E.2d 88 (1994).

Immunity under § 34-9-8(a). — Only an entity who is secondarily liable for workers' compensation benefits under O.C.G.A. § 34-9-8(a) is consequently entitled to tort immunity under O.C.G.A. § 34-9-11. *Yoho v. Ringier of Am., Inc.*, 263 Ga. 338, 434 S.E.2d 57 (1993).

Statutory employer immune. — The undisputed facts showed that defendant was plaintiff's statutory employer within the meaning of O.C.G.A. § 34-9-8(a), and therefore immune from tort liability under the

exclusive remedy provision of O.C.G.A. § 34-9-11. *Fowler-Flemister Concrete, Inc. v. Sumner*, 209 Ga. App. 312, 433 S.E.2d 329 (1993).

Employer liable where renovated premises under its control. — Where, at the time of the accident, the premises being renovated were totally under the dominion and control of the employer, and the employee was engaged in the employee's regular duties when the unfortunate incident occurred, the employee's sole recourse is against the employer, through the statutorily provided means, if there is no competent evidence of record to sustain the employee's contention that the contractor was in any way negligent in the performance of its work or that had it been permitted to complete the installation of the floor finish as originally contracted for, a dangerous or defective condition would have been created. *Church v. SMS Enters.*, 186 Ga. App. 791, 368 S.E.2d 554 (1988).

More than possession required for workers' compensation liability. — An owner who is merely in possession or control of the premises would not be subject to workers' compensation liability as a statutory employer and would not be immune from tort liability. *Southern Ry. v. Hand*, 216 Ga. App. 370, 454 S.E.2d 217 (1995).

Employer as joint tortfeasor. — This section took away from the employee any common-law right of action against the employer for injuries to the employee due to the employer's negligence, the legal effect of this being to completely eliminate the idea that the employer can be a common-law tortfeasor as to the employee; hence, there is no basis upon which the employer can be a joint tortfeasor with a third person as to an employee, where both the employer and the employee are under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Williams Bros. Lumber Co. v. Meisel*, 85 Ga. App. 72, 68 S.E.2d 384 (1951) (see O.C.G.A. § 34-9-11).

As to an employee, an employer cannot be considered as a joint tortfeasor with a third person whose negligence causes or aggravates an employee's injury. *Gay v. Greene*, 91 Ga. App. 78, 84 S.E.2d 847 (1954).

This section related only to contribution among "joint trespassers", that is, joint tortfeasors, and a proposed third-party de-

fendant cannot be made liable as a joint tortfeasor where it, as an employer, has already paid workers' compensation to the plaintiffs. *Central of Ga. Ry. v. Lester*, 118 Ga. App. 794, 165 S.E.2d 587 (1968) (see O.C.G.A. § 34-9-11).

An employer cannot be considered a joint tortfeasor with a third party, even where the employer's negligence combined with that of another to produce the employee's injuries. *Scott v. Crescent Tool Co.*, 306 F. Supp. 884 (N.D. Ga. 1969).

A joint tortfeasor's payment of workers' compensation to an employee makes the tortfeasor immune from further liability on account of the tortfeasor's negligence in causing the accident on which the negligence claim is predicated. *Georgia State Tel. Co. v. Scarboro*, 148 Ga. App. 390, 251 S.E.2d 309 (1978).

An employer who has been required to pay workers' compensation benefits to an injured employee cannot be considered as a joint tortfeasor whether or not the employer's negligence combined with that of a third party to produce the employee's injuries. *J.R. Mabbett & Son v. Ripley*, 185 Ga. App. 601, 365 S.E.2d 155 (1988).

Employer immune as third-party defendant. — An employer who pays workers' compensation benefits to an employee is immune from liability as a third-party defendant in the employee's tort action. *Georgia Dep't of Human Resources v. Joseph Campbell Co.*, 261 Ga. 822, 411 S.E.2d 871 (1992).

Negligent employee of a borrowing employer is an "employee of the same employer" under O.C.G.A. § 34-9-11 and, therefore, a borrowed employee cannot bring a personal injury action against a negligent employee even though the borrowing employer does not provide worker's compensation benefits. *Burt v. Underwood*, 258 Ga. 207, 367 S.E.2d 230 (1988).

Borrowed servant rule applied. — At the time of plaintiff's injuries, allegedly due to the negligence of employees loaned to plaintiff's employer, the loaned employees were under the exclusive control and direction of plaintiff's employer; therefore, the lending employer was entitled to tort immunity. *Berry v. Davis Feed & Seed, Inc.*, 237 Ga. App. 768, 516 S.E.2d 812 (1999).

Temporary employees. — Pursuant to Fed. R. Civ. P. 54(b), the court reconsidered

its prior denial of summary judgment to a corporation in an employee's suit to recover for a workplace injury because the court's prior holding that tort immunity under Georgia's workers' compensation scheme attached only if the corporation exercised the greater amount of control over the employee's job duties than did a temporary help contracting firm was clearly erroneous; the corporation was entitled to summary judgment because the temporary help contracting firm paid workers' compensation benefits to the employee and such benefits were the exclusive remedy pursuant to O.C.G.A. § 34-9-11. *Lambert v. Briggs & Stratton Corp.*, F. Supp. 2d , 2006 U.S. Dist. LEXIS 3104 (S.D. Ga. Jan. 18, 2006).

Immunity of employees of joint venture. — Where the owner of a crane and another construction company engaged in a joint venture on a project and both the plaintiff and the operator of a crane which injured plaintiff were employees of the joint venture, the employee, the crane owner, and the joint venture would be entitled to tort immunity, pursuant to O.C.G.A. § 34-9-11, irrespective of which party served as the general contractor on the project. *Burgett v. Thamer Constr., Inc.*, 165 Ga. App. 404, 300 S.E.2d 211 (1983).

Company as employer and contractor immune. — Regardless of the fact that decedent's employer was independent contractor and death occurred in performance of an independent contract, the evidence established defendant was both a principal contractor and decedent's statutory employer under O.C.G.A. § 34-9-8. Thus, defendant was entitled to tort immunity pursuant to O.C.G.A. § 34-9-11. *International Leadburning Co. v. Forrister*, 213 Ga. App. 558, 445 S.E.2d 546 (1994).

Affirmative showing of total of employees by principal or intermediate contractor. — A statutory employer under O.C.G.A. § 34-9-8 is by law subject to the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., and is required by law to comply with its requirements and the number of employees engaged by a statutory employer need not be affirmatively shown in order for such an employer to take advantage of tort immunity offered by the Act. *Hensel Phelps Constr. Co. v. Johnson*, 161 Ga. App. 631, 295 S.E.2d 843 (on motion for rehearing), rev'd on

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other grounds, 250 Ga. 83, 295 S.E.2d 841 (1982).

General contractor actively involved in enterprise. — The “enterprise” theory whereby an “owner” who is not also a “contractor” may nevertheless be held liable for workers’ compensation benefits and immune from tort liability is inconsistent with O.C.G.A. § 34-9-8’s concept of “principal contractor”. A mere owner to whom the contractual obligation of performance is owed and from whom no contractual obligation of performance is due is not a “principal contractor” under O.C.G.A. § 34-9-11. *Yoho v. Ringier of Am., Inc.*, 263 Ga. 338, 434 S.E.2d 57 (1993).

Tort immunity. — Only an entity who is secondarily liable for workers’ compensation benefits under O.C.G.A. § 34-9-8(a) is consequently entitled to tort immunity under O.C.G.A. § 34-9-11. *Southern Ry. v. Hand*, 216 Ga. App. 370, 454 S.E.2d 217 (1995).

Georgia Supreme Court did not abandon the traditional rule of *lex loci delicti* for conflict of law issues in tort matters, based on an evaluation of other theories and based on the conclusion that no other conflict theory was superior to the ease, certainty, and predictability of the traditional rule; accordingly, an employee who was a Tennessee resident and who received workers’ compensation benefits from a Missouri employer in that state could not file suit against the employer in Georgia, where the work accident occurred, as the exclusive remedy under O.C.G.A. § 34-9-11 of the Georgia Workers’ Compensation Law prevented the tort action. *Dowis v. Mud Slingers, Inc.*, 279 Ga. 808, 621 S.E.2d 413 (2005).

Subcontractor's liability for injury to another subcontractor's employee. — A subcontractor does not enjoy tort immunity from a suit by the injured employee of a different independent subcontractor. *Cleveland Elec. Constructors, Inc. v. Craven*, 167 Ga. App. 274, 306 S.E.2d 364 (1983).

Immunity from contribution/indemnity. — An employer paying benefits is immune from third-party tort actions for contribution/indemnity. *Insurance Co. of N. Am. v. United States*, 643 F. Supp. 465 (M.D. Ga. 1986).

Once a contractor has been determined

to be a statutory employer, such an employer cannot be a joint tortfeasor subject to contribution. *Modlin v. Swift Textiles, Inc.*, 180 Ga. App. 726, 350 S.E.2d 273 (1986).

A passive tortfeasor may not bring a claim for implied indemnity against an employer who pays workers’ compensation benefits, even when the employer’s active negligence is primarily responsible for an employee’s injuries. *Georgia Dep’t of Human Resources v. Joseph Campbell Co.*, 261 Ga. 822, 411 S.E.2d 871 (1992).

The indemnity provision of the High Voltage Safety Act (HVSA), O.C.G.A. § 34-9-1 et seq., may be enforced without offending the exclusive-remedy provision of the Workers’ Compensation Act (WCA), O.C.G.A. § 34-9-1 et seq., by according indemnity actions pursuant to the HVSA the same dignity case law has given contractual indemnity provisions executed by private parties; thus, while the WCA remains an employee’s sole remedy against an employer on account of a work-related injury, the HVSA authorizes a power-line company to obtain indemnification from an employer on account of the employer’s failure to abide by the safety provisions in the HVSA. *Flint Elec. Membership Corp. v. Ed Smith Constr. Co.*, 270 Ga. 464, 511 S.E.2d 160 (1999).

Contractual indemnity provision enforceable. — Although tort liability may be barred by the exclusive remedy provision of the workers’ compensation law (see O.C.G.A. § 34-9-1 et seq.), that provision does not bar enforcement of a contractual indemnity provision. *Interface Group-Nevada, Inc. v. Freeman Decorating Co.*, 222 Ga. App. 44, 473 S.E.2d 573 (1996).

Compensation set-off from tort judgment. — A tortfeasor, a defendant-manufacturer in a products liability action, was not entitled to have the amount of workers’ compensation paid to the injured plaintiff-employee by an employer set-off from the verdict obtained against it, even though the negligence of the employer contributed to the injury. Such a result was not unconstitutional. *Hudson v. Union Carbide Corp.*, 620 F. Supp. 558 (N.D. Ga. 1985).

Action for infliction of emotional distress and assault not barred. — Employee’s action against employer for intentional infliction of emotional distress and assault was not precluded by the exclusive remedy provisions of

the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. *Lightning v. Roadway Express, Inc.*, 60 F.3d 1551 (11th Cir. 1995).

Third Party Liability

In general. — It was never the purpose of this section to place exclusive liability upon the master for injuries to the master's employees arising out of and in the course of employment, and thus to grant immunity and license to others who were responsible for such injuries. *Echols v. Chattooga Mercantile Co.*, 74 Ga. App. 18, 38 S.E.2d 675 (1946) (see O.C.G.A. § 34-9-11).

Strict construction. — Because the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., is in derogation of common law, its provisions must be strictly construed; strictly construing the immunity provision of O.C.G.A. § 34-9-11(a), in order for a third party to be immune from suit, it must have had a contract or agreement with the employer to provide workers' compensation benefits to an injured employee. *Coker v. Deep S. Surplus of Ga., Inc.*, 258 Ga. App. 755, 574 S.E.2d 815 (2002).

Nature of compensation. — Compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is similar in character to benefits under an insurance policy, and its receipt by an injured employee can afford no ground upon which a third person who negligently injures another should escape liability, either wholly or in part. *Hotel Equip. Co. v. Liddell*, 32 Ga. App. 590, 124 S.E. 92 (1924); *Mixon v. Lovett*, 122 Ga. App. 517, 177 S.E.2d 826 (1970).

Right to bring suit. — An injured employee may maintain an action at law against a third person whose negligent conduct caused the employee's injury, and such suit will not be barred because such injury arose out of the employee's employment and the injured employee received compensation therefor under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Sheffield Co. v. Phillips*, 69 Ga. App. 41, 24 S.E.2d 834 (1943).

This section did not take away the right of an employee to sue a wrongdoer, but can only mean that the employee and the employer are subject to the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) and that an employee shall have no other remedy against an employer; third persons

were not concerned. *Echols v. Chattooga Mercantile Co.*, 74 Ga. App. 18, 38 S.E.2d 675 (1946) (see O.C.G.A. § 34-9-11).

An employee coming within the terms of this chapter is not precluded thereby from maintaining an action against a third party joint tortfeasor who inflicted the injuries complained of. *Echols v. Chattooga Mercantile Co.*, 74 Ga. App. 18, 38 S.E.2d 675 (1946).

This section should not be construed to abrogate the common-law right of an employee to maintain a negligence action against a defendant. *Scott v. Crescent Tool Co.*, 296 F. Supp. 158 (N.D. Ga. 1969) (see O.C.G.A. § 34-9-11).

An employee who receives workers' compensation from an employer was merely barred by this section from suing the employer at common law, not from suing a negligent third party. *Scott v. Crescent Tool Co.*, 296 F. Supp. 158 (N.D. Ga. 1969) (see O.C.G.A. § 34-9-11).

An injured employee may be entitled to collect workers' compensation from an employer and at the same time may maintain an action in tort against a third party who is responsible for the employee's injuries and damages. *Avis Truck Rental v. Coggins*, 129 Ga. App. 81, 198 S.E.2d 716 (1973).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) was not intended to allow a tortfeasor to exempt oneself from all liability by showing that the person injured received the person's injuries during the course of employment. *Floyd v. McFolley*, 131 Ga. App. 4, 205 S.E.2d 29 (1974).

This section was not intended to, nor did it, extinguish an employee's action against any third-party tortfeasor, but only served to bar an action against the employer and the insurance carrier. *Floyd v. McFolley*, 131 Ga. App. 4, 205 S.E.2d 29 (1974) (see O.C.G.A. § 34-9-11).

This section had as its basic purpose the preclusion of other remedies where the injured workman was entitled to recover workers' compensation, but remedies for on-the-job injuries are not so limited where the injury is the result of the negligence of a third-party tortfeasor. *Tect Constr. Co. v. Frymyer*, 146 Ga. App. 300, 246 S.E.2d 334 (1978) (see O.C.G.A. § 34-9-11).

O.C.G.A. § 34-9-11 preserves an employee's cause of action against a third-party

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tortfeasor. *United States v. Aretz*, 248 Ga. 19, 280 S.E.2d 345 (1981).

Third person as employee, loaned servant, or alter ego of employer. — The coverage of an employee by workers' compensation does not prevent a suit against a third person as a wrongdoer causing injury, unless the third person is an employee of the employer; exceptions to this rule are cases involving a loaned servant or borrowed employee, and cases where the third party is the alter ego of the employer corporation. *Clements v. Georgia Power Co.*, 148 Ga. App. 745, 252 S.E.2d 635 (1979).

Chief executive officer as alter ego of firm. — Where an employer learns of the defective condition in working premises not through the employer's ownership of the firm, but through the employer's active involvement in the management of the employer corporation as its chief executive officer, whatever breach of duty the employer may commit is committed solely through nonfeasance and while acting as the "alter ego" of the firm; accordingly, the employer cannot properly be labeled a third-party tortfeasor, and recovery against the employer is precluded. *Vaughn v. Jernigan*, 144 Ga. App. 745, 242 S.E.2d 482 (1978).

Where it is shown conclusively that an executive of a corporation acts in the executive's representative capacity as the alter ego of the corporation, an employee injured in the course of employment may not recover workers' compensation benefits and then sue the executive of the corporation in tort. *Stoker v. Wood*, 161 Ga. App. 110, 289 S.E.2d 265 (1982).

Third party action against employer. — O.C.G.A. § 34-9-11 does not preclude a third-party action against an employer paying workers' compensation benefits to the plaintiff on the basis of an indemnity agreement between the employer and defendant. *Seaboard C.L.R.R. v. Maverick Materials, Inc.*, 167 Ga. App. 160, 305 S.E.2d 810 (1983).

Common-law action against special master. — A special master employing, as a special servant, one who was a general servant of a general master is not a third person against whom a common-law action will lie under this section. *Scott v. Savannah Elec. &*

Power Co., 84 Ga. App. 553, 66 S.E.2d 179 (1951) (see O.C.G.A. § 34-9-11).

Notice of and assent to special relationship. — For a borrowed servant to be precluded from suing a special master in tort, there must be notice and assent by the borrowed servant as to the special relationship; however, it is not necessary that the borrowed servant be on notice of and give assent to the legal consequences of the special relationship. *Six Flags Over Ga., Inc. v. Hill*, 247 Ga. 375, 276 S.E.2d 572, *aff'd*, 158 Ga. App. 658, 282 S.E.2d 224 (1981).

Receipt of workers' compensation. — The fact that the plaintiff received compensation from an employer under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) and executed a final settlement receipt releasing the employer from all further liability under that law as the result of such an injury would not release another party, on whose premises the accident occurred, from liability for the injury, where such injury resulted from the other's negligence. *Sheffield Co. v. Phillips*, 69 Ga. App. 41, 24 S.E.2d 834 (1943).

Absence of contract with third party. — O.C.G.A. § 34-9-11(a) of the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., establishes that the Act is the exclusive remedy against employers for employees' injuries; the Act, however, did not provide an exclusive remedy against a third party who conducted an inspection of the employer's facilities for the employer's workers' compensation carrier in the absence of a contract or agreement with the employer to provide workers' compensation benefits to an injured employee. *Coker v. Deep S. Surplus of Ga., Inc.*, 258 Ga. App. 755, 574 S.E.2d 815 (2002).

Employee's Liability

Employee's liability to co-employee. — Until 1974 the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) did not relieve an employee from liability to a fellow employee unless such employee could be considered the alter ego of the employer. *Winslett v. Twin City Fire Ins. Co.*, 142 Ga. App. 653, 236 S.E.2d 898 (1977).

A fellow employee cannot be a joint tortfeasor with a third person as to a co-employee, where both are covered under the Workers' Compensation Act, O.C.G.A.

§ 34-9-1 et seq. *Walker v. Manley*, 637 F. Supp. 142 (M.D. Ga. 1986).

By virtue of the 1974 amendment, the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., is now the exclusive remedy for injuries sustained by an employee during the course of employment resulting from the negligence of a co-worker. *Dickey v. Harden*, 202 Ga. App. 645, 414 S.E.2d 924 (1992).

By pursuing and settling a workers' compensation claim with the employer after the employee was injured in an automobile collision while riding in a car driven by a co-worker, the employee was brought within the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., and its exclusive remedy restriction, O.C.G.A. § 34-9-11, barring the employee's negligence action against the co-worker. *Ridley v. Monroe*, 256 Ga. App. 686, 569 S.E.2d 561 (2002).

Trial court properly granted summary judgment in favor of a co-worker and an employer as the exclusivity doctrine of the Georgia Workers' Compensation Act, specifically O.C.G.A. § 34-9-11(a), barred an employee's assault and battery and intentional infliction of emotional distress claims against a co-worker and the employee's negligent retention and respondeat superior claims against the employer as the claims were ancillary to a physical occurrence arising in the course of employment; the injuries were incurred when the co-worker inflicted a minor punch or poke on the employee, not an incidental contact, which showed some level of physical harm. *Lewis v. Northside Hosp., Inc.*, 267 Ga. App. 288, 599 S.E.2d 267 (2004).

Personal injury action against employee of principal contractor. — An employee of an independent subcontractor can maintain a personal injury action against an employee of the principal contractor (the injured employee's statutory employer) where the injured employee has received workers' compensation payments for the injury from the subcontractor. *Long v. Marvin M. Black Co.*, 250 Ga. 621, 300 S.E.2d 150 (1983).

Employer's safety officer shares employer's statutory immunity. — In a contract with a subcontractor, as a person who was designated as the safety officer had the duty to supervise and inspect only in the subcontractor's capacity as the employer's representa-

tive but was not a party to the contract, the subcontractor shared statutory tort immunity with the employer. *Pardue v. Ruiz*, 263 Ga. 146, 429 S.E.2d 912 (1993).

Affirmative act of supervisory employee causing or increasing risk of injury. — In an action by a freelance welder against a project engineer and job superintendent for injuries suffered in an explosion, the project engineer was immune from liability where the engineer's negligence was based on a general nondelegable duty of the employer, but the job superintendent lost such immunity when the superintendent performed an affirmative act that caused or increased the risk of danger to the plaintiff. *Padgett v. CH2M Hill S.E., Inc.*, 866 F. Supp. 560 (M.D. Ga. 1994).

O.C.G.A. § 34-9-11 precludes a defendant in a personal injury action from asserting a third-party contribution claim against a co-employee of the plaintiff. *Weller v. Brown*, 266 Ga. 130, 464 S.E.2d 805 (1996).

Co-employee who is a construction design professional does not lose immunity. *Cotton v. Bowen*, 241 Ga. App. 543, 524 S.E.2d 737 (1999).

Insurance Carriers

Entitlement to tort immunity. — A workers' compensation carrier, as the employer's alter ego, is entitled to tort immunity afforded the employer under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *United States Fire Ins. Co. v. Day*, 136 Ga. App. 359, 221 S.E.2d 467 (1975); *Gray v. Charles Beck Mach. Corp.*, 495 F. Supp. 250 (S.D. Ga. 1980); *Fred S. James & Co. v. King*, 160 Ga. App. 697, 288 S.E.2d 52 (1981).

Because an insurer was entitled to the same immunity granted to the insurer's wholly-owned subsidiary under O.C.G.A. § 34-9-11(a), and an injured employee failed to create a triable issue of fact in response to the insurer's affidavit testimony in support of the insurer's summary judgment motion, the insurer was properly granted summary judgment as to the issue of the insurer's liability for the employee's injuries. Moreover, the undisputed evidence showed that the insurer would be the payor of any eligible workers' compensation benefits awarded to the employee. *Coker v. Great Am. Ins. Co.*, 290 Ga. App. 342, 659 S.E.2d 625 (2008).

Insurance Carriers (Cont'd)

Insurers other than compensation carriers. — The insurers of an employer, other than the compensation carrier, may be subject to tort liability for negligent safety inspections. *Gray v. Charles Beck Mach. Corp.*, 495 F. Supp. 250 (S.D. Ga. 1980).

Exception to carrier's immunity. — A compensation insurer itself is not immunized if it occupies the relation of insurer in any capacity other than that of compensation insurer. *Gray v. Charles Beck Mach. Corp.*, 495 F. Supp. 250 (S.D. Ga. 1980).

A compensation insurer enjoyed the employer's immunity, but other insurers of the employer were not immunized from common-law suit as third-party tortfeasors under this section; moreover, the compensation insurer itself was not so immunized if it occupied the relation of insurer in any capacity other than the compensation insurer. *Sims v. American Cas. Co.*, 131 Ga. App. 461, 206 S.E.2d 121, *aff'd sub nom. Providence Wash. Ins. Co. v. Sims*, 232 Ga. 787, 209 S.E.2d 61 (1974) (see O.C.G.A. § 34-9-11).

The statutory immunity of a workers' compensation insurer applies except where the insurer issues a policy covering risks other than workers' compensation and it acts or fails to act in accordance with a duty arising out of a general liability policy. *Fred S. James & Co. v. King*, 160 Ga. App. 697, 288 S.E.2d 52 (1981).

Liability insurance carrier must defend. — Liability insurance carrier of employer was obligated to defend against a tort action, even though the exclusivity of workers' compensation might have been a defense to the plaintiffs' action. *Penn-America Ins. Co. v. Disabled Am. Veterans, Inc.*, 268 Ga. 564, 490 S.E.2d 374 (1997).

Negligent inspection pursuant to workers' compensation coverage. — A workers' compensation carrier and its representative in inspecting machinery were the alter ego of the employer, and in this respect were entitled to the immunity afforded the employer against all other rights and remedies of an injured employee under this section. *Mull v. Aetna Cas. & Sur. Co.*, 120 Ga. App. 791, 172 S.E.2d 147 (1969), *cert. dismissed*, 226 Ga. 462, 175 S.E.2d 552 (1970) (see O.C.G.A. § 34-9-11).

An insurer which issues a workers' com-

pensation policy and also contracts for other types of coverages is not liable in tort for the negligent inspection of an insured's premises when done pursuant only to the workers' compensation coverage. *United States Fire Ins. Co. v. Day*, 136 Ga. 359, 221 S.E.2d 467 (1975).

An insurer which issues a workers' compensation policy and also contracts for other types of coverage is not liable in tort for the negligent inspection of an insured's premises when done pursuant only to the workers' compensation coverage. *Gray v. Charles Beck Mach. Corp.*, 495 F. Supp. 250 (S.D. Ga. 1980).

Where an insurer issues both workers' compensation and public liability insurance policies, but limits its inspections of an insured's premises to its role as a workers' compensation carrier, it is entitled, as the employer's alter ego, to the immunity afforded the employer under this section as against the tort claims of insured employees. *Newton v. Liberty Mut. Ins. Co.*, 148 Ga. App. 694, 252 S.E.2d 199 (1979); *Argonaut Ins. Co. v. Clark*, 154 Ga. App. 183, 267 S.E.2d 797 (1980) (see O.C.G.A. § 34-9-11).

Negligent safety inspections made pursuant to other policy. — For common-law tort liability to arise under another policy of the compensation insurer, negligent safety inspections must be undertaken pursuant to that other policy; a reliance by either the employee or the employer on inspections made by an insurance company is sufficient to give rise to a cause of action in tort for negligent inspection. *Gray v. Charles Beck Mach. Corp.*, 495 F. Supp. 250 (S.D. Ga. 1980).

Action on health and accident policy. — An employee is not estopped or debarred by an agreement or award for compensation for an injury under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) from maintaining an action against an insurance company which is not the carrier of the employer's liability insurance or a party to the agreement or award or involved in any tort causing the injury, upon a health and accident policy of such company, for benefits because of such injury; neither that law nor any principle of estoppel will permit such insurance company to relieve itself from the obligations of the policy by showing that the plaintiff has received or is receiving compen-

sation for the same injury from plaintiff's employer or the insurance carrier through a voluntary agreement, nor does an award under that law constitute an adjudication as to the rights and remedies of the plaintiff in relation to the defendant insurance company. *Carter v. Metropolitan Life Ins. Co.*, 47 Ga. App. 367, 170 S.E. 535 (1933).

Service agency. — A service agency which is responsible for the administration of a self-insured employer's workers' compensation program is included under the umbrella of immunity provided by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), since by contract the service agency administers and facilitates the payment of benefits by the self-insurer, and anyone who "undertakes to perform or assist in the performance" of an employer's statutory duties under that law should be immune from suit as a third party tortfeasor. *Fred S. James & Co. v. King*, 160 Ga. App. 697, 288 S.E.2d 52 (1981).

Trade association which provides services to self-insurers' fund and its member employers solely with regard to workers' compensation insurance is protected by the immunity under O.C.G.A. § 34-9-11. *Hinkley v. Building Material Merchants Ass'n*, 187 Ga. App. 345, 370 S.E.2d 201 (1988).

Withholding benefits pursuant to garnishment order. — The exclusive remedy provision did not prevent an action alleging fraud, deceit, conversion, abuse of process, intentional infliction of emotional distress, and/or misrepresentation arising out of the insurance carrier's cessation and withholding of the plaintiff's workers' compensation benefits pursuant to a garnishment order, since the intentional tortious conduct related to the disruption of the payment of benefits neither arose out of nor arose in the course of the employee's employment within the meaning of those phrases in the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. *Brazier v. Travelers Ins. Co.*, 602 F. Supp. 541 (N.D. Ga. 1984).

Parties reimbursing companies. — O.C.G.A. § 34-9-11, intended to provide tort immunity to workers' compensation insurers, does not apply to parties who reimburse such insurers pursuant to an indemnification agreement and who are not, therefore, insurance companies. *George v. Ashland-Warren, Inc.*, 254 Ga. 95, 326 S.E.2d 744 (1985).

Employee's tort claim against carrier precluded. — Employee's tort claims against employer's workers' compensation insurance carrier for alleged mishandling of benefits and documents were precluded by provisions of the workers' compensation law, O.C.G.A. § 34-9-1 et seq. *Stewart v. Auto-Owners Ins. Co.*, 230 Ga. App. 265, 495 S.E.2d 882 (1998).

Effect of Other Sources of Income

In general. — An award of workers' compensation benefits is not to be diminished by other sources of income. *Brannon v. Georgia Bureau of Investigation*, 146 Ga. App. 524, 246 S.E.2d 511 (1978).

Effect of former § 33-34-8. — Ga. L. 1974, p. 113 and 114, relating to the reduction or the elimination of benefits under the former Motor Vehicle Accident Reparations Act (see O.C.G.A. Ch. 34, T. 33) where the injured person is entitled to workers' compensation benefits, protects a plaintiff employee's rights under plaintiff's own no-fault policy, notwithstanding plaintiff's receipt of workers' compensation benefits; but having received compensation benefits, former Code 1933, § 114-103 (see O.C.G.A. § 34-9-11) precluded the employee's recovery of no-fault benefits from the employer. *Freeman v. Ryder Truck Lines*, 244 Ga. 80, 259 S.E.2d 36 (1979); *Boston Old Colony Ins. Co. v. Brown*, 155 Ga. App. 767, 272 S.E.2d 755 (1980); *Swafford v. Transit Cas. Co.*, 486 F. Supp. 175 (N.D. Ga. 1980).

Former § 33-34-8, relating to the reduction or the elimination of benefits under the former Motor Vehicle Accident Reparations Act (Ch. 34, T. 33) where the injured person is entitled to workers' compensation benefits, etc., did not impliedly repeal O.C.G.A. § 34-9-11. *Brown v. Boston Old Colony Ins. Co.*, 247 Ga. 287, 275 S.E.2d 651 (1981).

Effect of amendments to former § 33-34-8. — The amendment to former § 33-34-8 adding subsections (b) and (c) has broadened the rights of the injured employee by allowing the employee to collect basic benefits under the employer's no-fault insurance in addition to, though reduced by, benefits under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Atlanta Cas. Co. v. Sharpton*, 158 Ga. App. 758, 282 S.E.2d 214 (1981).

Effect of Other Sources of Income (Cont'd)

State action barred upon receipt of federal benefits. — A federal government employee who received the benefit of the federal worker's compensation laws was barred from bringing an action based upon state law against a co-employee. *Lower v. Cook*, 691 F. Supp. 356 (M.D. Ga. 1988).

Collection of no-fault benefits. — Neither former Code 1933, § 14-103 nor § 56-3409b (see O.C.G.A. § 34-9-11 nor § 33-34-8) was intended to prohibit an injured person from collecting benefits to which the person is entitled under the injured person's own personal no-fault insurance. *Atlanta Cas. Co. v. Sharpton*, 158 Ga. App. 758, 282 S.E.2d 214 (1981).

Preclusion of recovery of no-fault benefits from employer. — Former § 33-34-8 protected the plaintiff's rights under plaintiff's own no-fault policy notwithstanding plaintiff's receipt of workers' compensation benefits, but, if the plaintiff has received compensation benefits, O.C.G.A. § 34-9-11 precludes recovery of no-fault benefits from the employer. *Atlanta Cas. Co. v. Sharpton*, 158 Ga. App. 758, 282 S.E.2d 214 (1981).

Dual recovery under workers' compensation and employer's no-fault plan. — An employee may not recover both under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) and under the employer's "no-fault" insurance or self-insurance plan. *Swafford v. Transit Cas. Co.*, 486 F. Supp. 175 (N.D. Ga. 1980).

Collecting under insurance policy. — The fact that a claimant received payments under a group health and accident insurance policy for the identical injury for which the claimant now seeks workers' compensation would not estop the claimant in a claim for compensation. *Georgia Marble Co. v. McBee*, 90 Ga. App. 406, 83 S.E.2d 253 (1954).

Where the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is applicable, it provided an employee an exclusive remedy against an employer; notwithstanding the broad scope of this section, however, a compensation claimant was not precluded from collecting under an insurance policy covering the claimant's life, medical expenses, disability, or loss of income. *Freeman v.*

Ryder Truck Lines, 244 Ga. 80, 259 S.E.2d 36 (1979) (see O.C.G.A. § 34-9-11).

Receipt of unemployment benefits. — The fact that the claimant has applied for and is receiving unemployment compensation under the employment security law (see O.C.G.A. Ch. 8, T. 34) alters nothing as to a finding that the claimant's incapacity resulted from injuries which arose out of and in the course of the claimant's employment, nor does the claimant's application for and receipt of unemployment benefits estop the claimant from claiming compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) or constitute an election between inconsistent remedies. *Utica Mut. Ins. Co. v. Pioda*, 90 Ga. App. 593, 83 S.E.2d 627 (1954).

Disability pension. — Workers' compensation benefits may not be denied to a claimant otherwise entitled for the reason that the claimant is receiving a disability pension from the same employer. *Brannon v. Georgia Bureau of Investigation*, 146 Ga. App. 524, 246 S.E.2d 511 (1978).

The contractual right to a pension because of permanent disability caused by an injury incurred in the line of duty is not such a right or remedy as is excluded by this section. *City Council v. Young*, 218 Ga. 346, 127 S.E.2d 904 (1962) (see O.C.G.A. § 34-9-11).

Settlement of damage action. — Where an employee, who received an injury for which compensation was payable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), which injury was caused by a third person, filed a suit in damages against such third person, which action was settled by the parties, neither the employer nor the insurance carrier would be entitled to have the amount of compensation awarded the employee reduced, by subtracting therefrom the sum received by the employee in the settlement of the employee's damage action against the third person. *American Mut. Liab. Ins. Co. v. Wigley*, 50 Ga. App. 258, 177 S.E. 815 (1934) (decided under former Code 1933, § 114-403, repealed by Ga. L. 1972, p. 3).

Subrogation or setoff. — An employer liable to pay compensation was not entitled to subrogation of a claimant's rights against a railroad company, and not entitled to have any part of the sum collected by the claimant

from the railroad company in a settlement setoff against the amount of compensation awarded. *Lumbermen's Mut. Cas. Co. v. Babb*, 67 Ga. App. 161, 19 S.E.2d 550 (1942) (decided under former Code 1933, § 114-403, repealed by Ga. L. 1972, p. 3).

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"Dual-capacity" theory of recovery. — A police officer, who was injured when the officer lost control of the officer's patrol car when a motorgrader driven by an unsupervised inmate pulled in front of the officer, could not bring an action against the county to collect damages based on a dual capacity theory (that the county's duties arising out of its supervision of inmates were separate and distinct from those arising out of the employer-employee relationship), since the officer was injured as a result of a traffic incident, a risk that the officer was exposed to because of the officer's employment. *Pulliam v. Richmond County Bd. of Comm'rs*, 184 Ga. App. 403, 361 S.E.2d 544 (1987).

Injury during break period. — The plaintiff was limited in recovery against an employer to that available under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., where, although the injury occurred during plaintiff's lunch break, the employer introduced evidence that the precise time the plaintiff took a lunch break was dictated by the current status of the workload and that plaintiff often performed job-related duties during plaintiff's lunch break, thereby precluding the application of an exception to workers' compensation coverage for injuries occurring during regularly scheduled breaks at a time the plaintiff is free to do as plaintiff chooses. *Miles v. Brown Transp. Corp.*, 163 Ga. App. 563, 294 S.E.2d 734 (1982).

Even if the employee is on a scheduled break and even if the employee is free to use the break time as the employee pleases, if the employee is in fact engaged in employment-related activities, the injury is compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Swanson v. Lockheed Aircraft Corp.*, 181 Ga. App. 876, 354 S.E.2d 204 (1987).

Employee, who was injured in an automobile accident while being driven back to the office by a co-employee after lunch, was

barred from pursuing a common-law negligence action against the co-employee because of workers' compensation coverage, where the trial court found that the lunch was a business lunch at which recruitment needs, sources of recruitment, and recruiting strategy were discussed. *Mann v. Workman*, 257 Ga. 70, 354 S.E.2d 831 (1987).

Injury in parking lot. — Where the plaintiff was injured by a fellow employee on a public street while going from plaintiff's office to a company controlled parking lot across the street, the plaintiff was injured in the course of employment and was limited to the remedies provided by the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. *Knight-Ridder Newspaper Sales, Inc. v. Desselle*, 176 Ga. App. 174, 335 S.E.2d 458 (1985).

Employee was precluded by O.C.G.A. § 34-9-11 from further recovery from a fellow employee whose car collided with the employee's vehicle in a parking lot where, although the employee was finished with the employee's daily work shift, the employee was in a parking lot on the employer's premises and the accident occurred within a reasonable time for the employee's egress from the employee's workplace. *Crawford v. Meyer*, 195 Ga. App. 867, 395 S.E.2d 327 (1990).

An action by an employee for injuries sustained when the employee fell in the defendant employer's parking lot while on the employee's way to a scheduled lunch break was barred by the statute pursuant to the ingress and egress rule. *Rockwell v. Lockheed Martin Corp.*, 248 Ga. App. 73, 545 S.E.2d 121 (2001).

School worker who was involved in an accident with a schoolbus on an access road owned and controlled by the school while the worker was heading home after signing out for the day was still within the scope of the worker's employment. Hence, the worker was limited under O.C.G.A. § 34-9-11(a) to a workers' compensation claim and could not pursue a tort action against the bus driver. *Connell v. Head*, 253 Ga. App. 443, 559 S.E.2d 73 (2002).

Employer was properly granted summary judgment, in an employee's personal injury and loss of consortium suit filed against it, because the employee's accidental injury, which occurred as the employee was walking

Illustrative Cases (Cont'd)

to work from an employer-owned parking facility to the employee's work building and was struck by an employer-operated vehicle, was compensable under the Workers' Compensation Act (Act), O.C.G.A. § 34-9-1 et seq., under the parking lot exception; thus, the employee's exclusive remedy fell under the Act. *Longuepee v. Ga. Inst. of Tech.*, 269 Ga. App. 884, 605 S.E.2d 455 (2004).

Injury in parking garage. — Injuries from plaintiff's assault and rape arose out of and in the course of her employment where the attack occurred in a parking garage maintained by the employer for the benefit and convenience of its customers and employees. *Macy's S., Inc. v. Clark*, 215 Ga. App. 661, 452 S.E.2d 530 (1994).

Survivors' parent was killed while defending the parent's employer and the employer's property from third parties; under the positional risk doctrine, the parent's death arose out of employment, and therefore the survivors' exclusive remedy was under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. *DeKalb Collision Ctr., Inc. v. Foster*, 254 Ga. App. 477, 562 S.E.2d 740 (2002).

Injury in premises liability suit arising from same incident in workers' compensation claim. — Because, on the record, there was no evidence that compensation was paid to an injured person pursuant to a board-approved settlement agreement reached by the parties in a workers' compensation claim, the trial court erred by granting summary judgment to a spa in the injured person's premises liability suit arising from the same incident on the basis that the suit was barred by the exclusive remedy provisions. *Theesfeld v. Image Electrolysis & Skin Care, Inc.*, 274 Ga. App. 38, 619 S.E.2d 303 (2005).

Employer provided benefit causing injury. — Action by an employee against the employer's employer and a fellow employee was barred where the employee was injured while being driven home in company provided transportation. *Lee v. Sears*, 223 Ga. App. 897, 479 S.E.2d 196 (1996).

Intentional delay of payments. — The intentional delay of workers' compensation payments does not give rise to an independent cause of action against the employer or

its insurer, as the penalties for such a delay are provided by O.C.G.A. § 34-9-221(e). *Bright v. Nimmo*, 253 Ga. 378, 320 S.E.2d 365 (1984); *Dutton v. Georgia Associated Gen. Contractor Self-Insurers Trust Fund*, 215 Ga. App. 607, 451 S.E.2d 504 (1994).

Injury caused by third party for personal reasons. — Workers' compensation is not the exclusive remedy, and thus does not bar a common law tort claim, where the willful actions are directed against the employee by fellow employees for purely non-work-related personal reasons. *Knight v. Gonzalez*, 181 Ga. App. 468, 352 S.E.2d 646 (1987).

Where the evidence of record did not establish as a matter of law the existence of any causal relationship between the plaintiff's performance of plaintiff's duties at the supermarket and the incident which gave rise to the action, but instead it was inferred from the evidence that a co-employee attacked the plaintiff for reasons which were purely personal, within the contemplation of O.C.G.A. § 34-9-1(4), it followed that the employee was not entitled to summary judgment on the basis of O.C.G.A. § 34-9-11. *Lindsey v. Winn Dixie Stores, Inc.*, 186 Ga. App. 867, 368 S.E.2d 813 (1988).

Action for personal property damage. — Because the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., does not provide a remedy for damage to personal property, the act does not bar an action for damages to personal property, such as an employee's clothing. To hold otherwise would deny an employee of the constitutional right to due process and equal protection of the law. *Superb Carpet Mills, Inc. v. Thomason*, 183 Ga. App. 554, 359 S.E.2d 370 (1987).

Employee's suit for compensatory damages for the employee's pants and a boot destroyed in an industrial accident and for punitive damages against the employer for intentional creation of a dangerous condition by removing a safety device from a cardboard box folding machine was barred by the exclusive remedy provision of the Workers' Compensation Act, O.C.G.A. § 34-9-11. To allow the employee to include a demand for punitive damages in the employee's lawsuit for property loss would enable the employee to circumvent the exclusive remedy provision of the Act. *Wimbush v.*

Confederate Packaging, Inc., 252 Ga. App. 806, 556 S.E.2d 925 (2001).

Recovery for aggravated circumstances. — Although the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., does not bar an employee from bringing a claim for property damage against an employer, the employee may not recover additional damages for aggravated circumstances where the property damage arose out of the same incident in which the employee sustained personal injury compensable under the Act. *Superb Carpet Mills, Inc. v. Thomason*, 183 Ga. App. 554, 359 S.E.2d 370 (1987).

Liability of agent who fails to procure workers' compensation insurance. — An agent who failed to perform the agent's duty to procure workers' compensation insurance for an insolvent employer cannot rely upon the exclusive remedy bar in defending a suit for an amount equal to the award assessed against the employer. *Samuel v. Baitcher*, 247 Ga. 71, 274 S.E.2d 327 (1981).

Right of widow to sue tortfeasor. — The provision as to the exclusion of all other rights and remedies was applicable only to such rights or remedies as the plaintiff would have had against the employer of her husband independently of the law embraced in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), but as to a third party tortfeasor whose negligence resulted in the death of the husband, the plaintiff was not deprived of her right under the law to sue for and recover the full value of her husband's life. *Athens Ry. & Elec. Co. v. Kinney*, 160 Ga. 1, 127 S.E. 290 (1925).

The superior court properly dismissed on demurrer (now motion to dismiss) an action instituted against an insurance company by a widow, on a contract of workers' compensation insurance, to recover for the accidental death of her husband arising out of and in the course of his employment, as if the petition showed any right against the defendant in favor of the plaintiff, the only remedy for the enforcement of such right, under the terms of the contract, was a proceeding before the Department of Industrial Relations (now the board of workers' compensation). *Grice v. United States Fid. & Guar. Co.*, 187 Ga. 259, 200 S.E. 700 (1938).

Wrongful death action. — A wrongful death action, in which it was alleged that the employer required the decedent employee

and the decedent's father to operate a fuel truck although the employer knew that the vehicle's emergency brake system was faulty, was barred since the employee's death was compensable under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. *McCormick v. Mark Heard Fuel Co.*, 183 Ga. App. 488, 359 S.E.2d 171 (1987).

Because a subsidiary had no ownership interest in the* equipment that killed an employee, and to the extent that the subsidiary was acting in concert or in a joint enterprise with the employer/owner, O.C.G.A. § 34-9-11 of the Workers' Compensation Act barred the spouse's wrongful death suit; consequently, the trial court did not err in granting summary judgment to the subsidiary pursuant to O.C.G.A. § 9-11-56(c). *Jones v. Macon Soils, Inc.*, 270 Ga. App. 298, 606 S.E.2d 316 (2004).

In a wrongful death action, the appeals court reversed an order granting summary judgment to an employer, as O.C.G.A. § 34-9-11 did not bar the action, and genuine issues of material fact remained as to whether the death arose out of the scope of the decedent's employment, given that: (1) the accident that killed the decedent occurred 78 minutes before the employee came on shift; (2) the employee could not clock in earlier than 30 minutes before the shift began; and (3) the employee needed only five to ten minutes to prepare for and begin working. *Champion v. Pilgrim's Pride Corp. of Del., Inc.*, 286 Ga. App. 334, 649 S.E.2d 329 (2007).

Claim to recover for deceased barred by exclusivity provisions. — A claim against an employer for damages suffered as a result of the deceased employee's death was barred by the exclusivity provisions of the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., where the employee suffered a stroke while working the night shift for the defendant and emergency medical personnel could not reach the employee in a timely fashion because the defendant kept the premises locked during the shift. *Bryant v. Wal-Mart Stores, Inc.*, 203 Ga. App. 770, 417 S.E.2d 688, cert. denied, 203 Ga. App. 905, 417 S.E.2d 688 (1992).

Action for loss of consortium barred. — The exclusiveness of the remedy under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is a bar to an action by a wife

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against her husband's employer for the loss of consortium as a result of an injury on the job. *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668 (S.D. Ga. 1973).

Summary judgment was properly granted against an employee's spouse on a consortium claim in the employee's personal injury action because the employee's claim for injuries resulting from a collision between patrol cars driven by the employee and a co-worker was barred by the exclusive remedy provisions of O.C.G.A. § 34-9-11(a) of the Georgia Workers' Compensation Act, and the spouse's consortium claim was similarly barred. *Stevenson v. Ray*, 282 Ga. App. 652, 640 S.E.2d 340 (2006).

Action by parents of minor employee awarded compensation. — There is a "necessary implication" from the language of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) that the parents of an injured minor employee are deprived of their common-law right to recover for the loss of the minor's services where the duly constituted guardian of the minor has previously received compensation, under an award by the Department of Industrial Relations (now Board of Workers' Compensation), for injuries sustained by the minor. *Griggs v. Zimmerman*, 50 Ga. App. 24, 177 S.E. 86 (1934).

Wrongful death action by employee's adopted child. — While an adopted child may sue for the full value of the life of the child's natural father, such child, as next of kin, cannot maintain an action against the father's employer where the father's death arose out of and in the course of employment and the employer and the employees are subject to the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *New Amsterdam Cas. Co. v. Freeland*, 101 Ga. App. 754, 115 S.E.2d 443, rev'd on other grounds, 216 Ga. 491, 117 S.E.2d 538 (1960).

Injuries not derivative of work-related claim. — Claims of employees and their children against the employer for injuries allegedly caused to the children by exposure to hazardous chemicals at the workplace were not derivative of any work-related claim that could be asserted by the employees and were not barred by the exclusive remedy

provision. *Hitachi Chem. Electro-Products, Inc. v. Gurley*, 219 Ga. App. 675, 466 S.E.2d 867 (1995).

False arrest and illegal restraint. — An action for false arrest and illegal restraint, brought by an employee against an employer, was not barred by this section. *Skelton v. W.T. Grant Co.*, 331 F.2d 593 (5th Cir.), cert. denied, 379 U.S. 830, 85 S. Ct. 61, 13 L. Ed. 2d 39 (1964) (see O.C.G.A. § 34-9-11).

Action for fraud and intentional infliction of emotional distress. — The trial court erred in granting summary judgment to the defendant employer in an action for fraud and intentional infliction of emotional distress, arising from statements made by the employer's branch manager that an employee hospitalized for chemical poisoning and other possible conditions could not have been exposed to any chemicals at employment, since the evidence showed that the alleged torts did not occur "in the course of" employment and, therefore, the action was not barred by the exclusive remedy provision. *Potts v. UAP-GA*, 270 Ga. 14, 506 S.E.2d 101 (1998).

Employee murdered by fellow employee. — Where employee was murdered by another employee during an armed robbery while making a night deposit at a local bank for their employer, the exclusivity provision of the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., provided immunity for the employer in a tort action because the employee's death arose out of and in the course of employment. *Hadsock v. J.H. Harvey Co.*, 212 Ga. App. 782, 442 S.E.2d 892 (1994).

Remedy for sexual assault. — Where the plaintiff's assault, kidnapping, and rape by a fellow employee was clearly the result of an "accident" within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), the plaintiff's remedy, if any, lay exclusively under that law, and the plaintiff could not maintain a common-law tort action against the employer. *Helton v. Interstate Brands Corp.*, 155 Ga. App. 607, 271 S.E.2d 739 (1980).

Plaintiff's claims were not barred by the exclusivity provision of O.C.G.A. § 34-9-11 where the injury, although arising in the course of employment, did not arise out of the employee's employment; plaintiff charged the defendants with rape and sexual

harassment, which could, under the circumstances, only be classified as willful acts conducted for personal reasons. *Simon v. Morehouse Sch. of Medicine*, 908 F. Supp. 959 (N.D. Ga. 1995).

Remedy for sexual assault of "borrowed servant." — Where a hotel employee, who was sexually assaulted during the course of employment, was a "borrowed servant", the employee may not sue the hotel in tort as well as receive workers' compensation for the incident. *Pavuk v. Western Int'l Hotels*, 160 Ga. App. 82, 286 S.E.2d 319 (1981).

Dismissal of action based on assault by general manager proper. — Where a common-law action brought by an employee to recover on account of injuries allegedly sustained as a result of an assault and battery committed by the defendant corporation's general manager upon the employee, in connection with the manager's criticism of the employee's work and manner of service, disclosed that the employer and the employee were subject to the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), the court did not err in sustaining the defendant's general demurrer (now motion to dismiss) and dismissing the action. *McLaughlin v. Thompson, Boland & Lee, Inc.*, 72 Ga. App. 564, 34 S.E.2d 562 (1945).

Injury not due to intentional tort. — The exclusivity provision barred an employee's claim against a former employer and the employer's plant nurse alleging that the nurse prescribed pain medication without proper authorization and sent the employee back to work, thus aggravating the employee's wrist injury; the injury arose out of and in the course of the employee's employment and was not due to an intentional tort committed by one worker against another. *Wall v. Phillips*, 210 Ga. App. 490, 436 S.E.2d 517 (1993).

The conduct of the employer's agent, in directing the employee-plaintiff to assist management in cleaning up a toxic chemical spill without a respirator or protective clothing (other than gloves) being issued to the employee, directly related to the employer's business and did not amount to a tortious act such as to allow the employee-plaintiff to bring an independent action outside the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Zaytzeff v. Safety-Kleen Corp.*, 222 Ga. App. 48, 473 S.E.2d 565 (1996).

Where the store manager's physical contact causing plaintiff's injury arose during the manager's attempts to obtain plaintiff's cooperation in handling a telephone complaint on the job, plaintiff's claims for assault and battery and intentional infliction of emotional distress were barred by the exclusive remedy provisions of O.C.G.A. § 34-9-11. *Webster v. Dodson*, 240 Ga. App. 4, 522 S.E.2d 487 (1999); *Heard v. Mitchell's Formal Wear, Inc.*, 249 Ga. App. 492, 549 S.E.2d 149 (2001).

Intentional tort claim for battery and emotional distress was barred by the exclusive remedy provisions of O.C.G.A. § 34-9-11, as battery and emotional distress resulted from animosity which arose from reasons related to the employee's performance of work related duties. *Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092 (S.D. Ga. 1995).

Striking an employee upon dismissal. — Where a supervisor strikes an employee immediately upon firing the employee, the employee may not institute a tort action since the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., is still applicable as the aggressive acts of the supervisor are part of the res gestae of the discharge which creates an employment-related situation and constitutes an injury out of and in the course of employment. *Woodward v. St. Joseph's Hosp.*, 160 Ga. App. 676, 288 S.E.2d 10 (1981).

Libel, slander, and intentional infliction of emotional distress were not compensable under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., as these harms could not be considered physical injuries. *Oliver v. Wal-Mart Stores, Inc.*, 209 Ga. App. 703, 434 S.E.2d 500 (1993).

Owner-driver of truck leased to interstate carrier. — Notwithstanding a contract provision to the contrary, the owner-driver of a truck leased to an interstate carrier was not an independent contractor but an employee, entitling the employee to workers' compensation benefits for injuries sustained and making the carrier immune to tort liability. *Garrett v. Superior Trucking Co.*, 162 Ga. App. 558, 290 S.E.2d 528 (1982).

A truck owner-operator driving for a motor common carrier under an equipment lease was a "statutory employee" of the carrier, notwithstanding the fact that the owner-operator paid the owner's own work-

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ers' compensation insurance premiums. *Heaton v. Home Transp. Co.*, 659 F. Supp. 27 (N.D. Ga. 1986).

Action against owner of truck held not precluded. — Where, at the time of injury, the plaintiff was not an employee of the defendant, but may have been an employee of a person to whom the defendant's truck and servant had been hired, the plaintiff was not deprived of a common-law right to recover, as against the defendant, damages for an injury proximately caused by the defendant's negligence. *Albert v. Hudson*, 49 Ga. App. 636, 176 S.E. 659 (1934).

Transportation in employer's vehicle. — Whether employee's ride home in employer's personal vehicle was a mere accommodation by a fellow employee and whether the employee's injuries thus did not arise out of and in the scope of employment were issues of fact barring summary judgment. *Wade v. Georgia Diversified Indus., Inc.*, 240 Ga. App. 225, 522 S.E.2d 746 (1999).

Employer of truck driver delivering bricks to construction site was not a subcontractor of the general contractor such that the general contractor was the statutory employer and immune from tort liability. *Mobley v. Flowers*, 211 Ga. App. 761, 440 S.E.2d 473 (1994).

Injury to employee in company vehicle en route to job site. — Where claimant was being transported to an out-of-state job site in a company vehicle and was injured in an accident involving a second vehicle of the company, claimant's exclusive remedy was that provided by the employer's workers' compensation coverage. *Eickhorn v. Boatright*, 219 Ga. App. 895, 467 S.E.2d 214 (1996).

Automobile salesman. — Where an automobile salesman was injured while "finger-wrestling" with a supervisor, testimony that the supervisor believed that engaging in occasional horseplay with the employees to keep them "pumped up" constituted a part of the supervisor's supervisory responsibilities, created a material factual conflict, precluding summary judgment for the employer, on the issue of whether the supervisor's alleged misconduct occurred within the scope of employment. *Gaylor v. Jay & Gene's Chrysler-Plymouth-Dodge, Inc.*,

183 Ga. App. 255, 358 S.E.2d 655 (1987).

Temporary employees. — Because the evidence showed that an employee of a temporary help contracting firm was a borrowed servant of the special employer to whom the employee was contracted out, the employee's remedy for a job-related injury was limited to workers' compensation from the special employer. *Lewis v. Georgia-Pacific Corp.*, 230 Ga. App. 201, 496 S.E.2d 280 (1998).

Entity qualified as a temporary help contracting firm under O.C.G.A. § 34-8-46 where the entity provided its employee to a business and the employee then worked for the business under its general supervision; thus, the business was protected by the exclusivity provisions set forth in O.C.G.A. § 34-9-11, and the employee's recovery for workplace injuries was limited to the workers' compensation benefits that the temporary help contracting firm paid. *Lambert v. Briggs & Stratton Corp.*, F. Supp. 2d , 2006 U.S. Dist. LEXIS 3104 (S.D. Ga. Jan. 18, 2006).

Status of shipper. — The relationship between shipper and carrier did not afford a shipper the status of statutory employer for the purposes of tort immunity from action by the carrier's employee for an injury sustained while unloading a trailer upon delivery to the shipper's customer. *Gramling v. Sunshine Biscuits, Inc.*, 162 Ga. App. 863, 292 S.E.2d 539 (1982).

Taxicab companies. — Where a taxicab driver employed by a cab company was struck and injured by a taxi operated by an agent of another taxi company and the State Board of Workers' Compensation approved a stipulated settlement in which the taxi company, on behalf of the employer, agreed to pay compensation to the driver to satisfy and extinguish all workers' compensation benefits, the second taxicab company fell within the definition of "employer" found in O.C.G.A. § 34-9-1(3) and therefore was entitled to immunity from suit by the driver granted by O.C.G.A. § 34-9-11. *Rapid Cab Co. v. Colbert*, 166 Ga. App. 881, 305 S.E.2d 668 (1983).

Property owner. — A manufacturer which had a contract with an employer to repair and replace tires on the manufacturer's equipment was merely the "owner" of the property and was not the "statutory em-

ployer" of the employee dispatched to the manufacturer's plant to change a flat tire, who was injured when the new tire exploded, and, therefore, did not have immunity from tort liability. *McCrimmons v. Cornell-Young Co.*, 171 Ga. App. 561, 320 S.E.2d 398 (1984).

Since an owner of premises on which a temporary worker assigned to the owner was injured in an on-the-job accident did not owe any contractual duty of performance to another, the owner was not a "contractor" secondarily liable for workers' compensation benefits, and thus was not entitled to tort immunity. *Dye v. Trussway, Inc.*, 211 Ga. App. 139, 438 S.E.2d 194 (1993).

Plaintiff did not forfeit common law rights by self protection. — In an action for injuries against a principal contractor, because the plaintiff was not a subcontractor of the defendant, plaintiff's election to protect oneself under O.C.G.A. § 34-9-2.2 would not be treated as a forfeiture of plaintiff's common law rights when O.C.G.A. § 34-9-11 (a) does not mandate such loss of the right to sue a third party tortfeasor and when O.C.G.A. § 34-9-8 affords plaintiff no benefits or protection. *Kaplan v. Pulte Home Corp.*, 245 Ga. App. 286, 537 S.E.2d 727 (2000).

Action by nurse against doctor. — Where a hospital retained and exercised control and direction over a nurse, the nurse was not a borrowed servant of a physician whom the nurse was assisting, and was not barred from suing the physician in tort even though the hospital previously paid workers' compensation benefits. *Bosch v. Perry*, 169 Ga. App. 28, 311 S.E.2d 481 (1983).

Doctor employed by employee's company. — A doctor, who was employed by the same company as the plaintiffs, was not allowed to avoid liability for alleged fraud, deceit, and abuse of professional trust merely by invoking the "coemployee" doctrine of workers' compensation law since a professional person is liable for an abuse of the trust reposed in the professional by the public, provisions of the compensation act notwithstanding. *Downey v. Bexley*, 253 Ga. 125, 317 S.E.2d 523 (1984).

Intentional delay in authorizing treatment. — No independent cause of action arises from intentional delay in authorizing treatment since penalties are available under

various statutes, including O.C.G.A. §§ 34-9-18, 34-9-108(b), and 34-9-203(c), and benefits are allowed for injuries that are exacerbated or aggravated subsequent to the initial injury. *Doss v. Food Lion, Inc.*, 267 Ga. 312, 477 S.E.2d 577 (1996).

Medical malpractice. — Notwithstanding the provisions of O.C.G.A. § 34-9-11, a company physician who is sued for any alleged tortious breach of conduct applicable to the physician's profession generally is not entitled to claim the defense of tort immunity, even as against a company employee; the mere existence of control by a company over a physician will not provide a physician with absolute immunity from any possible tort liability for allegedly negligent medical treatment. *Davis v. Stover*, 184 Ga. App. 560, 362 S.E.2d 97 (1987), *aff'd*, 258 Ga. 156, 366 S.E.2d 670 (1988).

Malpractice by company physicians. — Because of the relationship between physicians and patients, company physicians cannot use the workers' compensation laws as a shield to insulate themselves from individual liability for medical malpractice claims. The workers' compensation laws were not intended to be a grant of immunity from professional malpractice actions. *Davis v. Stover*, 258 Ga. 156, 366 S.E.2d 670 (1988).

No exception for athletic trainers or other non-physician professionals. — The exception to fellow-servant or co-employee immunity under O.C.G.A. § 34-9-11, which thus far has been applied only where an injured employee brings a medical malpractice action against a company physician, does not apply to certified athletic trainers, and it does not automatically apply whenever a defendant co-employee is a professional who is subject to the authority of a professional licensing board. *McLeod v. Blase*, 290 Ga. App. 337, 659 S.E.2d 727 (2008).

Athletic trainer. — An athlete was not entitled to bring a professional malpractice action against an athletic trainer because as a fellow servant, the trainer fell within the exclusive remedy provision of the Workers' Compensation Act, O.C.G.A. § 34-9-11. The exception for medical malpractice actions against company physicians did not apply to athletic trainers. *McLeod v. Blase*, 290 Ga. App. 337, 659 S.E.2d 727 (2008).

There is no controlling authority for the premise that an employee injured as a result

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of medical malpractice may, consistent with the exclusive remedy provision of the Workers' Compensation Act, O.C.G.A. § 34-9-11, bring a medical malpractice action against a certified athletic trainer. *McLeod v. Blase*, 290 Ga. App. 337, 659 S.E.2d 727 (2008).

Common-law action for disfiguring burns.

— The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) does not provide for workers' compensation for a nondisability-producing disfigurement, nor could a common-law action by a young girl against her employer for burns to her neck and chest caused by the firing of a loaded gun in a staged entertainment, which resulted in no physical or economic disability, be maintained. *Nowell v. Stone Mt. Scenic R.R.*, 150 Ga. App. 325, 257 S.E.2d 344 (1979).

Employee of contractor working for power company. — Where a power company, through its project superintendent, had the right to control the time, manner, and method of executing work, a contract between the power company and the contractor created a master-servant relationship, and the employee of the contractor, which was itself a servant of the power company, was, under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), an employee of the power company whose exclusive remedy was before the board of workers' compensation. *Blackwell v. Taylor*, 497 F. Supp. 351 (M.D. Ga. 1980).

Professional malpractice exemption to co-employee immunity. — Supervising officer in sheriff's department did not owe any unique duty of trust to subordinate officer and, thus, professional malpractice exemption to co-employee immunity under the exclusive remedy provisions of O.C.G.A. § 34-9-11 did not apply and the supervisor's estate was immune to tort claim. *Clark v. Williamson*, 206 Ga. App. 8, 425 S.E.2d 311 (1992).

Remedies

Exclusivity of remedy. — Where an employee has accepted the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), the employee's rights against an employer to recover on account of any injuries sustained by reason of the employer's breach of any duty to an employee arising out of the

relation between them are determinable solely under that law, and are not determinable at common law, notwithstanding the fact that the injuries complained of did not result from an accident, and therefore the employee could not recover compensation therefor. *Stebbins v. Georgia Veneer & Package Co.*, 51 Ga. App. 56, 179 S.E. 649 (1935).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) covers the entire subject matter of claims for injuries by employees against employers, and the remedy given by the law is in lieu of any remedy formerly afforded by an action at common law. *Patterson v. Curtis Publishing Co.*, 58 Ga. App. 211, 198 S.E. 102 (1938); *Nowell v. Stone Mt. Scenic R.R.*, 150 Ga. App. 325, 257 S.E.2d 344 (1979).

The rights of an employee under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) are exclusive only as against the employer. *Mull v. Aetna Cas. & Sur. Co.*, 226 Ga. 462, 175 S.E.2d 552 (1970).

Where workers' compensation law is applicable, it provides an employee an exclusive remedy against an employer. *Swafford v. Transit Cas. Co.*, 486 F. Supp. 175 (N.D. Ga. 1980).

The existence of workers' compensation coverage excludes all other remedies against the employer. *United States v. Aretz*, 248 Ga. 19, 280 S.E.2d 345 (1981).

O.C.G.A. § 34-9-11 has been interpreted consistently to mean that, where the workers' compensation law is applicable, it provides the employee's exclusive remedy against an employer. *Atlanta Cas. Co. v. Sharpton*, 158 Ga. App. 758, 282 S.E.2d 214 (1981).

O.C.G.A. § 34-9-11 bars a suit by a covered employee against an employer and against fellow employees. *Boatman v. George Hyman Constr. Co.*, 157 Ga. App. 120, 276 S.E.2d 272 (1981); *Fountain v. Shoney's Big Boy, Inc.*, 168 Ga. App. 489, 309 S.E.2d 671 (1983).

A suit against an employer for negligence in causing an employee's on-the-job injury is precluded by O.C.G.A. § 34-9-11, which makes recovery under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., the employee's exclusive remedy in such a situation. *Kelly v. China One Restaurant, Inc.*, 161 Ga. App. 600, 289 S.E.2d 28 (1982).

When an injury arises out of and in the course of employment, the employee's sole remedy is against the employer, pursuant to O.C.G.A. § 34-9-11. *Labelle v. Lister*, 192 Ga. App. 464, 385 S.E.2d 118 (1989).

Where former employees sued their employer in tort for their development of cancer allegedly as the result of exposure in their place of employment to chemicals, the trial court properly dismissed their complaint; a claim under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is the employees' sole and exclusive remedy for injury or occupational disease incurred in the course of employment. *Ervin v. Great Dane Trailers, Inc.*, 195 Ga. App. 317, 393 S.E.2d 467 (1990).

Because the animosity between claimant and claimant's employer arose from reasons related to performance of claimant's work, the injuries the claimant received from the alleged battery, when the claimant was being removed from work by police were compensable under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq.; claimant's tort claim for battery was therefore barred by the exclusive remedy provision of the Act. *Baldwin v. Roberts*, 212 Ga. App. 546, 446 S.E.2d 272 (1994).

Worker's compensation was the exclusive remedy for an employee's emotional injuries arising from a robbery at the store where the employee worked, and the employer was not estopped from asserting that the exclusivity provision barred the employee's negligence action. *Boulware v. Quiktrip Corp.*, 226 Ga. App. 399, 486 S.E.2d 662 (1997).

Trial court properly granted a co-worker's summary judgment motion as to an employee's intentional infliction of emotional distress claim as: (1) there was no evidence that the co-worker had any degree of control over the employee or that the co-worker believed the employee to be especially vulnerable to a shove; (2) the severity of harm to the employee was small; and (3) the co-worker's conduct did not rise to the level of outrageous behavior required to support an action for intentional infliction of emotional distress. *Lewis v. Northside Hosp., Inc.*, 267 Ga. App. 288, 599 S.E.2d 267 (2004).

Trial court erred in granting summary judgment to the landscaper and the business entity on their claim that the estate administrator's wrongful death lawsuit was barred

by the exclusive remedy provision of the Workers' Compensation Act, O.C.G.A. § 34-9-11(a); a genuine issue of material fact existed regarding whether the decedent was an employee of the landscaper and the business entity at the time of death as the landscaper was more of a de facto guardian in relation to the decedent, but the landscaper also had some measure of control over the decedent because the decedent was assisting the landscaper on a project even though the decedent had never before worked for the landscaper and the business. *Glover v. Ware*, 276 Ga. App. 759, 624 S.E.2d 285 (2005).

Trial court did not err in determining that a deceased Georgia superior court judge was a State of Georgia employee but not a county employee for purposes of the exclusive remedy provision under O.C.G.A. § 34-9-11(a) of the Georgia Workers' Compensation Act in a claim by the judge's widow against county sheriffs, arising from the murder of the judge while in a courtroom, as the judge was vested with the judicial power of the State of Georgia under Ga. Const. 1983, Art. VI, Sec. I, Para. I and was defined as a "state official" pursuant to O.C.G.A. § 45-7-4(a)(20) for compensation purposes; the fact that the county asserted that the widow could obtain workers' compensation benefits and that it offered her the judge's funeral expenses, both of which sums the widow refused, or that it contributed a supplemental amount to the judge's salary, did not make the judge a county employee. *Freeman v. Barnes*, 282 Ga. App. 895, 640 S.E.2d 611 (2006).

Trial court's determination that a county sheriff was not also a State of Georgia employee for workers' compensation purposes under O.C.G.A. § 34-9-11(a), the exclusive remedy provision, was proper, as sheriffs were only authorized to act within their county, they were defined as county officers under Ga. Const. 1983, Art. IX, Sec. I, Para. III, and sheriffs' salaries were subject to change. *Freeman v. Barnes*, 282 Ga. App. 895, 640 S.E.2d 611 (2006).

In a wrongful death action, the trial court erred in denying an employer's motion for summary judgment against the claims filed by the decedent's parents, as those claims were limited by the exclusivity provisions of the Georgia Workers' Compensation Act,

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O.C.G.A. § 34-9-1 et seq., given evidence that the decedent's death arose out of and in the course of employment pursuant to O.C.G.A. § 34-9-1(4). *Burns Int'l Sec. Servs. Corp. v. Johnson*, 284 Ga. App. 289, 643 S.E.2d 800 (2007).

Agreement to accept exclusive remedy of workers' compensation. — Where surviving spouse accepted death benefits under workers' compensation laws, O.C.G.A. § 34-9-1 et seq., the surviving spouse was estopped by the exclusive remedy provisions of O.C.G.A. § 34-9-11 from recovering in a tort action based on a claim that willful misconduct of an employee fell outside the scope of the employee's employment. *Clark v. Williamson*, 206 Ga. App. 8, 425 S.E.2d 311 (1992).

There are no exceptions to unambiguous and exclusive rights and remedies provisions of O.C.G.A. § 34-9-11 so as to enable an injured employee to obtain a judgment against a co-employee in order to meet any statutory or contractual conditions necessary to the ultimate recovery of insurance benefits from the employee's own insurer. *Williams v. Thomas*, 187 Ga. App. 527, 370 S.E.2d 773, cert. denied, 187 Ga. App. 909, 370 S.E.2d 773 (1988).

Common-law actions prohibited. — If an injury is compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), and both an employer and an employee are subject thereto, a common-law action on account of such injury is not maintainable by the employee against the employer. *Blue Bell Globe Mfg. Co. v. Baird*, 61 Ga. App. 298, 6 S.E.2d 83 (1939), later appeal, 64 Ga. App. 347, 13 S.E.2d 105 (1941).

If an employee has accepted the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), the employee's rights against an employer to recover on account of injuries sustained by reason of the breach of any duty arising out of the employment relation are determinable solely under that law, and are not determinable at common law. *McLaughlin v. Thompson, Boland & Lee, Inc.*, 72 Ga. App. 564, 34 S.E.2d 562 (1945); *Smith v. White Lift of Dalton, Inc.*, 145 Ga. App. 596, 244 S.E.2d 117 (1978); *Samuel v. Baitcher*, 154 Ga. App. 602, 269 S.E.2d 96

(1980); *Gray v. Charles Beck Mach. Corp.*, 495 F. Supp. 250 (S.D. Ga. 1980).

This section took away from the employee any common-law right that the employee might have had to recover from an employer for an injury caused by the negligence of the employer. *Williams Bros. Lumber Co. v. Meisel*, 85 Ga. App. 72, 68 S.E.2d 384 (1951) (see O.C.G.A. § 34-9-11).

If an injury is compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), and both the employer and employee are subject thereto and have not rejected the law's provisions, a common-law action on account of such injury is not maintainable by the employee against an employer, either general or special. *Forrester v. Scott*, 125 Ga. App. 245, 187 S.E.2d 323 (1972); *United States Fid. & Guar. Co. v. Forrester*, 230 Ga. 182, 196 S.E.2d 133 (1973).

An employee cannot maintain a common-law action against an employer where both are subject to the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668 (S.D. Ga. 1973).

An employee's sole remedy as against an employer, for failure to furnish a safe place in which to work, is under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), regardless of the cause for such failure. *Sands v. Union Camp Corp.*, 559 F.2d 1345 (5th Cir. 1977).

Under this section, the rights and remedies granted to employees under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) excluded all other rights and remedies of the employee at common law or otherwise, on account of such injury, other than an employee's right to bring an action against a third party tortfeasor, the purpose of this provision being to preclude common-law remedies where a workman was entitled to recover workers' compensation. *Blackwell v. Taylor*, 497 F. Supp. 351 (M.D. Ga. 1980) (see O.C.G.A. § 34-9-11).

O.C.G.A. § 34-9-11 provides, in effect, that the rights granted to an employee to recover workers' compensation benefits from an employer exclude all common-law rights of the employee to recover against an employer and certain others. *Wright Assocs. v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981).

O.C.G.A. § 34-9-108(b)(1) provided a

penalty for an insurer's controverting medical payments without reasonable grounds and, therefore, the employee's use of the common-law remedy for breach of contract (i.e., a settlement agreement) was excluded. *Aetna Cas. & Sur. Co. v. Davis*, 253 Ga. 376, 320 S.E.2d 368 (1984).

Common-law indemnity. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) has removed completely an employer's tort liability for an employee's injuries, and no action may be maintained under common-law indemnity or contribution. *Coleman v. GMC*, 386 F. Supp. 87 (N.D. Ga. 1974).

Purpose of exclusivity. — The concept of exclusiveness of remedy is a rational mechanism for making the workers' compensation system work in accord with the purpose of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668 (S.D. Ga. 1973).

In exchange for the right to recover scheduled compensation without proof of negligence on the part of the employer in those cases in which a right of recovery is granted, an employee forgoes other rights and remedies which the employee might have had, but if the employee accepts the terms of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) the employee, as well as the employer, is limited to those things for which the law makes provision. *Nowell v. Stone Mt. Scenic R.R.*, 150 Ga. App. 325, 257 S.E.2d 344 (1979).

Employee and representatives barred. — Rights and remedies granted under the workers' compensation law, O.C.G.A. § 34-9-1 et seq., to an employee exclude all other rights and remedies of such an employee, the employee's personal representative, parents, dependents or next-of-kin, or otherwise, on account of such injury, loss of service, or death, other than an employee's right to bring an action against a third-party tortfeasor. *Haygood v. Home Transp. Co.*, 149 Ga. App. 229, 253 S.E.2d 805, aff'd, 244 Ga. 165, 259 S.E.2d 429 (1979).

Exclusivity applied to wrongful death action filed by parent. — Where a city loaned one of its police officers to another city but, by contract continued to provide the officer's wages, benefits and workers' compensation, the lending city was the officer's em-

ployer, and a wrongful death action filed by the officer's mother was barred by the exclusive remedy provisions of O.C.G.A. § 34-9-11. *Adams v. Collins*, 195 Ga. App. 36, 392 S.E.2d 549 (1990).

Action permitted if not barred by workers' compensation law. — The remedy provided by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is exclusive within the field of its operation, but does not exclude redress in cases to which it is not applicable. *Covington v. Berkeley Granite Corp.*, 182 Ga. 235, 184 S.E. 871, answer conformed to, 53 Ga. App. 269, 185 S.E. 386 (1936), aff'd, 183 Ga. 801, 190 S.E. 8 (1937).

The right to bring an ordinary action for damages was not excluded by this section as to injuries which did not fall within its terms. *Covington v. Berkeley Granite Corp.*, 182 Ga. 235, 184 S.E. 871, answer conformed to, 53 Ga. App. 269, 185 S.E. 386 (1936), aff'd, 183 Ga. 801, 190 S.E. 8 (1937) (see O.C.G.A. § 34-9-11).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) cannot be construed as being designed to deprive an employee of any common-law action which the employee might otherwise have against an employer, unless the action which the employee seeks to assert is one for an injury as to which relief has actually been granted under the law. *Skelton v. W.T. Grant Co.*, 331 F.2d 593 (5th Cir.), cert. denied, 379 U.S. 830, 85 S. Ct. 61, 13 L. Ed. 2d 39 (1964).

Where it is not alleged, and there is nothing in the record to establish the fact, that an employer's alleged illegal conduct amounted to an "accident arising out of and in the course of employment", an action by an employee against an employer is not barred by anything provided for in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Skelton v. W.T. Grant Co.*, 331 F.2d 593 (5th Cir.), cert. denied, 379 U.S. 830, 85 S. Ct. 61, 13 L. Ed. 2d 39 (1964).

Independent right of action for employee injured out of state. — Under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., an employee has no independent right of action for an injury against an employer or any other person who is statutorily insulated from suit, even where the employee is injured outside of the state and benefits for that injury are recoverable pursuant to O.C.G.A. § 34-9-242. *Karimi v. Crowley*, 172

Remedies (Cont'd)

Ga. App. 761, 324 S.E.2d 583 (1984).

Agreement to accept exclusive remedy of workers' compensation. — The decedent who acted as an independent contractor in relation to an employer was entitled to coverage under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) by an agreement whereby the employer accepted deductions from the contractor's pay and applied them to the employer's workers' compensation insurance policy in order for the contractor to obtain coverage under the employer's policy. *Lott v. Ace Post Co.*, 175 Ga. App. 196, 332 S.E.2d 676 (1985).

The decedent/independent contractor who agreed with the employer to be covered by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) was limited to exclusive coverage under this law and could not (by the decedent's survivors) claim a lack of reciprocal estoppel, as the employer's quid pro quo was its surrender under the agreement of any defense of a lack of negligence in regard to a compensable injury to the decedent. *Lott v. Ace Post Co.*, 175 Ga. App. 196, 332 S.E.2d 676 (1985).

No exception for violating safety standards. — O.C.G.A. § 46-3-30 et seq., imposing certain safety standards, not only upon employers of workers performing certain acts in proximity to hazardous high-voltage lines, is not an exception to the exclusive remedy provision of the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. *Pappas v. Hill-Staton Eng'rs, Inc.*, 183 Ga. App. 258, 358 S.E.2d 625, cert. denied, 183 Ga. App. 906, 358 S.E.2d 625 (1987); *City of Dalton v. Gene Rogers Constr. Co.*, 223 Ga. App. 819, 479 S.E.2d 171 (1996); *Flint Elec. Membership Corp. v. Ed Smith Constr. Co.*, 229 Ga. App. 838, 495 S.E.2d 136 (1998).

No separate action for concealed work hazards. — An employee could not bring a separate action against an employer independent of the exclusivity provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) on the ground that the employer concealed work place hazards in violation of O.C.G.A. § 34-7-20, since this law makes no statutory exception to the exclusive remedy provisions. *Dugger v. Miller Brewing Co.*, 199 Ga. App. 850, 406 S.E.2d 484 (1991), cert. denied, 199 Ga.

App. 905, 406 S.E.2d 484 (1991).

Restricted application of equitable estoppel. — The successful continuation of the workers' compensation system requires that studied caution be exercised before the doctrine of estoppel is applied against an injured party bringing a personal injury action who does nothing more than receive compensation benefits voluntarily provided by an employer. *Collins v. Grafton, Inc.*, 263 Ga. 441, 435 S.E.2d 37 (1993).

Pleadings and Practice

Exclusive jurisdiction of board. — Where the injuries which a plaintiff sustains are clearly the result of an "accident" within the terms of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), plaintiff's remedy against an employer is exclusively within the jurisdiction of the state board of workers' compensation and not in the superior court. *Echols v. Chattooga Mercantile Co.*, 74 Ga. App. 18, 38 S.E.2d 675 (1946).

Proof of coverage required to bar negligence action. — A defendant may assert coverage under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) as a bar to a common-law negligence action against defendant arising out of the same occurrence, whether or not a claim for compensation has been made, but in order to sustain such assertion one must plead and prove coverage; an award of compensation would be an adjudication of coverage and consequently a bar to a common-law action, but an award of no compensation because of no coverage would be an adjudication of no coverage and a common-law action could proceed. *Bishop v. Weems*, 118 Ga. App. 180, 162 S.E.2d 879 (1968).

When immunity defense to be raised. — O.C.G.A. § 9-11-8(c) does not require that the statutory employer's defense under O.C.G.A. §§ 34-9-8 and 34-9-11 be affirmatively raised in the defendant's answer. *Wright Assocs. v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981).

Conflict of laws. — For a case dealing with one jurisdiction's ability to make a supplemental workers' compensation award subsequent to an award by another jurisdiction, despite the fact that the latter has an exclusivity of remedies provision, see *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 100 S. Ct. 2647, 65 L. Ed. 2d 757 (1980).

Claim of statutory immunity. — A claim of statutory immunity under Georgia's workers' compensation scheme is an affirmative defense and subject to waiver under Rule

8(c), Fed. R. Civ. P., in federal diversity of citizenship actions. *Troxler v. Owens-Illinois, Inc.*, 717 F.2d 530 (11th Cir. 1983).

OPINIONS OF THE ATTORNEY GENERAL

No-fault insurance benefits. — For a discussion of the correlation of no-fault insurance benefits with workers' compensation

benefits for employees injured while operating an employer's motor vehicle, see 1980 Op. Att'y Gen. No. 80-61.

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, §§ 9, 50, 205, 405.

C.J.S. — 101 C.J.S., Workers' Compensation, § 1587 et seq.

ALR. — Workmen's compensation: rights and remedies where employee was injured by third person's negligence, 19 ALR 766; 27 ALR 493; 37 ALR 838; 67 ALR 249; 88 ALR 665; 106 ALR 1040.

Insurance under Workmen's Compensation Act as coextensive with the insured's liability under act, 45 ALR 1329; 108 ALR 812.

Application for an acceptance of benefits under Workmen's Compensation Act as affecting right of action against employer independently of that act, 50 ALR 223.

Admissibility and effect of finding or order on claim under Workmen's Compensation Act for personal injury, in proceedings on claim for compensation for death, 88 ALR 1179.

Voluntary payment or other relief by insurance carrier under Workmen's Compensation Act as estoppel to deny issuance of policy or that case is within coverage, 91 ALR 1530.

Bringing action against employer as an election or estoppel precluding claim under Workmen's Compensation Act, 94 ALR 1430.

Workmen's Compensation Act as exclusive of remedy by action against employer for injury or disease not compensable under act, 100 ALR 519; 121 ALR 1143.

Award under Workmen's Compensation Act as bar to or ground for reduction of claim under act of another state, 101 ALR 1445; 150 ALR 431; 169 ALR 1185.

Employee's right of election after injury or disability as between benefits or Work-

men's Compensation Act and action at law against employer, 117 ALR 515.

Construction and application of provisions of Workmen's Compensation Act that compensation for specific injury or injuries under the act shall be exclusive of all other compensation, 129 ALR 663.

Constitutionality, construction, and application of provision of Workmen's Compensation Act for deduction in computing compensation on account of recovery from a third person responsible for the injury, 142 ALR 170.

Limitation of action by employee, his representative or beneficiaries, against third person for injury or death of employee as affected by the provisions of the Workmen's Compensation Act, 143 ALR 284.

Liability of insurance carrier under Workmen's Compensation Act in respect of personal injury to or death of employee where because of relationship between employee and employer recovery would inure in whole or in part to employer, 147 ALR 115.

Common-law remedy against general employer by employee of independent contractor or against independent contractor by employee of subcontractor, as affected by specific provisions of Workmen's Compensation Act relating to employees of such persons, 151 ALR 1359; 166 ALR 813.

Right of employee who has not received award under Workmen's Compensation Act to maintain action against physician for malpractice, 154 ALR 315.

Workmen's compensation: remedy as between subcontractor and principal contractor (or independent contractor and contractee) in respect of compensated injury to employee of one due to negligence of other, where injured employee had no remedy apart from the act, 166 ALR 1221.

Application for, or award, denial, or acceptance of, compensation under State Workmen's Compensation Act as precluding action under Federal Employers' Liability Act by one engaged in interstate commerce within that act, 6 ALR2d 581.

Scope of provision in group health or accident insurance policy excluding from coverage sickness or accidents arising out of, or in the course of, employment, 47 ALR2d 1240.

Matters concluded, in action at law to recover for the same injury, by decision or finding made in workmen's compensation proceeding, 84 ALR2d 1036.

Application for, or receipt of, unemployment compensation benefits as affecting claim for workmen's compensation, 96 ALR2d 941.

Collateral source rule: right of tort-feasor to mitigate opponent's damages for loss of earning capacity by showing that his compensation, notwithstanding disability, has been paid by his employer, 7 ALR3d 516.

Right to maintain direct action against fellow employee for injury or death covered by workmen's compensation, 21 ALR3d 845; 57 ALR4th 888.

Right to maintain malpractice suit against injured employee's attending physician notwithstanding receipt of workmen's compensation award, 28 ALR3d 1066.

Insured's receipt of or right to workmen's compensation benefits as affecting recovery under accident, hospital, or medical expense policy, 40 ALR3d 1012.

Workmen's compensation provision as precluding employee's action against employer for fraud, false imprisonment, defamation, or the like, 46 ALR3d 1279.

Workmen's compensation: attorney's fee or other expenses of litigation incurred by employee in action against third-party tort-feasor as charge against employer's distributive share, 74 ALR3d 854.

Right of employee to maintain common-law action for negligence against workmen's compensation insurance carrier, 93 ALR3d 598.

What conduct is willful, intentional, or deliberate within Workmen's Compensation Act provision authorizing tort action for such conduct, 96 ALR3d 1064.

Modern status of effect of State Workmen's Compensation Act on right of

third-person tort-feasor to contribution or indemnity from employer of injured or killed workman, 100 ALR3d 350.

Employer's tort liability to worker for concealing workplace hazard or nature or extent of injury, 9 ALR4th 778.

Workmen's Compensation Act as furnishing exclusive remedy for employee injured by product manufactured, sold, or distributed by employer, 9 ALR4th 873.

Modern status: "Dual capacity doctrine" as basis for employee's recovery from employer in tort, 23 ALR4th 1151.

Worker's compensation immunity as extending to one owning controlling interest in employer corporation, 30 ALR4th 948.

Third-party tortfeasor's right to have damages recovered by employee reduced by amount of employee's workers' compensation benefits, 43 ALR4th 849.

Workers' compensation law as precluding employee's suit against employer for third person's criminal attack, 49 ALR4th 926.

Workers' Compensation Act as precluding tort action for injury to or death of employee's unborn child, 55 ALR4th 792.

Willful, wanton, or reckless conduct of coemployee as ground of liability despite bar of workers' compensation law, 57 ALR4th 888.

"Dual capacity doctrine" as basis for employee's recovery for medical malpractice from company medical personnel, 73 ALR4th 115.

Workers' compensation: third-party tort liability of corporate officer to injured workers, 76 ALR4th 365.

Workers' compensation: coverage of injury occurring in parking lot provided by employer, while employee was going to or coming from work, 4 ALR5th 443.

Workers' compensation: coverage of injury occurring between workplace and parking lot provided by employer, while employee is going to or coming from work, 4 ALR5th 585.

Right to workers' compensation for injuries suffered after termination of employment, 10 ALR5th 245.

Pre-emption by workers' compensation statute of employee's remedy under state "whistleblower" statute, 20 ALR5th 677.

Right of employer or workers' compensation carrier to lien against, or reimbursement out of, uninsured or underinsured

motorist proceeds payable to employee injured by third party, 33 ALR5th 587.

Workers' compensation as precluding employee's suit against employer for sexual harassment in the workplace, 51 ALR5th 163.

Contractual waiver of exclusivity of workers' compensation remedy, 117 ALR5th 441.

Postaccident conduct by employer, employer's insurer, or employer's employees in relation to workers' compensation claim as waiving, or estopping employer from assert-

ing, exclusivity otherwise afforded by workers' compensation statute, 120 ALR5th 513.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress — Age discrimination, 11 ALR6th 447.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress — accusation or implication of employee's dishonesty, 21 ALR6th 671.

34-9-11.1. Employee's or survivor's right of action against person other than employer; subrogation lien of employer; rights of employer or insurer upon failure of employee to bring action; attorney fees; retroactive application.

(a) When the injury or death for which compensation is payable under this chapter is caused under circumstances creating a legal liability against some person other than the employer, the injured employee or those to whom such employee's right of action survives at law may pursue the remedy by proper action in a court of competent jurisdiction against such other persons, except as precluded by Code Section 34-9-11 or otherwise.

(b) In the event an employee has a right of action against such other person as contemplated in subsection (a) of this Code section and the employer's liability under this chapter has been fully or partially paid, then the employer or such employer's insurer shall have a subrogation lien, not to exceed the actual amount of compensation paid pursuant to this chapter, against such recovery. The employer or insurer may intervene in any action to protect and enforce such lien. However, the employer's or insurer's recovery under this Code section shall be limited to the recovery of the amount of disability benefits, death benefits, and medical expenses paid under this chapter and shall only be recoverable if the injured employee has been fully and completely compensated, taking into consideration both the benefits received under this chapter and the amount of the recovery in the third-party claim, for all economic and noneconomic losses incurred as a result of the injury.

(c) Such action against such other person by the employee must be instituted in all cases within the applicable statute of limitations. If such action is not brought by the employee within one year after the date of injury, then the employer or such employer's insurer may but is not required to assert the employee's cause of action in tort, either in its own name or in the name of the employee. The employer or its insurer shall immediately notify the employee of its assertion of such cause of action, and the employee shall have a right to intervene. If after one year from the date of injury the employee asserts his or her cause of action in tort, then the

employee shall immediately notify the employer or its insurer of his or her assertion of such cause of action, and the employer or its insurer shall have a right to intervene. In any case, if the employer or insurer recovers more than the extent of its lien, then the amount in excess thereof shall be paid over to the employee. For purposes of this subsection only, "employee" shall include not only the injured employee but also those persons in whom the cause of action in tort rests or survives for injuries to such employee.

(d) In the event of a recovery from such other person by the injured employee or those to whom such employee's right of action survives by judgment, settlement, or otherwise, the attorney representing such injured employee or those to whom such employee's right of action survives shall be entitled to a reasonable fee for services; provided, however, that if the employer or insurer has engaged another attorney to represent the employer or insurer in effecting recovery against such other person, then a court of competent jurisdiction shall upon application apportion the reasonable fee between the attorney for the injured employee and the attorney for the employer or insurer in proportion to services rendered. The provisions of Code Sections 15-19-14 and 15-19-15 shall apply.

(e) It is the express intent of the General Assembly that the provisions of subsection (c) of this Code section be applied not only prospectively but also retroactively to injuries occurring on or after July 1, 1992. (Code 1981, § 34-9-11.1, enacted by Ga. L. 1992, p. 1942, § 2; Ga. L. 1995, p. 642, § 2.)

Editor's notes. — Ga. L. 1995, p. 642, § 13, not codified by the General Assembly, provides for severability.

Law reviews. — For annual survey article discussing developments in insurance law, see 51 Mercer L. Rev. 313 (1999). For annual survey article discussing workers' compensation law, see 52 Mercer L. Rev. 505 (2000). For article, "Insurance," see 53 Mercer L. Rev. 281 (2001). For article, "Workers' Compensation," see 53 Mercer L. Rev. 521 (2001). For article, "Subrogation Under Georgia's Workers' Compensation Act," see 5 Ga. St. B.J. 18 (1999). For survey article on trial practice and procedure for the period

from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 439 (2003). For survey article on workers' compensation law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For annual survey of workers' compensation law, see 57 Mercer L. Rev. 419 (2005).

For note on 1992 enactment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992).

For comment, "The Employer's/Insurance Carrier's Right to Subrogation Under the Georgia Workers' Compensation Act (O.C.G.A. Section 34-9-11.1): How Long Will It Last?," see 46 Mercer L. Rev. 1575 (1995).

JUDICIAL DECISIONS

Retroactive application of the 1995 amendment permitting an employee to commence a third-party action within the applicable statute of limitations did not impair vested rights of the employer. *Moore v. Savannah Cocoa, Inc.*, 217 Ga. App. 869, 459 S.E.2d 580 (1995); *Conner v. Greene*, 219 Ga. App. 860, 467 S.E.2d 199 (1996).

Where an employee who was injured in December, 1992, commenced a third-party action within two years, the period permitted by the applicable statute of limitations, the trial court's order of dismissal predicated on the former version of O.C.G.A. § 34-9-11(c) was erroneous. *Vaughn v. Vulcan Materials Co.*, 266 Ga. 163, 465 S.E.2d 661 (1996).

An employee's failure to file suit against a third party within one year of the date of injury, in accordance with the former section, did not give the employer a vested right in the assignment of the action; thus, the employee's filing of an action within the applicable statute of limitations in accordance with the revised section did not impair vested rights of the employer and was timely. *Wilson v. Christian*, 220 Ga. App. 221, 469 S.E.2d 362 (1996).

The legislature may revive a claim which would have been barred by a previous limitation period by enacting a new statute of limitation without violating our constitutional prohibition against retroactive laws. *Cleveland v. Snowdrop Properties*, 221 Ga. App. 448, 471 S.E.2d 542 (1996).

No retroactive application. — O.C.G.A. § 34-9-11.1 provided a substantive change in the law and, thus, would not be applied retroactively to give an insurer the right of subrogation. *Maryland Cas. Ins. Co. v. Glomski*, 210 Ga. App. 759, 437 S.E.2d 616 (1993); *Dutton v. Georgia Associated Gen. Contractor Self-Insurers Trust Fund*, 215 Ga. App. 607, 451 S.E.2d 504 (1994).

The legislative decision in O.C.G.A. § 34-9-11.1(e) not to extend the retroactive application of the amended section to claims arising before the effective date of the section was an expression of intention that the former section was not applicable to injuries occurring prior to July 1, 1992; thus, an injured worker's action for damages against a third party brought within the two-year statute of limitations applicable under the section as amended was timely, even though the injury occurred prior to the effective date of the amendment. *Draughn v. Delta Airlines*, 218 Ga. App. 540, 462 S.E.2d 445 (1995).

Prior to the 1995 amendment, O.C.G.A. § 34-9-11.1 clearly limited recovery to disability benefits and medical expenses, and because an insurer had not shown that it paid either disability benefits or medical expenses, but only death benefits, it was not entitled to subrogation. *Bankhead v. Lucas Aerospace Ltd.*, 878 F. Supp. 221 (N.D. Ga. 1994), *aff'd*, 120 F.3d 1390 (11th Cir. 1997).

Effect of 1995 amendment. — Prior to the 1995 amendment, O.C.G.A. § 34-9-11.1 did not allow an employer's insurer to recover death benefits and/or burial expenses paid

pursuant to O.C.G.A. § 34-9-265 from the proceeds of the survivor's litigation under § 34-9-11.1 against a third party tortfeasor. *Wausau Ins. Co. v. McLeroy*, 266 Ga. 794, 471 S.E.2d 504 (1996).

The language of O.C.G.A. § 34-9-11.1(e) could not be more imperative; the provisions of O.C.G.A. § 34-9-11.1(c) are to be applied retroactively. *Dowdy v. Earthwise Restaurant Mgt., Inc.*, 221 Ga. App. 220, 471 S.E.2d 42 (1996).

No new substantive rights. — O.C.G.A. § 34-9-11.1 does not grant any new substantive rights to injured employees or change an employer's immunity from tort liability. *Warden v. Hoar Constr. Co.*, 269 Ga. 715, 507 S.E.2d 428 (1998).

Reassignment of employer's rights not authorized. — O.C.G.A. § 34-9-11.1 does not allow reassignment of an employee's action against a third party from the employer back to the employee in order to preserve the employee's right to maintain the action after that right was assigned to the employer because of the employee's failure to timely file a claim. *Bennett v. Williams Elec. Constr. Co.*, 215 Ga. App. 423, 450 S.E.2d 873 (1994).

Employer not a party to action. — Even though the employer of an injured plaintiff in a negligence action was entitled to protect and enforce its claim to a subrogation lien, where the employer was not a party to the action, it lacked standing to appeal the dismissal of the action. *Astin v. Callahan*, 222 Ga. App. 226, 474 S.E.2d 81 (1996).

Right to intervention by insurer. — Both O.C.G.A. §§ 9-11-24 and 34-9-11.1, the general intervention statute, granted a workers' compensation insurer the right to intervene in a personal injury case against third parties and their insurers brought by a claimant to whom the insurer paid benefits. *Department of Admin. Servs. v. Brown*, 219 Ga. App. 27, 464 S.E.2d 7 (1995).

Intervention permitted. — If intervention appears before final judgment, if the rights of the intervening parties have not been protected, and if the denial of intervention would dispose of the intervening parties' cause of action, intervention should be allowed and the failure to do so amounts to an abuse of discretion. *Payne v. Dundee Mills, Inc.*, 235 Ga. App. 514, 510 S.E.2d 67 (1998).

Because it was not clear whether the de-

defendant “immediately” notified the plaintiff of its subrogation complaint, but the plaintiff moved to intervene before any judgment in the subrogation action and before the defendant dismissed its complaint against contractors, where the plaintiff could not have moved to intervene before the expiration of the statute of limitations on the tort claim because the defendant did not inform plaintiff about the subrogation action until after it was filed on the last day before expiration, and where there was no indication that granting the motion to intervene would prejudice the defendant in any way or that the defendant had taken any steps to protect the plaintiff’s interest before dismissing its suit against the contractors, the trial court abused its discretion in denying the motion to intervene. *Payne v. Dundee Mills, Inc.*, 235 Ga. App. 514, 510 S.E.2d 67 (1998).

Worker’s employer and employer’s workers’ compensation insurer were entitled to intervene in plaintiff worker’s tort action arising from a workplace injury (the right to intervene arose because the employer and its insurer could assert a subrogation lien pursuant to O.C.G.A. § 34-9-11.1(b)); the right to recover was not at issue and was properly addressed at trial upon a showing that plaintiffs had fully and completely recovered. *Lara v. Tri-State Drilling*, 504 F. Supp. 2d 1323 (N.D. Ga. 2007).

Employer and insurer were erroneously dismissed as intervenors. — Although intervenors, a worker’s employer and the employer’s insurer had interests which conflicted with the worker’s interests and took action as intervenors to support a summary judgment motion by defendant owner against the worker, thus, the trial court erred in dismissing the intervenors from the worker’s personal injury suit against the owner and two others who were allegedly responsible for the worker’s injuries and thereby leaving intervenors to file a separate suit to enforce their subrogation lien, as O.C.G.A. § 34-9-11.1(b) gave the employer and its insurer an absolute right to intervene to enforce their subrogation lien to recover the costs of medical and disability benefits that they paid the worker as workers’ compensation. *Int’l Maint. Corp. v. Inland Paper Bd. & Packaging, Inc.*, 256 Ga. App. 752, 569 S.E.2d 865 (2002).

Evidence of an employee’s contributory/comparative negligence or assumption of

risk. — O.C.G.A. § 34-9-11.1(b) does not permit consideration of any evidence of the employee’s contributory/comparative negligence or assumption of the risk in the court’s calculation of whether the employee has been fully and completely compensated for injuries. *Homebuilders Ass’n v. Morris*, 238 Ga. App. 194, 518 S.E.2d 194 (1999).

O.C.G.A. § 34-9-11.1(b) instructed courts in determining whether an employee has been fully and completely compensated to consider both the workers’ compensation benefits the employee received and the amount of the employee’s recovery against the third party. *Hartford Ins. Co. v. Fed. Express Corp.*, 253 Ga. App. 520, 559 S.E.2d 530 (2002).

Employer’s burden of proof. — Given the injured employee’s economic damages, the indications of pain and suffering, the possibility of future medical expenses, and the amount of net proceeds available to the employee, the record demonstrated that the trial court did not abuse its discretion in concluding that the city, which was seeking to enforce a subrogation lien, failed to carry its burden of showing that the employee had been fully and completely compensated in a personal injury suit against the third party that injured the employee in an automobile accident that occurred in the scope of the employee’s employment. *City of Warner Robins v. Baker*, 255 Ga. App. 601, 565 S.E.2d 919 (2002).

Where an employer failed to carry its burden of showing that the combination of workers’ compensation benefits and a personal injury claim settlement fully and completely compensated an injured person for injuries sustained in an auto accident, a trial court’s ruling that the employer was not entitled to recover on its subrogation lien for the workers’ compensation benefits paid was affirmed. *Ga. Elec. Mbrshp. Corp. v. Garnto*, 266 Ga. App. 452, 597 S.E.2d 527 (2004).

Pretermitted whether the trial court correctly determined that no benefits had been paid under Georgia’s Workers’ Compensation Act, and thus the employer had no right of subrogation to the tort claim settlement proceeds, the trial court’s order granting partial summary judgment to the employee extinguishing the employer’s subrogation lien had to be affirmed, as the employer failed to carry its burden of showing that its

injured employee was fully and completely compensated within the meaning of O.C.G.A. § 34-9-11.1(b). *Paschall Truck Lines, Inc. v. Kirkland*, 287 Ga. App. 497, 651 S.E.2d 804 (2007).

Effect of settlement between employee and tortfeasor on subrogation lien. — Where an employee settled the employee's personal injury claim against a tortfeasor without filing suit, and the tortfeasor had no knowledge of the workers' compensation claim, the employer had no right of action against the tortfeasor, but the loss of the right to bring a subrogation action did not extinguish the employer's lien on the recovery. *Rowland v. Department of Admin. Servs.*, 219 Ga. App. 899, 466 S.E.2d 923 (1996).

Because the employee settled a lawsuit and released third-party tortfeasors prior to receiving workers' compensation payments, the settlement and release extinguished subrogation rights asserted by the employer and its insurer. It made no difference that the tortfeasors settled with the employee after receiving notice of the pending workers' compensation claim. *Georgia Star Plumbing, Inc. v. Bowen*, 225 Ga. App. 379, 484 S.E.2d 26 (1997).

A settlement and release agreement between the manufacturer and the employee demonstrated the employee waived the employee's right to insist that the employer prove that the employee had been fully and completely compensated. *Ga. Elec. Mbrshp. Corp. v. Hi-Ranger, Inc.*, 275 Ga. 197, 563 S.E.2d 841 (2002).

Effect of settlement with one party. — Where plaintiffs, a worker and the worker's spouse, sued defendants, the owner, designer, and builder of a staircase and platform which fell on the worker, for personal injuries, and intervenors, the worker's employer and its insurer, intervened to enforce a subrogation lien, the trial court did not err in giving its approval under O.C.G.A. § 9-11-21 to plaintiffs' dismissal of the builder and the designer over intervenors' objections after plaintiffs settled with the builder and the designer because, although O.C.G.A. § 34-9-11.1(b) gave the employer and the insurer the right to intervene to enforce a subrogation lien, it did not allow them to take away plaintiffs' power to direct their own lawsuit against defendants or to

settle with one or more of the defendants. *Int'l Maint. Corp. v. Inland Paper Bd. & Packaging, Inc.*, 256 Ga. App. 752, 569 S.E.2d 865 (2002).

Amount of damages. — Trial court had authority to reduce an employee's personal injury award to cover the subrogation lien of the employer. *Powell v. Daniels Constr. & Demolition, Inc.*, 232 Ga. App. 422, 501 S.E.2d 578 (1998).

Subrogation authorized. — Because the plaintiff was awarded \$50,000, \$25,000 for medical expenses and \$25,000 for pain and suffering, in an action arising from a motor vehicle accident and because there was nothing in the record which indicated that plaintiff had any outstanding medical or other claims or obligations, plaintiff's employer was entitled to enforce its subrogation lien against the \$25,000 awarded for medical expenses, but not against the \$25,000 awarded for pain and suffering. *North Bros. Co. v. Thomas*, 236 Ga. App. 839, 513 S.E.2d 251 (1999).

Insurer was entitled to a subrogation lien against medical expenses recovered by an employee in a suit against a third-party tortfeasor after the evidence showed that the workers' compensation medical expense benefits paid to the employee along with the medical expenses the employee recovered in the suit were more than sufficient to fully and completely compensate for the medical expenses incurred as a result of the injury. *Hammond v. Lee*, 244 Ga. App. 865, 536 S.E.2d 231 (2000).

Subrogation not authorized. — O.C.G.A. § 34-9-11.1 did not authorize a workers' compensation insurer to assert a subrogation right against an injured employee's uninsured motorist carrier. *Stewart v. Auto-Owners Ins. Co.*, 230 Ga. App. 265, 495 S.E.2d 882 (1998).

An insurer was not entitled to a subrogation lien pursuant to O.C.G.A. § 34-9-11.1(b) against an employee's recovery of past lost wages where the evidence showed that the employee's wages prior to the injury averaged more per week than the wage benefits paid by the insurer per week through the time of the trial. *Hammond v. Lee*, 244 Ga. App. 865, 536 S.E.2d 231 (2000).

Trial court properly dismissed the insurer's action for recovery of workers' compen-

sation benefits paid to the victim and properly dismissed the insurer's subrogation lien because the insurer failed to meet its burden of proving that the victim had been fully and completely compensated for losses under O.C.G.A. § 34-9-11.1(b), where experts' testimony was deficient causing speculative evaluations. *CGU Ins. Co. v. Sabel Indus.*, 255 Ga. App. 236, 564 S.E.2d 836 (2002).

An insurer may not obtain reimbursement, via a subrogation claim, unless and until its insured has been completely compensated for the insured's losses. *Canal Ins. Co. v. Liberty Mut. Ins. Co.*, 256 Ga. App. 866, 570 S.E.2d 60 (2002).

Employer who paid a workers' compensation claimant workers' compensation benefits under Texas law was not entitled to a subrogation claim to the proceeds of a tort settlement against the alleged tortfeasors under the full faith and credit and comity provisions of U.S. Constitution. *Tyson Foods, Inc. v. Craig*, 266 Ga. App. 443, 597 S.E.2d 520 (2004).

Apportionment of attorney fees. — Following settlement of a negligence action, the court erred in apportioning attorney fees under O.C.G.A. § 34-9-11.1(d), as the section read as a whole does not permit an apportionment of fees in the absence of the employer's recovery on its subrogation lien after the injured employee has been fully

and completely compensated. *Simpson v. Southwire Co.*, 249 Ga. App. 406, 548 S.E.2d 660 (2001).

Statute of limitation. — For purposes of its subrogation claim, the asserting employer is deemed an "employee" for statute of limitation purposes and is subject to the two-year statute of limitation applicable to the injured employee. *Newsome v. Department of Admin. Servs.*, 241 Ga. App. 357, 526 S.E.2d 871 (1999).

Intervenor's claim for pain and suffering was a claim arising out of the conduct, transaction, or occurrence set forth in the original complaint and could be treated as an amendment by a party plaintiff relating back to the date of the original complaint for statute of limitation purposes. *P.F. Moon & Co. v. Payne*, 256 Ga. App. 191, 568 S.E.2d 113 (2002).

No right to jury trial. — When pursuing its subrogation rights, a workers' compensation insurer is not entitled to a jury trial on the question of whether the injured employee has been fully and completely compensated under O.C.G.A. § 34-9-11.1(b). *Liberty Mut. Ins. Co. v. Johnson*, 244 Ga. App. 338, 535 S.E.2d 511 (2000).

Cited in Int'l Maint. Corp. v. Inland Paper Bd. & Packaging, Inc., 256 Ga. App. 752, 569 S.E.2d 865 (2002); *Thurman v. State Farm Mut. Auto. Ins. Co.*, 278 Ga. 162, 598 S.E.2d 448 (2004).

34-9-12. Employer's record of injuries; availability of board records; supplementary report on termination of disability; penalties; routine reports.

(a) Every employer subject to the provisions of this chapter relative to the payment of compensation shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment on blanks approved by the board. Within ten days after notice, as provided in Code Section 34-9-80, of the occurrence of an injury to an employee requiring medical or surgical treatment or causing his absence from work for more than seven days, a report thereof shall be made in writing and mailed to the board on blanks to be procured from the board for this purpose.

(b) The records of the board, insofar as they refer to accidents, injuries, and settlements, shall not be open to the public but only to the parties satisfying the board of their interest in such records and their right to inspect them. The board shall provide data contained on Employers' First Report of Injury forms reporting fatalities to the Georgia Department of

Labor and the United States Department of Labor for use in the Census of Fatal Occupational Injuries Program. The board shall provide data to such other state and federal governmental entities or departments as required by law. Under such reasonable rules and regulations as the board may adopt, the records of the board as to any employee in any previous case in which such employee was a claimant shall be open to and made available to such claimant, to an employer or its insurance carrier which is called upon to pay compensation, medical expenses, or funeral expenses, and to any party at interest, except that the board may make such reasonable charge as it deems proper for furnishing information by mail and for copies of records.

(c) Upon the termination of the disability of the injured employee, the employer shall make a supplementary report to the board on blanks to be procured from the board for the purpose. The report shall contain the name, nature, and location of the business of the employer; the name, age, sex, and wages and occupation of the injured employee; and shall state the date and hour of the accident causing the injury, the nature and cause of the injury, and such other information as may be required by the board.

(d) Any employer who refuses or willfully neglects to make the report required by subsection (a) of this Code section shall be subject to a penalty of not more than \$100.00 for each refusal or instance of willful neglect, to be assessed by the board, a member, or an administrative law judge in an open hearing, with the right of review as in other cases. In the event the employer has sent the report to the insurance carrier for forwarding to the board, the insurance carrier willfully neglecting or failing to forward the report shall be liable and shall pay the penalty.

(e) Every employer shall, upon request of the board, report the number of his employees, hours of their labor, and number of days of operation of business. (Ga. L. 1920, p. 167, § 65; Ga. L. 1923, p. 92, § 6; Ga. L. 1929, p. 358, § 1; Code 1933, § 114-716; Ga. L. 1957, p. 493, § 1; Ga. L. 1963, p. 141, § 16; Ga. L. 1975, p. 198, § 12; Ga. L. 1988, p. 1679, § 2; Ga. L. 1993, p. 1396, § 1; Ga. L. 1994, p. 97, § 34; Ga. L. 2002, p. 846, § 1.)

Cross references. — General duty of employers to keep record of name, address, and occupation of employees, § 34-2-11. Board's duty to provide injured workers with notice of rights, benefits, and obligations, § 34-9-81.1.

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Access to records limited to interested parties. — In a suit to recover for personal injuries and property damage arising out of an automobile collision, the defendants served the board with a request for the production of any and all claims by the plaintiff for workers' compensation benefits, including but not limited to all medical records, reports, and narratives. The trial

court did not err in denying this motion, as the board is not a general repository of discoverable material for defendants in civil actions, and access to the board's records is properly limited to those parties who have a specific interest in the workers' compensation claim in connection with which the records are maintained by the board. Insofar as the plaintiff's actual medical records were

concerned, the defendants could have pursued the usual means of discovery that were available to any defendant in a civil action. *Farrell v. Dunn*, 199 Ga. App. 631, 405 S.E.2d 731 (1991).

Notice and opportunity to be heard prior to assessment of penalty. — Deputy director abused the director's discretion in assessing a penalty under this section against an employer without first affording the employer notice of the assessment of such penalty and opportunity to be heard. *Bailey-Lewis-Williams of Ga., Inc. v. Thomas*, 103 Ga. App. 279, 119 S.E.2d 141 (1961) (see O.C.G.A. § 34-9-12).

Running of statute not tolled by employer's mere failure to report. — If it is not required by the worker's compensation law (see O.C.G.A. § 34-9-1 et seq) itself, and in the absence of any fraud on the part of the employer, the employer's mere failure to report an accident, as required, does not toll the running of the statute as to the time for

filing a claim for compensation, as failure of the employer to make such a report has nothing whatever to do with the employee's failure to file, or delay in filing, a claim for compensation on account of such accident. *Welchel v. American Mut. Liab. Ins. Co.*, 54 Ga. App. 511, 188 S.E. 357 (1936), overruled on other grounds, *Brown Transp. Co. v. James*, 243 Ga. 701, 257 S.E.2d 242 (1979).

Cited in Employers' Liability Assur. Corp. v. Pruitt, 63 Ga. App. 149, 10 S.E.2d 275 (1940); *Hartford Accident & Indem. Co. v. Dutton*, 110 Ga. App. 398, 138 S.E.2d 733 (1964); *Peters v. Liberty Mut. Ins. Co.*, 113 Ga. App. 41, 147 S.E.2d 26 (1966); *Fidelity & Cas. Co. v. Whitehead*, 114 Ga. App. 630, 152 S.E.2d 706 (1966); *S.S. Kresge Co. v. Black*, 144 Ga. App. 58, 240 S.E.2d 554 (1977); *Southern Cotton Oil Co. v. Lockett*, 150 Ga. App. 835, 258 S.E.2d 644 (1979); *Insurance Co. of N. Am. v. Henson*, 150 Ga. App. 788, 258 S.E.2d 706 (1979).

OPINIONS OF THE ATTORNEY GENERAL

Term "employer" as used in former Code 1933, § 114-716 (see O.C.G.A. § 34-9-12) must be interpreted to have the same meaning as set out in former Code 1933, §§ 114-101 and 114-102 (see O.C.G.A. § 34-9-12). 1980 Op. Att'y Gen. No. 80-55.

State and all departments must comply with record-keeping provisions. — Since the State of Georgia is specifically included in former Code 1933, §§ 114-101 and 114-102 (see O.C.G.A. § 34-9-1), it was, by implication, included in former Code 1933, § 114-716 (see O.C.G.A. § 34-9-12), and the State of Georgia and all departments, instrumentalities, and authorities thereof must comply with the record-keeping provisions of former Code 1933, § 114-716. 1980 Op. Att'y Gen. No. 80-55.

Confidentiality of board records. — All records of the State Board of Workers' Compensation pertaining to accidents, injuries, and settlements are confidential, unless a party can meet the statutory requirements for access or has authority pursuant to the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq. 1991 Op. Att'y Gen. No. 91-5.

Files and records that would otherwise be confidential under O.C.G.A. § 34-9-12(b) should be furnished to prosecutors in furtherance of a Fraud and Compliance Division investigation. 1997 Op. Att'y Gen. No. 97-20.

State Board of Workers' Compensation may legally assess a penalty against Department of Administrative Services, as the agent for other departments, instrumentalities, and authorities of the state, if there is a refusal or willful neglect to file timely reports of injuries required by this section. 1980 Op. Att'y Gen. No. 80-55 (see O.C.G.A. § 34-9-12).

What constitutes "refusal" or "willful neglect" is a factual question which must be resolved on a case-by-case basis; mere delay in filing the reports, without more, probably would not amount to either refusal or willful neglect so as to give rise to the penalty. 1980 Op. Att'y Gen. No. 80-55.

Employer is not required to inform an insurer of all employee injuries. 1980 Op. Att'y Gen. No. 80-126.

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 574.

C.J.S. — 101 C.J.S., Workers' Compensation, § 1583 et seq.

34-9-13. Definitions; persons presumed next of kin; apportionment of payments among partial and total dependents; termination of dependency.

(a) As used in this Code section, the term:

(1) "Child" includes dependent stepchildren, legally adopted children, posthumous children, and acknowledged children born out of wedlock but does not include married children; and

(2) "Parent" includes stepparents and parents by adoption.

(b) The following persons shall be conclusively presumed to be the next of kin wholly dependent for support upon the deceased employee:

(1) A wife or husband, except that if the wife and husband were living separately for a period of 90 days immediately prior to the accident which resulted in the death of the deceased employee the presumption of total dependence shall be rebuttable; and

(2) A child of the employee if:

(A) The child is under 18 or enrolled full time in high school;

(B) The child is over 18 and is physically or mentally incapable of earning a livelihood; or

(C) The child is under the age of 22 and is a full-time student or the equivalent in good standing enrolled in a postsecondary institution of higher learning.

(c) If the deceased employee leaves a dependent surviving spouse, as above described, and no dependent child or children, the full compensation shall be paid to such spouse. If the deceased employee leaves a dependent surviving spouse, as above described, and also a dependent child or children, the full compensation shall be paid to such spouse for his or her use and that of such child or children; provided, however, that the board shall have the power in proper cases, in its discretion, to apportion the compensation; provided, further, that, if the dependent surviving spouse dies before payment is made in full, the balance remaining shall be paid to the person or persons wholly dependent, if any, share and share alike. If there is no person wholly dependent, payment shall be made to partial dependents.

(d) In all other cases, questions of dependency, in whole or in part, shall be determined in accordance with the facts at the time of the accident, but

no allowance shall be made for any payment made in lieu of board and lodging or services, and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident. In such other cases, if there is more than one person wholly dependent, the death benefit shall be divided among them, and persons partially dependent, if any, shall receive no part thereof; if there is no one wholly dependent and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

(e) For the purpose of this chapter, the dependency of a spouse upon a deceased employee shall terminate with remarriage or cohabitation in a meretricious relationship; and for this purpose cohabitation in a meretricious relationship shall be a relationship in which persons of the opposite sex live together continuously and openly in a relationship similar or akin to marriage, which relationship includes either sexual intercourse or the sharing of living expenses. The dependency of a child, except a child physically or mentally incapable of earning a livelihood, shall terminate with the attainment of 18 years of age, except as provided in paragraph (2) of subsection (b) of this Code section. The dependency of a spouse and of a partial dependent shall terminate at age 65 or after payment of 400 weeks of benefits, whichever provides greater benefits. (Ga. L. 1920, p. 167, § 39; Code 1933, § 114-414; Ga. L. 1985, p. 149, § 34; Ga. L. 1985, p. 727, § 1; Ga. L. 1987, p. 806, § 1; Ga. L. 1988, p. 1720, § 14; Ga. L. 1989, p. 14, § 34; Ga. L. 1990, p. 8, § 34; Ga. L. 1990, p. 1409, § 1; Ga. L. 2000, p. 1321, § 1.)

Law reviews. — For article surveying developments in Georgia constitutional law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 51 (1981). For article surveying developments in Georgia workers' compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981). For annual survey of workers' compensation, see 38 Mercer L. Rev. 431 (1986). For

annual survey of workers' compensation law, see 57 Mercer L. Rev. 419 (2005).

For note on 2000 amendment of O.C.G.A. § 34-9-13, see 17 Ga. St. U.L. Rev. 231 (2000).

For comment on New Amsterdam Cas. Co. v. Freeland, 216 Ga. 491, 117 S.E.2d 538 (1960), see 23 Ga. B.J. 563 (1961).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SPOUSES

1. IN GENERAL
2. FORMER LAW

CHILDREN

PARENTS

General Consideration

Policy of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is to provide

a measure of compensation to persons suffering direct loss of support because of the death of an employee as a result of employment. St. Paul-Mercury Indem. Co. v.

Robinson, 88 Ga. App. 217, 76 S.E.2d 512 (1953).

This section was intended to set a schedule of priorities among claimants who are not wholly dependent but are otherwise eligible for benefits. *O'Steen v. Florida Ins. Exch.*, 118 Ga. App. 562, 164 S.E.2d 334 (1968) (see O.C.G.A. § 34-9-13).

Section does not award benefits to claimants who are ineligible. — That part of this section which declared that the wife and other dependents listed herein are "conclusively presumed" to be "totally dependent" is intended to set a schedule of priorities among claimants who are otherwise eligible for benefits, but does not purport to award benefits to claimants who, for some other reason, are not eligible to participate in the distribution thereof. *Zachery v. Royal Indem. Co.*, 80 Ga. App. 659, 56 S.E.2d 812 (1949), overruled on other grounds, *Freeman Decorating Co. v. Subsequent Injury Trust Fund*, 175 Ga. App. 369, 333 S.E.2d 204 (1985) (see O.C.G.A. § 34-9-13).

Those persons specifically designated in this section were primary dependents, as they have priority in the payment of death benefits, to the exclusion of all other, or secondary, dependents. *O'Steen v. Florida Ins. Exch.*, 118 Ga. App. 562, 164 S.E.2d 334 (1968) (see O.C.G.A. § 34-9-13).

Secondary dependents are entitled to benefits only if there is no eligible primary beneficiary or the primary beneficiary has waived the beneficiary's right to compensation. *O'Steen v. Florida Ins. Exch.*, 118 Ga. App. 562, 164 S.E.2d 334 (1968).

Entitlement of secondary beneficiaries where primary beneficiary waives compensation. — Upon death of employee, liability of employer becomes fixed and the employer is bound to pay death benefits under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), and if the beneficiary primarily entitled thereto waives compensation, beneficiaries secondarily entitled thereto may recover. *Zachery v. Royal Indem. Co.*, 80 Ga. App. 659, 56 S.E.2d 812 (1949).

Workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) provides for compensation for partial dependency as well as total dependency. *Glens Falls Indem. Co. v. Jordan*, 56 Ga. App. 449, 193 S.E. 96 (1937).

Establishment of partial dependency. — To establish partial dependency, claimant

need not prove claimant had no other income. *Glens Falls Indem. Co. v. Jordan*, 56 Ga. App. 449, 193 S.E. 96 (1937).

Partial dependency may be established even though contributions are at irregular intervals and of irregular amounts. *Glens Falls Indem. Co. v. Jordan*, 56 Ga. App. 449, 193 S.E. 96 (1937).

Provision as to division of benefits among partial dependents for their protection. — Provision that if there is no one wholly dependent and more than one person partially dependent, the death benefit shall be divided among them is merely for the benefit and protection of those partially dependent, as a safeguard to see that each dependent receives his or her just share of compensation. *Glens Falls Indem. Co. v. Jordan*, 56 Ga. App. 449, 193 S.E. 96 (1937).

Contingent right of partial dependent to balance of unpaid compensation. — Provision that a partial dependent is entitled to balance of unpaid compensation in the event the one primarily entitled may no longer receive compensation is a contingent and not a vested right, and no obligation or right to show that one would be entitled to a contingent right arises until the happening of the contingency. *Bituminous Cas. Corp. v. Johnson*, 79 Ga. App. 105, 53 S.E.2d 119 (1949).

Dependents not limited to relatives. — Fact that few employees provide support for persons not related to them is no reason to limit the policy of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) by restricting the class of persons who may be shown to have been dependent upon a deceased employee to those related to the employee. *St. Paul-Mercury Indem. Co. v. Robinson*, 88 Ga. App. 217, 76 S.E.2d 512 (1953).

Legal or moral obligation of support not necessary. — Legal obligation of deceased employee to support claimant is not necessary to show claimant's dependency, nor is even a moral obligation to support an essential element of dependency. *St. Paul-Mercury Indem. Co. v. Robinson*, 88 Ga. App. 217, 76 S.E.2d 512 (1953).

Beneficiaries not determined by employee's obligations. — Workers' compensation is a creature of statute, and the beneficiaries of the death benefits of a deceased employee do not purport to be determined by the

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obligations the employee had to the beneficiaries. *Flint River Mills v. Henry*, 239 Ga. 347, 236 S.E.2d 583 (1977), appeal dismissed, 434 U.S. 1003, 98 S. Ct. 707, 54 L. Ed. 2d 746 (1978).

Evidence authorized finding that first cousin of deceased employee was totally dependent upon deceased at time of death. *Bituminous Cas. Corp. v. Williams*, 80 Ga. App. 337, 56 S.E.2d 157 (1949).

"Dependent" is one who looks to another for support, or is dependent on another for the ordinary necessities of life for a person of that person's class and position; to be entitled to compensation as a dependent, one need not deprive oneself of the ordinary necessities of life to which one has been accustomed. *Glens Falls Indem. Co. v. Jordan*, 56 Ga. App. 449, 193 S.E. 96 (1937); *Wallace v. American Mut. Liab. Ins. Co.*, 73 Ga. App. 869, 38 S.E.2d 624 (1946); *Insurance Co. of N. Am. v. Cooley*, 118 Ga. App. 46, 162 S.E.2d 821 (1968).

Dependency does not depend on whether alleged dependents could support themselves without decedent's earnings, or so reduce their expenses that they would be supported independent of decedent's earnings, but on whether they were in fact supported in whole or in part by such earnings, under circumstances indicating an intent on the part of decedent to furnish such support. *Glens Falls Indem. Co. v. Jordan*, 56 Ga. App. 449, 193 S.E. 96 (1937); *Aetna Cas. & Sur. Co. v. Johnson*, 70 Ga. App. 698, 29 S.E.2d 318 (1944); *Wallace v. American Mut. Liab. Ins. Co.*, 73 Ga. App. 869, 38 S.E.2d 624 (1946); *Insurance Co. of N. Am. v. Cooley*, 118 Ga. App. 46, 162 S.E.2d 821 (1968).

Fact that claimant earns enough to barely sustain life does not negate dependency. *Glens Falls Indem. Co. v. Jordan*, 56 Ga. App. 449, 193 S.E. 96 (1937).

Continued contribution of cash or supplies is evidence of dependency, but not an essential thereof. *St. Paul-Mercury Indem. Co. v. Robinson*, 88 Ga. App. 217, 76 S.E.2d 512 (1953).

Reliance on contributions must be shown. — Dependency does not arise upon mere proof that contributions have been made; it must be shown that the contributions were made and relied upon by claimant or claim-

ants for their support, according to their needs, judged by their class and position in life. *Glens Falls Indem. Co. v. Jordan*, 56 Ga. App. 449, 193 S.E. 96 (1937).

Amount contributed rather than number of dependents as determining factor in fixing benefits. — Under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), in determining the amount of death benefit payable to a deceased employee's dependents, where there is no one wholly dependent upon the decedent for support, the amount contributed by the deceased is the determining factor, and not the number of dependents. *Glens Falls Indem. Co. v. Jordan*, 56 Ga. App. 449, 193 S.E. 96 (1937).

"Standard of living" is a generic term and must of necessity be determined by the facts and circumstances in each particular case. *London Guar. & Accident Co. v. Bernstein*, 74 Ga. App. 692, 41 S.E.2d 810 (1947).

"Standard of living" is a generic term and a question of fact rather than law, where evidence is sufficient to sustain a finding of dependency. *Insurance Co. of N. Am. v. Cooley*, 118 Ga. App. 46, 162 S.E.2d 821 (1968).

Time for determination of eligibility. — Eligibility of a primary beneficiary must be determined as of the date of the accident, not the date of the hearing on a claim for benefits. *Freeman Decorating Co. v. Subsequent Injury Trust Fund*, 175 Ga. App. 369, 333 S.E.2d 204 (1985).

Employment for less than three months. — Evidence showing, without dispute, that the employee for whose injury or death compensation was sought had been employed for a period of less than three months prior to the accident did not affirmatively disprove the fact of dependency for three months, as required under this section as a condition to allowance of compensation. *Maryland Cas. Co. v. Bartlett*, 37 Ga. App. 777, 142 S.E. 189 (1928) (see O.C.G.A. § 34-9-13).

Contributions during three-month period not necessarily required. — It was not necessary, in order to satisfy provision that dependency must have existed three months prior to accident, that it be shown that contributions were actually made during that period, or at the time of the accident, where for a considerable period prior thereto contributions had been made and

received by claimants and used to support them according to a standard authorized by their position in life, and there were reasonable grounds for belief that the contributions would have been continued, although in an irregular amount and at irregular intervals, and that the lapse in contributions was not brought about by an intention of the deceased employee to refuse further aid. *Glens Falls Indem. Co. v. Jordan*, 56 Ga. App. 449, 193 S.E. 96 (1937).

Neither amounts contributed nor times when made are necessarily controlling elements in test of dependency. *Neese v. Subsequent Injury Trust Fund*, 164 Ga. App. 136, 296 S.E.2d 427 (1982).

Dependency for requisite period held not shown. — While duration of dependency is not necessarily limited to the actual period of time during which injured employee had been employed or had contributed out of the employee's wages to claimant's support, yet where the employee had, immediately preceding the accident, been employed and had contributed from the employee's wages during a period of time of only ten weeks and four days, which was less than three months, prior to which time the employee had been out of employment and idle, and where it did not otherwise appear that prior to this period claimant was dependent upon the employee, dependency for a period of three months prior to the accident was not shown. *Barnett v. American Mut. Liab. Ins. Co.*, 40 Ga. App. 800, 151 S.E. 537 (1930).

Burden is on claimant to establish fact of dependency for the period provided by this section. *Barnett v. American Mut. Liab. Ins. Co.*, 40 Ga. App. 800, 151 S.E. 537 (1930) (see O.C.G.A. § 34-9-13).

Question of dependency is one of fact, to be determined according to the facts and circumstances of each case, from the amounts, frequency, and continuity of actual contributions of cash or supplies, the needs of the claimants, and the legal and moral obligation of the employee. *Georgia Power & Light Co. v. Patterson*, 46 Ga. App. 7, 166 S.E. 255 (1932); *Glens Falls Indem. Co. v. Jordan*, 56 Ga. App. 449, 193 S.E. 96 (1937); *London Guar. & Accident Co. v. Bernstein*, 74 Ga. App. 692, 41 S.E.2d 810 (1947); *St. Paul-Mercury Indem. Co. v. Robinson*, 88 Ga. App. 217, 76 S.E.2d 512 (1953); *Insurance Co. of N. Am. v. Cooley*, 118 Ga. App.

46, 162 S.E.2d 821 (1968).

Except where the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) specifically creates a presumption of dependency in favor of named classes, question of dependency is one of fact rather than of law. *U.S. Fid. & Guar. Co. v. Washington*, 37 Ga. App. 140, 139 S.E. 359 (1927); *Wallace v. American Mut. Liab. Ins. Co.*, 73 Ga. App. 869, 38 S.E.2d 624 (1946).

Each case to be decided on own facts. — Dependency being a question of fact, at least until the facts are found, each case must be decided on its own facts. *Glens Falls Indem. Co. v. Jordan*, 56 Ga. App. 449, 193 S.E. 96 (1937).

Conclusiveness of determination of disability and dependency. — While doctrine of *res judicata* does not make forever conclusive the determination of the amount of disability and dependency, such determinations are conclusive as to those issues up to and at the time of the hearing and remain conclusive unless a change in condition or dependency occurring after such hearing is shown. *Fishten v. Campbell Coal Co.*, 95 Ga. App. 410, 98 S.E.2d 179 (1957).

Change in dependency occurring subsequent to first hearing can be shown on review, but all issues which were determined or which could have been adjudicated on first hearing, concerning facts as they then stood, are conclusive; any issue which could have been determined on the first hearing is *res judicata*. *Fishten v. Campbell Coal Co.*, 95 Ga. App. 410, 98 S.E.2d 179 (1957).

Liability of employer becomes fixed upon death of employee, and the employer is bound to pay death benefits under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), providing that the death arose under circumstances held to be compensable, that employer was subject to the provisions of the law, and that a valid claim was filed within the period of limitation on behalf of one entitled to compensation. *Zachery v. Royal Indem. Co.*, 80 Ga. App. 659, 56 S.E.2d 812 (1949), overruled on other grounds, *Freeman Decorating Co. v. Subsequent Injury Trust Fund*, 175 Ga. App. 369, 333 S.E.2d 204 (1985).

Number of dependents of no concern to employer or carrier. — Where death of employee was compensable, the workers' compensation law (see O.C.G.A. § 34-9-1 et

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seq.) fixed the amount to be paid the dependents described in this section; the number of dependents who participated in the use of the fund was of no concern to the employer or insurance carrier, their only interest being to see that the amount of the award was paid to those entitled to receive the award. *Georgia Forestry Comm'n v. Harrell*, 98 Ga. App. 238, 105 S.E.2d 461 (1958); *Handcrafted Furn., Inc. v. Black*, 182 Ga. App. 115, 354 S.E.2d 696 (1987) (see O.C.G.A. § 34-9-13).

Award to spouse and children not diminished where one no longer entitled. — Obligation of employer or insurance carrier to pay compensation awarded jointly to spouse and children is not diminished simply because one of them is no longer entitled to participate in its use. *Georgia Forestry Comm'n v. Harrell*, 98 Ga. App. 238, 105 S.E.2d 461 (1958).

Meaning of "during dependency." — Where the dependency of a person was fixed by former Code 1933, § 114-414 (see O.C.G.A. § 34-9-13) as a matter of law, term "during dependency" in former Code 1933, § 114-413 (see O.C.G.A. § 34-9-265) meant until an event specified in former Code 1933, § 114-414 (see O.C.G.A. § 34-9-13) as terminating dependency. *U.S. Fid. & Guar. Co. v. Dunbar*, 112 Ga. App. 102, 143 S.E.2d 663 (1965).

Death of widow, children or other dependents terminates receipt of benefits. *Hartford Accident & Indem. Co. v. Fuller*, 102 Ga. App. 384, 116 S.E.2d 628 (1960).

Cited in *United States Fid. & Guar. Co. v. Washington*, 37 Ga. App. 140, 139 S.E. 359 (1927); *Moody v. Tillman*, 45 Ga. App. 84, 163 S.E. 521 (1932); *Porter v. Liberty Mut. Ins. Co.*, 46 Ga. App. 86, 166 S.E. 675 (1932); *Durham v. Durham*, 59 Ga. App. 430, 1 S.E.2d 207 (1939); *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939); *Employers Liab. Assurance Corp. v. Pruitt*, 190 Ga. 479, 9 S.E.2d 641 (1940); *Travelers Ins. Co. v. Lester*, 73 Ga. App. 465, 36 S.E.2d 880 (1946); *Lumbermen's Mut. Cas. Co. v. Allen*, 74 Ga. App. 133, 38 S.E.2d 841 (1946); *McDonald v. Travelers Ins. Co.*, 81 Ga. App. 614, 59 S.E.2d 537 (1950); *Globe Indem. Co. v. Reid*, 92 Ga. App. 828, 89 S.E.2d 905 (1955); *Liberty Mut. Ins. Co. v. Ellis*, 99 Ga.

App. 486, 109 S.E.2d 70 (1959); *Gibbons v. Maryland Cas. Co.*, 114 Ga. App. 788, 152 S.E.2d 815 (1966); *Jordan v. Vulcan Materials Co.*, 121 Ga. App. 695, 175 S.E.2d 123 (1970); *Flint River Mills v. Henry*, 234 Ga. 385, 216 S.E.2d 895 (1975); *Southern Bell Tel. & Tel. Co. v. Hodges*, 164 Ga. App. 757, 298 S.E.2d 570 (1982); *Sutter v. Turner*, 172 Ga. App. 777, 325 S.E.2d 384 (1984).

Spouses**1. In General**

Proof required for conclusive presumption. — There is no longer a conclusive presumption of dependency of widows under provisions of O.C.G.A. § 34-9-13, absent proof that surviving spouse was wholly or partially dependent for support upon deceased or was in need of such support. *Neese v. Subsequent Injury Trust Fund*, 164 Ga. App. 136, 296 S.E.2d 427 (1982).

O.C.G.A. § 34-9-13 does not provide that the fact claimant worked 90 days prior to the wife's death conclusively rebuts a presumption of total dependency; it merely provides the presumption is rebuttable. *Jones v. Winners Corp.*, 189 Ga. App. 875, 377 S.E.2d 705 (1989).

Evidence showing that a worker's spouse earned a substantial part of her own support and that she received substantial contributions toward her support from sources other than her husband would authorize a finding that she was dependent upon her husband for support, but it would not authorize a finding that she was totally rather than partially dependent upon him. *Goode Bros. Poultry Co. v. Kin*, 201 Ga. App. 557, 411 S.E.2d 724, cert. denied, 201 Ga. App. 903, 411 S.E.2d 724 (1991).

Absence of marriage. — Where the claimant lived with the employee for approximately 11 years prior to the employee's accidental death on the job, but the two never married, nor did they established a common-law marriage, the claimant was not entitled to a workers' compensation award. *Williams v. Corbett*, 195 Ga. App. 85, 392 S.E.2d 310, aff'd, 260 Ga. 668, 398 S.E.2d 1 (1990).

One cannot recover dependency benefits arising from a living arrangement that includes neither ceremonial nor common-law

marriage. *Williams v. Corbett*, 260 Ga. 668, 398 S.E.2d 1 (1990).

2. Former Law

Editor's notes. — The cases appearing below were decided prior to the 1985 amendments to this Code section and should therefore be consulted with care.

Also, cases dealing with widows and widowers under this Code section should be consulted with care, in light of *Insurance Co. of N. Am. v. Russell*, 246 Ga. 269, 271 S.E.2d 178 (1980), holding the different treatment of widows and widowers under this Code section unconstitutional.

Different treatment of widows and widowers under this section was unconstitutional under the equal protection clause of the fourteenth amendment. *Insurance Co. of N. Am. v. Russell*, 246 Ga. 269, 271 S.E.2d 178 (1980) (see O.C.G.A. § 34-9-13).

Spouses entitled to conclusive presumption only if wholly or partly dependent or in need of support. — Until the General Assembly provides otherwise, paragraphs (b)(1) and (b)(2) of this section should be read together, as follows: "The following persons shall be conclusively presumed to be the next of kin wholly dependent for support upon the deceased employee: A surviving spouse upon a deceased spouse if the survivor was wholly or partially dependent for support upon the deceased or was in need of such support." *Insurance Co. of N. Am. v. Russell*, 246 Ga. 269, 271 S.E.2d 178 (1980) (see O.C.G.A. § 34-9-13).

General Assembly may reestablish conclusive presumption of dependency for both widows and widowers if it chooses to do so. *Insurance Co. of N. Am. v. Russell*, 246 Ga. 269, 271 S.E.2d 178 (1980).

Conclusive presumption in wife's favor absent voluntary desertion or abandonment. — In determining right of a married woman to compensation for the death of her husband, unless she has voluntarily deserted or abandoned him at the time of the accident and is not at all dependent upon him in fact, she is conclusively presumed to be wholly dependent upon him. *Aetna Cas. & Sur. Co. v. Johnson*, 70 Ga. App. 698, 29 S.E.2d 318 (1944).

Widow who has not deserted or abandoned her husband is conclusively presumed to be totally dependent, and is there-

fore eligible for an award, so far as dependency is concerned; this right becomes fixed as of the time of the accident. *Zachery v. Royal Indem. Co.*, 80 Ga. App. 659, 56 S.E.2d 812 (1949), overruled on other grounds, *Freeman Decorating Co. v. Subsequent Injury Trust Fund*, 175 Ga. App. 369, 333 S.E.2d 204 (1985).

Unlike most states which use an actual dependency test, the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) conclusively presumes dependency of the legal wife unless she has voluntarily abandoned or deserted her husband. *Gibbons v. Atlantic Steel Co.*, 124 Ga. App. 71, 183 S.E.2d 212 (1971).

Wife guilty of voluntary desertion and abandonment of husband not entitled to compensation. — Where claimant is legally married to employee at the time of an accident, but had voluntarily deserted and abandoned him, was not dependent on him, and received no actual support from him at such time, she would not be entitled to compensation for his death. *Harden v. United States Cas. Co.*, 49 Ga. App. 340, 175 S.E. 404 (1934).

Total or permanent desertion or abandonment contemplated. — Desertion or abandonment contemplated by former Code 1933, § 114-414 (see O.C.G.A. § 34-9-13), in order to defeat a claim for compensation filed by the wife of a deceased employee, must be total and permanent. *Liberty Mut. Ins. Co. v. Ellis*, 99 Ga. App. 486, 109 S.E.2d 70 (1959).

Passivity not actual abandonment. — Board's conclusion that wife was perfectly happy to see her husband go may be quite correct, but it does not turn her passivity into an active abandonment. *Gibbs v. Atlantic Steel Co.*, 124 Ga. App. 71, 183 S.E.2d 212 (1971).

Adultery or bigamy after abandonment by husband no bar to compensation. — Where claimant wife has been abandoned by husband through no fault of her own, and later is guilty of adultery or bigamous marriage, this conduct will not bar a recovery of compensation. *Williams v. American Mut. Liab. Ins. Co.*, 72 Ga. App. 205, 33 S.E.2d 451 (1945).

Court erred in affirming order denying compensation to deceased employee's first wife, from whom he was undivorced, as

Spouses (Cont'd)**2. Former Law (Cont'd)**

under the law she was conclusively presumed to be entitled to compensation as a dependent of the deceased unless she had voluntarily abandoned or deserted him at the time of the accident, and although wife moved north and married again after separation from deceased, there was no evidence that she deserted or abandoned him, and no evidence that he ever offered to have her return to him. *Sims v. American Mut. Liab. Ins. Co.*, 59 Ga. App. 170, 200 S.E. 164 (1938).

Fact that wife, after abandonment by her husband, contracted a bigamous marriage with another, does not in itself operate to exclude her from benefits under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Lumbermens Mut. Cas. Co. v. Reed*, 84 Ga. App. 541, 66 S.E.2d 360 (1951); *Rush v. Holtzclaw*, 154 Ga. App. 4, 267 S.E.2d 316 (1980).

Under this section, a wife is conclusively presumed dependent upon the husband whom she has not voluntarily deserted or abandoned at the time of the accident, and the fact that she might have lived with other men thereafter, if there was no desertion in the leaving, does not militate against the award. *Utilities of Augusta, Inc. v. Jackson*, 123 Ga. App. 78, 179 S.E.2d 563 (1970) (see O.C.G.A. § 34-9-13).

If dependency arose from immorality, award would be denied. — Although immorality of claimant is not in itself a ground for denial of workers' compensation, if dependency for support arose out of claimant's immorality, public policy dictates that compensation be denied. *Insurance Co. of N. Am. v. Jewel*, 118 Ga. App. 599, 164 S.E.2d 846 (1968).

Claimant who entered into a ceremonial marriage with employee when claimant had a living husband and employee had a living wife, although claimant did not know that employee had a wife at the time of the ceremonial marriage, but discovered this fact a month later and continued to live with the employee, was not entitled to an award as a dependent. *Insurance Co. of N. Am. v. Jewel*, 118 Ga. App. 599, 164 S.E.2d 846 (1968).

Where board found that claimant and

deceased employee had not contracted a valid marriage because, though they lived together, the evidence showed they had not held themselves out as man and wife, claimant was not entitled to compensation even if she was actually dependent on the employee. *Georgia Cas. & Sur. Co. v. Bloodworth*, 120 Ga. App. 313, 170 S.E.2d 433 (1969).

Abandonment not shown. — Evidence that claimant wife left the abode of her husband, the deceased employee, but continued to cohabit with him elsewhere, that she did not intend that even the partial separation from deceased be permanent, and that she and deceased planned on moving back together in a house to themselves, the evidence showed that claimant wife did not abandon her husband, and demanded an award of compensation. *Liberty Mut. Ins. Co. v. Ellis*, 99 Ga. App. 486, 109 S.E.2d 70 (1959).

Conclusiveness of finding as to wife's desertion. — Findings of industrial commission (now board of workers' compensation) on questions of fact, which would include any issue upon the question of voluntary desertion by a claimant wife, if supported by any evidence, are conclusive. *Maryland Cas. Co. v. England*, 160 Ga. 810, 129 S.E. 75 (1925); *U.S. Cas. Co. v. Matthews*, 35 Ga. App. 526, 133 S.E. 875 (1926); *Ocean Accident & Guarantee Corp. v. Council*, 35 Ga. App. 632, 134 S.E. 331 (1926).

Finding of commissioner before whom case was originally tried that claimant was not entitled to compensation on account of her admission that she had voluntarily left her husband was a conclusion of law, based upon her own testimony, and hence reversible. *Ocean Accident & Guarantee Corp. v. Council*, 35 Ga. App. 632, 134 S.E. 331 (1926).

Workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) includes husband in category "next of kin." *Gulf States Ceramic v. Fenster*, 228 Ga. 400, 185 S.E.2d 801 (1971).

Marriage after accident too late. — Department (now board) properly construed the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) in awarding the entire compensation to eight-year-old daughter of deceased employee and in excluding wife, who did not marry employee until after the accident. *Atkinson v.*

Atkinson, 47 Ga. App. 345, 170 S.E. 527 (1933).

Timely filing condition precedent to widow's claim. — Whether widow is entitled to award depends not only upon status and dependency, but upon enforcement of the right in the manner provided by law, and includes as a condition precedent the filing of a claim within one year of the death, pursuant to former Code 1933, § 114-305 (see O.C.G.A. § 34-9-82); unless she does this, the widow's claim is forever barred. *Zachery v. Royal Indem. Co.*, 80 Ga. App. 659, 56 S.E.2d 812 (1949), overruled on other grounds, *Freeman Decorating Co. v. Subsequent Injury Trust Fund*, 175 Ga. App. 369, 333 S.E.2d 204 (1985).

Remarriage of a widow terminates her right to compensation. *Hartford Accident & Indem. Co. v. Fuller*, 102 Ga. App. 384, 116 S.E.2d 628 (1960).

Compensation for husband's death not payable to widow's estate. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) contemplated that compensation awarded hereunder shall be awarded to dependents only, and where compensation, payable in weekly installments, has been awarded to a widow on account of the death of her husband, and the widow dies before all the installments awarded her have become due and payable, installments becoming due and payable after her death are not payable to her estate. *U.S. Fid. & Guar. Co. v. Hairston*, 37 Ga. App. 234, 139 S.E. 685 (1927), cert. denied, 37 Ga. App. 834 (1928).

Children

Editor's notes. — Cases cited below referring to dependency after 18 years of age were decided prior to the 1985 amendments to § 34-9-13. Note also that the 1988 amendment substituted "born out of wedlock" for "illegitimate" in paragraph (a)(1).

Conclusive presumption for minor children. — Child under 18 years of age was conclusively presumed to be wholly dependent on parent, and was therefore entitled to compensation for the homicide of the parent in accordance with the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Travelers Ins. Co. v. Williamson*, 35 Ga. App. 214, 132 S.E. 265, cert. denied, 35 Ga. App. 808 (1926).

Wife and minor children (including stepchildren) are conclusively presumed to be the next of kin wholly dependent for support upon deceased employee. *St. Paul Fire & Marine Ins. Co. v. Miniweather*, 119 Ga. App. 617, 168 S.E.2d 341 (1969).

O.C.G.A. § 34-9-13 does not unconstitutionally create a conclusive presumption of the dependence of children. *Spalding County Comm'rs v. Tarver*, 167 Ga. App. 661, 307 S.E.2d 58 (1983).

Five parent and child relationships contemplated. — It was the intent of the legislature that the conclusive presumption for a child's dependency upon a deceased employee-parent would arise where one of five relationships of parent and child exists: (1) natural children; (2) stepchildren; (3) adopted children; (4) posthumous children; and (5) acknowledged illegitimate children. *New Amsterdam Cas. Co. v. Freeland*, 216 Ga. 491, 117 S.E.2d 538 (1960), for comment, see 23 Ga. B.J. 563 (1961).

Phrase "acknowledged illegitimate children" not unconstitutional. — The phrase "acknowledged illegitimate children", as found in paragraph (a)(1) of O.C.G.A. § 34-9-13, is not unconstitutionally vague. *Spalding County Comm'rs v. Tarver*, 167 Ga. App. 661, 307 S.E.2d 58 (1983).

This section, designating stepchildren as beneficiaries of death benefits, was not unconstitutional even though there is no moral or legal duty of a stepparent to a stepchild, nor because presumptions in that section may be contrary to fact in a particular case. *Flint River Mills v. Henry*, 239 Ga. 347, 236 S.E.2d 583 (1977), appeal dismissed, 434 U.S. 1003, 98 S. Ct. 707, 54 L. Ed. 2d 746 (1978) (see O.C.G.A. § 34-9-13).

Provision for stepchildren as enlargement of sphere of conclusive dependency. — Clause of Ga. L. 1920, p. 167, § 39 providing that the term "child" shall include "stepchild" and that the term "parent" shall include "stepparents" is to be liberally construed as enlarging the sphere of conclusive dependency in favor of such a child, so as to include a right which would not otherwise conclusively exist, and is not to be construed as intended to exclude by unnecessary implication a plainly established claim for the homicide of an actual parent. *Travelers' Ins. Co. v. Williamson*, 35 Ga. App. 214, 132 S.E. 265, cert. denied, 35 Ga. App. 808 (1926) (see O.C.G.A. § 34-9-13).

Children (Cont'd)

Child under 18 is conclusively presumed to be dependent upon the child's father; hence, if the child's mother is divorced and marries another man who becomes the child's stepfather, this section establishes a principle of double dependency, and the stepfather clause does not preclude the child from recovering for the homicide of the child's actual father. *Travelers' Ins. Co. v. Williamson*, 35 Ga. App. 214, 132 S.E. 265, cert. denied, 35 Ga. App. 808 (1926) (see O.C.G.A. § 34-9-13).

Minor unmarried stepchildren of deceased employee were treated as children under this section and were presumed conclusively dependent upon their stepfather; as such, they are entitled to an award of death benefits. *St. Paul Fire & Marine Ins. Co. v. Miniweather*, 119 Ga. App. 617, 168 S.E.2d 341 (1969) (see O.C.G.A. § 34-9-13).

"Stepchild" includes an illegitimate child of widow. *U.S. Fire Ins. Co. v. City of Atlanta*, 135 Ga. App. 390, 217 S.E.2d 647 (1975).

No application of presumption to natural father after adoption by another. — If undisputed facts show that, at the time of the injury or death of the natural father, relationship of parent and child as between the injured or deceased natural father did not exist by reason of the adoption of the child by another, with whom the child was living and being wholly supported at the time of the injury or death of the natural father, the conclusive presumption of dependency would arise as against the adoptive father and have no application as to the natural father. *New Amsterdam Cas. Co. v. Freeland*, 216 Ga. 491, 117 S.E.2d 538 (1960), for comment, see 23 Ga. B.J. 563 (1961).

Minor natural child of deceased employee who had been legally adopted by the child's mother's second husband and wholly supported by him after divorce of the child's mother and decedent was not entitled to recover compensation as a dependent of the deceased employee. *Alexander v. Employers Mut. Liab. Ins. Co.*, 102 Ga. App. 750, 118 S.E.2d 215 (1960).

After final order of adoption creating legal relation of parent and child between child and adoptive father, child is not entitled to workers' compensation benefits by reason of the death of the child's natural

father. *U.S. Fid. & Guar. Co. v. Dunbar*, 112 Ga. App. 102, 143 S.E.2d 663 (1965).

Adoption not yet final. — If at the time of the injury or death of natural father there has been no final order of adoption and relation of parent and child still exists between him and his child, conclusive presumption of dependency would arise against the natural father. *U.S. Fid. & Guar. Co. v. Dunbar*, 112 Ga. App. 102, 143 S.E.2d 663 (1965).

Rights after parental termination order. — Even after parental termination order, child possesses the rights afforded under workers' compensation so long as the child retains the status of "child." *Menard v. Fairchild*, 254 Ga. 275, 328 S.E.2d 721 (1985).

Phrase "posthumous children" includes posthumous acknowledged illegitimate children. *American Mut. Liab. Ins. Co. v. Hogan*, 91 Ga. App. 891, 87 S.E.2d 661 (1955).

What constitutes acknowledgement dependent on circumstances. — Posthumous children include posthumous acknowledged illegitimate children; what constitutes acknowledgement on the part of the putative father necessarily depends on the circumstances of each case, as there is no definitive rule to be applied. *Patterson v. Liberty Mut. Ins. Co.*, 110 Ga. App. 23, 137 S.E.2d 549 (1964).

In deciding claim for illegitimate posthumous child, it is immaterial whether or not putative father knew as a matter of positive fact that mother was pregnant, it being sufficient that putative father believed such to be the case when in fact it was, and that, acting on such belief, he acknowledged his parentage of the child. *Patterson v. Liberty Mut. Ins. Co.*, 110 Ga. App. 23, 137 S.E.2d 549 (1964).

Illegitimate granddaughter of woman living with employee. — Four-year-old illegitimate daughter of illegitimate daughter of woman with whom deceased employee had lived for 12 years, who had been cared for and supported by deceased employee since her birth, was undoubtedly reliant upon his support and had a reasonable expectation of its continuance had he lived, and superior court did not err in affirming award of death benefits to such child, who was actually dependent upon the deceased employee, regardless of bigamous relationship between child's grandmother and deceased em-

ployee. *St. Paul-Mercury Indem. Co. v. Robinson*, 88 Ga. App. 217, 76 S.E.2d 512 (1953).

Infant stepgrandchild not a primary dependent. — Infant stepgrandchild of a deceased employee, although living with and wholly dependent upon the deceased, does not fall within the class of named "primary" dependents, and is not entitled to participate in an award. *St. Paul Fire & Marine Ins. Co. v. Miniweather*, 119 Ga. App. 617, 168 S.E.2d 341 (1969).

Legislature intended to make named children beneficiaries without regard to their actual dependency on the deceased employee. *Flint River Mills v. Henry*, 239 Ga. 347, 236 S.E.2d 583 (1977), appeal dismissed, 434 U.S. 1003, 98 S. Ct. 707, 54 L. Ed. 2d 746 (1978). But see *New Amsterdam Cas. Co. v. Freeland*, 216 Ga. 491, 117 S.E.2d 538 (1960), for comment, see 23 Ga. B.J. 563 (1961).

Status of a child as a dependent beneficiary was fixed at the time provided by this section, and did not change except upon an event expressly provided by that section for terminating compensation. *U.S. Fid. & Guar. Co. v. Dunbar*, 112 Ga. App. 102, 143 S.E.2d 663 (1965) (see O.C.G.A. § 34-9-13).

Cessation of dependency. — Children attaining age of 18 ceased to be entitled to death benefits unless physically or mentally incapacitated, and certain classes of dependents would have ceased to be entitled to the death benefits if they ceased to be dependent. *Hartford Accident & Indem. Co. v. Fuller*, 102 Ga. App. 384, 116 S.E.2d 628 (1960).

Child who has reached 18 years of age was no longer deemed a dependent unless the child was physically or mentally incapable of earning a living. *Turner v. U.S. Fid. & Guar. Co.*, 125 Ga. App. 371, 187 S.E.2d 905 (1972).

Determination as to dependency after age cutoff not required. — Superior court judge properly affirmed award allowing compensation to minor claimant only until the claimant reached age 18, without providing for a further hearing on dependency as a matter of fact when the claimant reached that age. *Turner v. U.S. Fid. & Guar. Co.*, 125 Ga. App. 371, 187 S.E.2d 905 (1972).

Parents

Inapplicability of paragraph (b)(1) to claim for compensation on account of son's death. — While, legally speaking, a wife could only demand support from her husband, this would not prevent dependency upon her son as a matter of fact. *Glens Falls Indem. Co. v. Jordan*, 56 Ga. App. 449, 193 S.E. 96 (1937).

Paragraph (b)(1) of this section was intended to apply where wife makes a claim for compensation on account of the death of her husband, not where she makes a claim for compensation on account of the death of her son; where husband was still living at the time of the death of son, this paragraph had no application. *Aetna Cas. & Sur. Co. v. Johnson*, 70 Ga. App. 698, 29 S.E.2d 318 (1944) (see O.C.G.A. § 34-9-13).

In a proceeding under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) by a mother to recover for the death of a son, it is incorrect to instruct that if the mother is a wife who has not voluntarily deserted her husband and is dependent upon him, she is conclusively presumed to be wholly dependent upon husband, and is thereby precluded from receiving compensation for son's death. *Aetna Cas. & Sur. Co. v. Johnson*, 70 Ga. App. 698, 29 S.E.2d 318 (1944).

Criteria for determining whether minor child contributes to parent's support. — Whether or not minor child living with parent, who is working and receiving a wage, contributes to parent's support and thereby renders parent partially dependent on the minor for support is determinable according to the facts and circumstances of the particular case, from the amount contributed by the child, the frequency of the contribution, the continuity of the contribution, whether in cash or in supplies, the necessities of the parent, the amount of the earnings of the parent, the necessity of the child's contribution, and the legal or moral obligation to contribute to the parent's support. *Burel v. Liberty Mut. Ins. Co.*, 56 Ga. App. 716, 193 S.E. 791 (1937).

Dependency arising from services rendered by child. — Dependency, as contemplated in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), does not

Parents (Cont'd)

arise solely by reason of employment of the employee and contribution by the employee from the employee's wages to the support of claimant, but may arise otherwise, as out of services rendered to claimant by employee who is claimant's child, in work about the home. *Maryland Cas. Co. v. Bartlett*, 37 Ga. App. 777, 142 S.E. 189 (1928).

Total dependency on son not precluded by gratuitous contributions of others. — Where evidence tended to show that parent was wholly dependent upon deceased son, the employee, but that two of the parent's other children gratuitously contributed board to their father, it could not be said that these gratuitous contributions of board prevented an award of total dependency. *Ocean Accident & Guarantee Corp. v. Jones*, 56 Ga. App. 820, 194 S.E. 75 (1937).

Cost of minor employee's support should not be deducted from the employee's contribution to family income. *Commercial Union Ins. Co. v. Brock*, 134 Ga. App. 903, 216 S.E.2d 700 (1975).

Cost of maintenance of deceased employee. — Cost of maintenance of a minor son who contributed to the support of his parent's family, so that the parent was his partial dependent, should not be considered in determining the amount of compensation to which dependent father was entitled under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) for son's death. *Macon Dairies, Inc. v. Duhart*, 69 Ga. App. 91, 24 S.E.2d 732 (1943).

Expenditures in maintaining property considered in determining dependency. — Where claimant parents owned property, some of which was encumbered, and a substantial portion of the income from the property was necessary to maintain the property and to pay off encumbrances and taxes, these expenditures could be considered in determining whether claimants were dependent upon the monthly contributions of deceased unmarried son to maintain their ordinary standard of living. *London Guar. & Accident Co. v. Bernstein*, 74 Ga. App. 692, 41 S.E.2d 810 (1947).

Award to father dependent on minor child. — Where it appears that father is in fact dependent upon minor child, award of

compensation to father for death of the child is not invalid as being for father and the use of himself and his wife and another minor child. *Maryland Cas. Co. v. Bartlett*, 37 Ga. App. 777, 142 S.E. 189 (1928).

Finding of dependency of father on minor child not demanded by facts. — Where father receives a wage which may be sufficient to support himself and his family in their station in life, and is not in need of the earnings of any one of his children for his support or the support of the family, although one of the minor children may, at infrequent and indeterminable intervals, have contributed money and groceries in indeterminable amounts towards the support of the family, and may pay a fixed sum periodically to the father in payment of board, there being no legal obligation resting on the child to support the father, but on the other hand the father being under a legal obligation to support the child, the inference is not demanded as a matter of law that the father is to any degree dependent on the child's earnings for his support or the support of his family. *Burel v. Liberty Mut. Ins. Co.*, 56 Ga. App. 716, 193 S.E. 791 (1937).

Failure to apportion parents' benefits held not error. — Where contributions have been made by deceased employee to mother and father as a family group, and the award is made to the father for the use and benefit of them both, and there is no objection to the award on the part of the mother, the insurer is not injured, nor is the intention of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) violated by a failure to actually divide the death benefit by making two awards, one in favor of each parent, in an amount to be determined by the relative extent of their dependency. *Glens Falls Indem. Co. v. Jordan*, 56 Ga. App. 449, 193 S.E. 96 (1937).

Partially dependent mother excluded from compensation by child under 18. — Unmarried daughter of deceased employee, under the age of 18, was conclusively presumed to be wholly dependent upon the deceased, and was entitled to the full death benefits until she reached the age of 18, to the exclusion of employee's mother, when there was a finding by the board, supported by evidence, that employee's mother was

only partially dependent upon the deceased. *Mays v. Glens Falls Indem. Co.*, 77 Ga. App. 332, 48 S.E.2d 550 (1948).

Entitlement of mother to benefits where wife waives right thereto. — Where employer and insurance carrier are subject to the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), and deceased employee leaves surviving him a wife who is conclusively presumed to be totally dependent upon her husband and eligible for death benefits under the law, but the wife

waives her right to such benefits by refusing to file a claim therefor within the period of limitations, and where a proper claim is filed within the period by the mother of the deceased employee, who was totally dependent upon him for support, employer and insurance carrier cannot avoid their liability for the payment of death benefits by merely showing that there is a widow in life. *Zachery v. Royal Indem. Co.*, 80 Ga. App. 659, 56 S.E.2d 812 (1949).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, §§ 162, 171 et seq., 193, 414.

C.J.S. — 99 C.J.S., Workers' Compensation, § 251 et seq. 100A C.J.S., Workers' Compensation, §§ 957, 969.

ALR. — Workmen's compensation: effect of divorce on right of spouse or child to compensation, 8 ALR 1113; 13 ALR 729.

"Dependency" within Workmen's Compensation Act, 13 ALR 686; 30 ALR 1253; 35 ALR 1066; 39 ALR 313; 53 ALR 218; 53 ALR 1066; 62 ALR 160; 86 ALR 865; 100 ALR 1090.

Workmen's compensation: effect of divorce on right of spouse or child to compensation, 13 ALR 729.

Constitutionality of provision of Workmen's Compensation Act for contribution to general fund in absence of dependents of deceased workman, 20 ALR 1001; 35 ALR 1061.

Workmen's compensation: injury while riding to or from work in employer's conveyance as arising out of, or in the course of employment, 24 ALR 1233; 62 ALR 1438; 145 ALR 1033.

Survival of right to compensation under Workmen's Compensation Acts upon the death of the person entitled to the award, 29 ALR 1426; 51 ALR 1446; 87 ALR 864; 95 ALR 254.

Change of status as regards relationship or dependents after injury as affecting compensation to employee under Workmen's Compensation Act, 73 ALR 1016.

Bigamous character of marriage as affecting right of one party thereto to compensa-

tion for death of other under Workmen's Compensation Act, 80 ALR 1428.

Right of woman who marries injured workman to compensation as his widow or surviving wife under Workmen's Compensation Act, 98 ALR 993.

Workmen's compensation: release or waiver of claim by employee as affecting right of dependents in event of his death as result of injury, 101 ALR 1410.

Rights and remedies of persons in deferred or secondary class of beneficiaries of death benefits under Workmen's Compensation Acts as affected by acts or omissions of one in primary class of beneficiaries, 105 ALR 1232.

Workmen's compensation: power or duty of commission to direct payment to another of balance remaining unpaid upon award at termination of right of person to whom it was originally made, 108 ALR 158.

Right of one who is excluded or ignored by bureau's award of compensation to another to appeal therefrom, 128 ALR 1490.

Children of one with whom deceased workman was living in illicit relations as dependents within Workmen's Compensation Act, 154 ALR 698.

Remarriage tables, 25 ALR2d 1464.

Workmen's compensation: posthumous children and children born after accident as dependents, 18 ALR3d 900.

Discrimination on basis of illegitimacy as denial of constitutional rights, 38 ALR3d 613.

Legal status of posthumously conceived child of decedent, 17 ALR6th 593.

34-9-14. Provision of substitute systems of compensation; approval by board; grounds and procedure for termination.

(a) Subject to the joint approval of the board and the Commissioner of Insurance, any employer may enter into or continue any agreement with its employees to provide a system of compensation, benefit, or insurance in lieu of the compensation and insurance provided by this chapter. No such substitute system shall be approved unless it complies with the following requirements:

(1) The benefits provided for injured employees must at least equal the benefits required by this chapter;

(2) Except as provided in Code Section 34-9-122.1, no contributions may be required from employees unless the substitute system of compensation confers benefits in addition to this chapter and the contributions are applied to the additional benefits;

(3) The system must contain all provisions required of a standard policy of workers' compensation insurance issued in this state, including a workers' compensation benefits policy and an employer liability policy, and one of these policies may not be canceled independently of the other policy;

(4) Any substitute system shall be required to file statistical data which would be required with regard to a standard policy of workers' compensation insurance; and

(5) Such other standards as are necessary to ensure the compliance of such substitute system with the provisions of this chapter as are jointly promulgated by rule or regulation of the State Board of Workers' Compensation and the Commissioner of Insurance.

(b) Such substitute system may be terminated by the board on reasonable notice and hearing to the interested parties if it shall appear that the system is not fairly administered or if its operation shall disclose defects threatening its solvency or if for any substantial reason it fails to accomplish the purpose of this chapter and is not in compliance with the provisions of this Code section; and in this case the board shall determine the proper distribution of all remaining assets, if any, subject to the right of any party at interest to take an appeal to the superior court of the county wherein the principal office or chief place of business of the employer is located.

(c) It is the specific intent of the General Assembly that any alternative system of workers' compensation which is approved by the board and the Commissioner of Insurance pursuant to this Code section shall preserve an employer's immunity from civil action resulting from an injury which is compensable under this chapter as provided in Code Section 34-9-11, and the provisions of this Code section shall not be construed to the contrary. (Ga. L. 1920, p. 167, § 69; Code 1933, § 114-605; Ga. L. 1993, p. 491, § 2.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1993, “workers’ compensation” was substituted for “worker’s compensation” in subsection (c).

Law reviews. — For survey article on workers’ compensation law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003).

JUDICIAL DECISIONS

Cited in Seibels, Bruce & Co. v. National Sur. Corp., 63 Ga. App. 520, 11 S.E.2d 705 (1940).

OPINIONS OF THE ATTORNEY GENERAL

Required participation in workers’ compensation insurance plan. — Companies providing alternative insurance coverage in lieu of workers’ compensation insurance may be required to participate in the Work-

ers’ Compensation Assigned Risk Insurance Plan by a rule properly promulgated under the Administrative Procedure Act, O.C.G.A. Ch. 13, T. 50. 1995 Op. Att’y Gen. No. 95-33.

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers’ Compensation, §§ 47, 470.

ers’ Compensation Assigned Risk Insurance Plan by a rule properly promulgated under the Administrative Procedure Act, O.C.G.A. Ch. 13, T. 50. 1995 Op. Att’y Gen. No. 95-33.

ALR. — Cancellation or attempted cancel-

lation of insurance under Workmen’s Compensation Act, 107 ALR 1514.

34-9-15. Procedure for settlement between parties generally; approval by board; finality of settlement; lump sum settlements.

(a) Nothing contained in this chapter shall be construed so as to prevent settlements made by and between the employee and employer but rather to encourage them, so long as the amount of compensation and the time and manner of payment are in accordance with this chapter. A workers’ compensation insurer shall not be authorized to settle a claim on behalf of its insured employer without giving prior notice to such employer of the terms of the settlement agreement. A copy of any such settlement agreement shall be filed by the employer with the board, and no such settlement shall be binding until approved by the board. Whenever it shall appear to the board, by stipulation of the parties or otherwise, that there is a bona fide dispute as to facts, the determination of which will materially affect the right of the employee or dependent to recover compensation or the amount of compensation to be recovered, or that there is a genuine dispute as to the applicability of this chapter, and it further appears that the parties have agreed upon a settlement between themselves, which settlement gives due regard and weight to the conflicting evidence available relating to the disputed facts or to the questions as to the applicability of this chapter, then, upon such determination, the board shall approve the settlement and enter an award conforming to the terms thereof even though such settlement may provide for the payment of compensation in a sum or sums less than would be payable if there were no conflict as to the employee’s right to recover compensation. When such settlement has been agreed upon and

approved by the board, it shall constitute a complete and final disposition of all claims on account of the incident, injury, or injuries referred to therein, and the board shall not be authorized to enter upon any award subsequent to such board approval amending, modifying, or changing in any manner the settlement, nor shall the settlement be subject to review by the board under Code Section 34-9-104.

(b) The board shall be authorized to approve a stipulated settlement between the parties which concludes that there is no liability under this chapter and to retain jurisdiction to enforce any agreement which resolves, in whole or in part, a claim filed with the board. If payments required under such an agreement are not made within 20 days, the board may assess a penalty of 20 percent in the same manner as provided in Code Section 34-9-221. When such settlement has been agreed upon and approved by the board, it shall constitute a complete and final disposition of all claims on account of the incident, injury, or injuries referred to therein, and the board shall not be authorized to enter upon any award subsequent to such board approval amending, modifying, or changing in any manner the settlement, nor shall the settlement be subject to review by the board under Code Section 34-9-104.

(c) The parties by agreement and with the approval of the board may enter into a compromise lump sum settlement resolving all issues which prorates the lump sum settlement over the life expectancy of the injured worker. When such an agreement has been approved, neither the weekly compensation rate paid throughout the case nor the maximum statutory weekly rate applicable to the injury shall apply. No compensation rate shall exceed the maximum statutory weekly rate as of the date of injury. Instead, the prorated rate set forth in the approved settlement documents shall control and become the rate for that case. This subsection shall be retroactive in effect. (Ga. L. 1920, p. 167, § 19; Code 1933, § 114-106; Ga. L. 1963, p. 141, § 2; Ga. L. 1975, p. 190, § 2; Ga. L. 1992, p. 1942, § 3; Ga. L. 2000, p. 1321, § 2.)

Cross references. — Rendering of judgment in accordance with settlement agreement approved by board, § 34-9-106.

Law reviews. — For article surveying developments in Georgia workers' compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981). For survey article on workers' compensation law for the

period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003).

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992). For note on 2000 amendment of O.C.G.A. § 34-9-15, see 17 Ga. St. U.L. Rev. 231 (2000).

JUDICIAL DECISIONS

Settlements encouraged. — It is the general policy of the law to encourage settlements of disputes, and under this section, settlements of claims under the workers'

compensation law (see O.C.G.A. § 34-9-1 et seq.) were encouraged. *Cardin v. Riegel Textile Corp.*, 217 Ga. 797, 125 S.E.2d 62 (1962) (see O.C.G.A. § 34-9-15).

First few sentences of this section express the intent of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) to encourage settlements and recognize the validity and binding effect of a settlement filed with and approved by the board, if the amount of compensation and the time and manner of payment are in accordance with the law. *National Engine Rebuilding, Inc. v. Noles*, 116 Ga. App. 762, 159 S.E.2d 178 (1967) (see O.C.G.A. § 34-9-15).

Principal purpose of settlement agreement is to show compensable injury and amount of compensation agreed upon. *Georgia Cas. & Sur. Co. v. Carter*, 116 Ga. App. 737, 158 S.E.2d 271 (1967).

This section referred to settlements entered upon before award of compensation was made by the department (now the board), but the same rule applied after such award was made. *Tillman v. Moody*, 181 Ga. 530, 182 S.E. 906 (1935) (see O.C.G.A. § 34-9-15).

O.C.G.A. § 34-9-15 provides the sole method by which claims arising under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., may be settled. *Caldwell v. Perry*, 179 Ga. App. 682, 347 S.E.2d 286 (1986).

Exclusivity requirements not shown. — Because, on the record, there was no evidence that compensation was paid to an injured person pursuant to a board-approved settlement agreement reached by the parties in a workers' compensation claim, the trial court erred by granting summary judgment to a spa in the injured person's premises liability suit arising from the same incident on the basis that the suit was barred by the exclusive remedy provisions. *Theesfeld v. Image Electrolysis & Skin Care, Inc.*, 274 Ga. App. 38, 619 S.E.2d 303 (2005).

Conditions for execution of compromise settlement. — This section imposed two conditions which were essential to a valid settlement between employer and employee: (1) time and manner of payment must be in accordance with the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.); and (2) agreement must be approved by the department (now the board). *Tillman v. Moody*, 181 Ga. 530, 182 S.E. 906 (1935) (see O.C.G.A. § 34-9-15).

Compromise settlements of claims were

permitted under this section where the following facts appeared: both sides must be represented by counsel; the dispute regarding the factum or amount of compensation or the applicability of the act must be bona fide; the parties must agree; the agreement must be reasonable under the evidence available at the time; and it must be approved by the board. *Proctor v. Dixie Bell Mills, Inc.*, 113 Ga. App. 787, 149 S.E.2d 550 (1966) (see O.C.G.A. § 34-9-15).

Counsel requirement deleted. — Prior to 1975, it was necessary that claimant before the board be represented by counsel if a settlement agreement was to have the binding effect of *res judicata*, and this requirement was mandatory and nonwaivable; in 1975, however, this section was amended to delete that requirement. *Insurance Co. of N. Am. v. Rutledge*, 146 Ga. App. 35, 245 S.E.2d 328 (1978) (see O.C.G.A. § 34-9-15).

When counsel required in execution of settlement. — Where there is a bona fide dispute as to compensation due claimant, and parties reach a settlement, for such settlement to be valid it is necessary that both parties be represented by counsel; however, it is not necessary that the parties be represented by counsel when they have executed a standard form agreement to pay compensation and it has been approved by the board. *Gardner v. Fireman's Fund Ins. Co.*, 145 Ga. App. 863, 245 S.E.2d 19 (1978).

Lump sum settlements governed by § 34-9-222. — The only authority vested in the department (now the board) to approve lump sum settlements is that conferred by former Code 1933, § 114-417 (see O.C.G.A. § 34-9-222). *Tillman v. Moody*, 181 Ga. 530, 182 S.E. 906 (1935).

Former Code 1933, § 114-106 (see O.C.G.A. § 34-9-15) provided that the employer may voluntarily assume the obligation which the workers' compensation laws (see O.C.G.A. § 34-9-1 et seq.) imposed upon the employer, without being ordered to do so by the department (now the board); if the department (board) approves such a settlement, or if no such settlement is made and the department (board) enters an award against the employer, the employer may then contract with the employee, or the beneficiary of a deceased employee, to discharge the obligation imposed upon the employer in accordance with former Code

1933, § 114-417 (see O.C.G.A. § 34-9-222) by redeeming the amount to be paid in weekly sums by the payment of a lump sum. *Tillman v. Moody*, 181 Ga. 530, 182 S.E. 906 (1935).

Approved agreement equivalent to award.

— Approval by the board of an agreement between the parties for payment of compensation has the same effect as an award. *National Union Ins. Co. v. Mills*, 99 Ga. App. 697, 109 S.E.2d 830 (1959).

Res judicata effect of approved agreement. — Agreement fixing compensation between employer and employee, approved by the board and not appealed from, is res judicata as to the matters therein determined, and the parties are precluded from thereafter contradicting or challenging the matters thus agreed upon. *Aetna Ins. Co. v. Gipson*, 104 Ga. App. 108, 121 S.E.2d 256 (1961); *Haygood v. Home Transp. Co.*, 244 Ga. 165, 259 S.E.2d 429 (1979).

Settlement agreement filed with and approved by the board was res judicata under this section, and was as binding on the parties as if the claim had been tried and a final award entered. *Fidelity & Cas. Co. v. King*, 104 Ga. App. 261, 121 S.E.2d 284 (1961) (see O.C.G.A. § 34-9-15).

Agreement to pay compensation for total temporary loss of use of a specific member is res judicata as to the degree of disability and the amount of compensation due the employee, until such time as it is changed in a manner provided by law. *Vivian v. Liberty Mut. Ins. Co.*, 119 Ga. App. 159, 166 S.E.2d 399 (1969).

Original settlement agreement approved by the board is res judicata and is binding on the parties as if the claim had been tried and a final award entered. *Gulf Ins. Co. v. Williamson*, 137 Ga. App. 79, 222 S.E.2d 885 (1975), overruled as to its holding that the average weekly wage could be relitigated in a change of condition hearing. *Burkhart v. Argonaut Ins. Co.*, 239 Ga. 608, 238 S.E.2d 400 (1977).

Conclusiveness of agreement dates from execution thereof. — Conclusiveness established by an agreement filed with and approved by the board that an employee has suffered an injury compensable under the terms of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) dates from the moment of execution of the agreement.

Bump v. Continental Cas. Co., 109 Ga. App. 228, 136 S.E.2d 14 (1964).

Agreement not binding until approved. —

Settlement agreement is not binding, though filed with the board, until it has been approved. *Taylor v. Sunnyland Packing Co.*, 112 Ga. App. 544, 145 S.E.2d 587 (1965).

Court without authority to enter judgment pursuant to agreement not approved by board. — Where the department (now the board), on hearing a claim for compensation, made an award in favor of claimant for compensation payable in a certain amount weekly during disability, judge of the superior court, in considering the case on appeal, had no authority to render a judgment against the insurance carrier and in favor of claimant for a lump sum, in full and final settlement of the claim, pursuant to an agreement between the insurance carrier and claimant, not approved by the department (board). *Department of Indus. Relations v. Travelers' Ins. Co.*, 177 Ga. 669, 170 S.E. 883 (1933).

Release not submitted to board void. — A

worker's release of an employer from various claims, which release was never submitted to or approved by the board, was void and had no effect as to any claim for benefits, regardless of whether a claim was pending or contemplated when the settlement was attempted. *Caldwell v. Perry*, 179 Ga. App. 682, 347 S.E.2d 286 (1986).

Agreement binding absent fraud, accident, or mistake. — Agreement between injured employee and an employer, providing for compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), is, in the absence of fraud, accident, or mistake, binding on the parties. *Cardin v. Riegel Textile Corp.*, 217 Ga. 797, 125 S.E.2d 62 (1962).

Movant guilty of negligence not entitled to have agreement set aside. — Where an agreement between claimant and employer has been approved by the board and no appeal is taken therefrom, it cannot be set aside because of fraud, accident, or mistake where it is shown that the movant was guilty of negligence in entering into the agreement. *Argonaut Ins. Co. v. Hix*, 120 Ga. App. 415, 170 S.E.2d 762 (1969).

Procedure for alleging defect in proceedings. — If there was any defect in the procedure followed by the parties and board, the

claimant should contest the board's decision and not bring a civil action to attack the workers' compensation judgment alleging fraud. *O'Neal v. Cincinnati Ins. Co.*, 169 Ga. App. 483, 313 S.E.2d 501 (1984).

Delay in the performance of a ministerial function by clerk of the board is inconsequential as, under the language of O.C.G.A. § 34-9-15, a settlement agreement becomes binding on the date of approval. *Denton v. U.S. Fid. & Guar. Co.*, 158 Ga. App. 849, 282 S.E.2d 350 (1981).

Withdrawal of acceptance of offer of settlement. — Any settlement that may be reached between an employer and an employee represents no more than their proposed mutual offer to settle, which offer must be accepted and approved by the board before a binding settlement agreement between them is created. Where the claimants withdrew their consent to the mutual offer before the board could accept and approve it, the board correctly refused to enforce the settlement agreement. *Justice v. Davidson Kennedy Co.*, 194 Ga. App. 585, 391 S.E.2d 414, cert. denied, 194 Ga. App. 911, 391 S.E.2d 414 (1990).

Equity has jurisdiction to relieve against agreements entered upon in violation of the terms of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), by reason of which the beneficiary of an award of compensation is prevented from enforcing the award according to its terms. *Tillman v. Moody*, 181 Ga. 530, 182 S.E. 906 (1935).

Declining payment until claim determined to be compensable. — A workers' compensation insurer was authorized to controvert and decline to pay a medical claim until such time as the board determined whether it was compensable under a settlement agreement, and seeking judicial enforcement of the agreement prior to that determination was premature. *Aetna Cas. & Sur. Co. v. Davis*, 253 Ga. 376, 320 S.E.2d 368 (1984).

Denial of claim for medical expenses incurred after approval of settlement proper. — Where an approved settlement stipulated that it was in full, final, and complete settlement of any claims arising out of compensable injury, superior court did not err in affirming award of the board denying claim for medical expenses incurred after approval of the settlement. *Stone v. Citizens Cas. Co.*, 114 Ga. App. 805, 152 S.E.2d 894 (1966).

Discontinuance of payments after award or agreement. — Where claimant is entitled to compensation payments under an award of the board or an agreement between the parties, employer or its insurance carrier cannot discontinue payments thereunder until the claim has been paid in full or has been settled between the parties, or until a new award or order of the board authorizes such discontinuance. *American Cas. Co. v. Herron*, 102 Ga. App. 658, 117 S.E.2d 172 (1960).

New agreement following award. — If parties to original award enter into a new agreement effecting a change in the compensation payable, approval of such agreement by the board is not authorized unless the agreement stipulates facts showing that claimant's condition has changed since original award or agreement. *Nationwide Mut. Ins. Co. v. Hamilton*, 112 Ga. App. 452, 145 S.E.2d 645 (1965).

Adjudication of change in condition does not result from approved agreement unless facts are stipulated in it showing a change in employee's condition. *Taylor v. Sunnyland Packing Co.*, 112 Ga. App. 544, 145 S.E.2d 587 (1965).

Cited in *Thomas v. Macken*, 37 Ga. App. 624, 141 S.E. 316 (1928); *New York Indem. Co. v. Allen*, 47 Ga. App. 657, 171 S.E. 191 (1933); *Attaway v. First Nat'l Bank*, 49 Ga. App. 270, 175 S.E. 258 (1934); *Maryland Cas. Co. v. Stephens*, 76 Ga. App. 723, 47 S.E.2d 108 (1948); *Wiley v. Bituminous Cas. Co.*, 76 Ga. App. 862, 47 S.E.2d 652 (1948); *New Amsterdam Cas. Co. v. Brown*, 81 Ga. App. 790, 60 S.E.2d 245 (1950); *Pacific Employers Ins. Co. v. Shoemaker*, 105 Ga. App. 432, 124 S.E.2d 653 (1962); *Fidelity & Cas. Co. v. Parham*, 218 Ga. 640, 129 S.E.2d 868 (1963); *Connecticut Indem. Co. v. Gaudio*, 116 Ga. App. 672, 158 S.E.2d 680 (1967); *Atlanta Coca Cola Bottling Co. v. Gates*, 225 Ga. 824, 171 S.E.2d 723 (1969); *Williams v. Bituminous Cas. Co.*, 121 Ga. App. 175, 173 S.E.2d 250 (1970); *Bowen v. Sentry Ins. Co.*, 134 Ga. App. 88, 213 S.E.2d 185 (1975); *Insurance Co. of N. Am. v. Puckett*, 139 Ga. App. 772, 229 S.E.2d 550 (1976); *GMC v. Dover*, 239 Ga. 611, 238 S.E.2d 403 (1977); *Aetna Cas. & Sur. Co. v. Barden*, 179 Ga. App. 442, 346 S.E.2d 588 (1986); *Don Mac Golf Shaping Co. v. Register*, 185 Ga. App. 159, 363 S.E.2d 583 (1987); *King v. Travelers*

Ins. Co., 202 Ga. App. 568, 415 S.E.2d 176 (1992).

OPINIONS OF THE ATTORNEY GENERAL

State may not make workers' compensation payments without agreement approved

by Workers' Compensation Board. 1975 Op. Att'y Gen. No. U75-23.

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workers' Compensation, §§ 760, 766 et seq.

ALR. — Judgment against or settlement by person responsible for a personal injury as affecting his liability on account of improper medical or surgical treatment of injured person, 29 ALR 1313.

Construction and effect of provision of Workmen's Compensation Act as to "waiver" or "compromise" of claims, 65 ALR 160.

Validity of agreement by injured employee that employer shall have benefit of workmen's compensation, 96 ALR 1019.

Settlement of claim or recovery against physician or surgeon or one responsible for his malpractice on account of aggravation of injury as affecting right to compensation

under Workmen's Compensation Act, 98 ALR 1392.

Relief from settlement or compromise of claim under Workmen's Compensation Act upon ground of fraud or mistake respecting amount of compensation to which employee was entitled, 121 ALR 1270.

Workmen's compensation: right of employer or insurance carrier to discontinue, without an order or ruling in that regard, payments provided for by agreement, 129 ALR 418.

Workmen's compensation: character or status of right or claim within provision of act requiring or authorizing approval by the court or commission of settlement or compromise, 153 ALR 285.

34-9-16. Settlement of questions if approved agreement cannot be reached.

All questions arising under this chapter shall be determined by the trial division and the appellate division of the board if the interested parties cannot reach an agreement which is approved by the board. (Ga. L. 1920, p. 167, § 64; Code 1933, § 114-715; Ga. L. 1992, p. 1942, § 4.)

Law reviews. — For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992).

JUDICIAL DECISIONS

Administration of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is vested in an administrative board, which is expressly empowered to hear and determine claims arising under the law, and, as between the parties, its award has the same effect as a judgment rendered by a court of competent jurisdiction. *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939).

Determination as to what credits employer may be entitled to is to be made by the board

of workers' compensation. *Taylor v. Sunnyland Packing Co.*, 112 Ga. App. 544, 145 S.E.2d 587 (1965).

Expert opinions are advisory and not binding upon a fact-finding tribunal when such opinions are as broad in scope as the question of fact at issue, such as the cause of death or disability. *American Mut. Liab. Ins. Co. v. King*, 88 Ga. App. 176, 76 S.E.2d 81 (1953).

Medical expert witness may give the ex-

pert's opinion as to the cause of an injury, but where the cause of the injury constitutes the ultimate issue of fact to be determined by the fact-finding tribunal, this opinion is not absolutely binding on such tribunal. *Lockheed Aircraft Corp. v. Marks*, 88 Ga. App. 167, 76 S.E.2d 507 (1953), overruled on other grounds, *Fowler v. City of Atlanta*, 116 Ga. App. 352, 157 S.E.2d 306 (1967).

Director was authorized to disregard conflicting medical testimony and draw the director's conclusions from the chain of events, facts, and circumstances attending claimant's loss of vision in the right eye, *B.F. Goodrich Co. v. Arnold*, 88 Ga. App. 64, 76 S.E.2d 20 (1953).

Diagnosis and treatment of injury and disease are essentially medical questions, to be established by physicians as expert wit-

nesses, and not by laymen. *Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Gilliam*, 88 Ga. App. 451, 76 S.E.2d 834 (1953).

Cited in *Patterson v. Curtis Publishing Co.*, 58 Ga. App. 211, 198 S.E. 102 (1938); *Complete Auto Transit, Inc. v. Davis*, 106 Ga. App. 369, 126 S.E.2d 909 (1962); *St. Paul Fire & Marine Ins. Co. v. Bridges*, 106 Ga. App. 621, 127 S.E.2d 699 (1962); *Carpenter v. Newcomb Devilbiss Co.*, 111 Ga. App. 472, 142 S.E.2d 381 (1965); *Baggett Transp. Co. v. Barnes*, 113 Ga. App. 58, 147 S.E.2d 372 (1966); *Davis v. Caldwell*, 53 F.R.D. 373 (N.D. Ga. 1971); *Hanover Ins. Co. v. Jones*, 148 Ga. App. 236, 251 S.E.2d 60 (1978); *Sadie G. Mays Mem. Nursing Home v. Freeman*, 163 Ga. App. 557, 295 S.E.2d 340 (1982).

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., *Workers' Compensation*, § 703 et seq.

34-9-17. Grounds for denial of compensation; burden of proof in establishing grounds for denial.

(a) No compensation shall be allowed for an injury or death due to the employee's willful misconduct, including intentionally self-inflicted injury, or growing out of his or her attempt to injure another, or for the willful failure or refusal to use a safety appliance or perform a duty required by statute.

(b) No compensation shall be allowed for an injury or death due to intoxication by alcohol or being under the influence of marijuana or a controlled substance, except as may have been lawfully prescribed by a physician for such employee and taken in accordance with such prescription:

(1) If the amount of alcohol in the employee's blood within three hours of the time of the alleged accident, as shown by chemical analysis of the employee's blood, urine, breath, or other bodily substance, is 0.08 grams or greater, there shall be a rebuttable presumption that the accident and injury or death were caused by the consumption of alcohol;

(2) If any amount of marijuana or a controlled substance as defined in paragraph (4) of Code Section 16-13-21, Code Sections 16-13-25 through 16-13-29, Schedule I-V, or 21 C.F.R. Part 1308 is in the employee's blood within eight hours of the time of the alleged accident, as shown by chemical analysis of the employee's blood, urine, breath, or other bodily substance, there shall be a rebuttable presumption that the accident and

injury or death were caused by the ingestion of marijuana or the controlled substance; or

(3) If the employee unjustifiably refuses to submit to a reliable, scientific test to be performed in the manner set forth in Code Section 34-9-415 to determine the presence of alcohol, marijuana, or a controlled substance in an employee's blood, urine, breath, or other bodily substance, then there shall be a rebuttable presumption that the accident and injury or death were caused by the consumption of alcohol or the ingestion of marijuana or a controlled substance.

(c) With the exception of the rebuttable presumptions set forth above, the burden of proof shall be generally upon the party who claims an exemption or forfeiture under this Code section. (Ga. L. 1920, p. 167, § 14; Code 1933, § 114-105; Ga. L. 1990, p. 1147, § 1; Ga. L. 1994, p. 887, § 2; Ga. L. 1996, p. 1291, § 4.)

Law reviews. — For article surveying Georgia cases in the area of workers' compensation from June 1979 through May 1980, see 32 Mercer L. Rev. 261 (1980). For article surveying developments in Georgia workers' compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981). For annual survey of workers' compensation law, see 57 Mercer L. Rev. 419 (2005).

For note discussing alcoholism and suicide as intentionally self-inflicted injuries under this chapter, in light of *Bullington v.*

Aetna Cas. & Sur. Co., 122 Ga. App. 842, 178 S.E.2d 901 (1970), see 8 Ga. St. B.J. 107 (1971). For note on the 1994 amendments of Code Sections 34-9-1, 34-9-17, 34-9-18, and enactment of Code Section 34-9-23 of this article, see 11 Ga. St. U.L. Rev. 204 (1994).

For comment on *Hall v. Kendall*, 81 Ga. App. 592, 59 S.E.2d 421 (1950), see 13 Ga. B.J. 245 (1950). For comment on *Pacific Indem. Ins. Co. v. Eberhardt*, 107 Ga. App. 391, 130 S.E.2d 136 (1963), see 26 Ga. B.J. 111 (1963).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

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SELF-INFLICTED INJURY

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SAFETY APPLIANCES

BREACH OF RULE APPROVED BY BOARD

General Consideration

Constitutionality of paragraph (b)(3). — Due process does not require that claimant have notice of the potential applicability of the rebuttable presumption of O.C.G.A. § 34-9-17(b)(3). *Georgia Self-Insurers Guar. Trust Fund v. Thomas*, 269 Ga. 560, 501 S.E.2d 818 (1998), reversing *Thomas v. Diamond Rug & Carpet Mills*, 226 Ga. App. 403, 486 S.E.2d 664 (1997).

The rebuttable presumption of O.C.G.A.

§ 34-9-17(b)(3) does not violate equal protection since it applies equally to all employees without regard to whether their employers fail to comply with the notice requirement of O.C.G.A. § 34-9-414. *Georgia Self-Insurers Guar. Trust Fund v. Thomas*, 269 Ga. 560, 501 S.E.2d 818 (1998), reversing *Thomas v. Diamond Rug & Carpet Mills*, 226 Ga. App. 403, 486 S.E.2d 664 (1997).

Paragraph (b)(2) does not violate equal

protection. — An injured worker's claim was denied because the worker tested positive for marijuana and cocaine after the accident and then failed to rebut the presumption found in O.C.G.A. § 34-9-17(b)(2) that the accident was caused by the illegal use of controlled substances. The Supreme Court held that paragraph (b)(2) does not violate equal protection by differentiating between legal and illegal drug use; there is a rational basis for distinguishing between workers who are injured while taking prescription medication and those who are injured while taking illegal substances, and distinguishing between legal and illegal drug use bears a direct and real relationship to the legitimate government objective of promoting a safe work place. *Kendrix v. Hollingsworth Concrete Prods., Inc.*, 274 Ga. 210, 553 S.E.2d 270 (2001).

Liberal construction. — Court should give this section a liberal construction and as broad an interpretation as can be fairly given to it. *Van Treeck v. Travelers Ins. Co.*, 157 Ga. 204, 121 S.E. 215 (1924) (see O.C.G.A. § 34-9-17).

Construction of paragraph (b)(3) with Drug-Free Workplace Programs Act. — The rebuttable presumption of O.C.G.A. § 34-9-17(b)(3) incorporates only the drug testing procedures of O.C.G.A. § 34-9-415, not the notice provisions of O.C.G.A. § 34-9-414 thereof. *Georgia Self-Insurers Guar. Trust Fund v. Thomas*, 269 Ga. 560, 501 S.E.2d 818 (1998), reversing *Thomas v. Diamond Rug & Carpet Mills*, 226 Ga. App. 403, 486 S.E.2d 664 (1997).

Mere negligence is not a defense such as will bar recovery in compensation cases. *General Accident Fire & Life Assurance Corp. v. Prescott*, 80 Ga. App. 421, 56 S.E.2d 137 (1949).

Burden of proof. — Once claimant proved that claimant's injury arose out of and in the scope of claimant's employment, the burden shifted to the employer to prove that either claimant's injuries were intentionally self-inflicted or they were caused by an attack for reasons personal to claimant. *Hulbert v. Domino's Pizza, Inc.*, 239 Ga. App. 370, 521 S.E.2d 43 (1999).

Workers' compensation award to an injured employee was reversed where an administrative law judge erred by ruling that the rebuttable presumption in O.C.G.A.

§ 34-9-17(b)(3) could not arise because the employer/insurer failed to produce evidence that the alcohol and drug test that the employee failed to take would have been performed in a statutorily prescribed manner. Because of this error, the administrative law judge further erred by failing to rule on the issues of whether the rebuttable presumption arose and whether the employee's refusal to submit to the test was unjustified, and if so, whether the employee rebutted the presumption. *Marine Port Terms, Inc. v. Dixon*, 252 Ga. App. 340, 556 S.E.2d 246 (2001).

Aggravating work-related injury. — An employee's conduct in negligently aggravating a work-related injury outside of the workplace may be a bar to compensation. *Fort Howard Paper Co. v. Hallisey*, 221 Ga. App. 325, 471 S.E.2d 231 (1996).

Showing of willful misconduct or intoxication not sufficient. — It is not sufficient to authorize a finding that the employee's injury or death is due to the employee's willful misconduct or intoxication to show merely that at the time of the injury the employee was engaged in the performance of an act of willful misconduct or was intoxicated. *Shiplett v. Moran*, 58 Ga. App. 854, 200 S.E. 449 (1938).

Proximate cause must be shown. — Willful misconduct or intoxication which bars compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) must be such willful misconduct or intoxication as proximately causes the injury; burden of proof to show this is on the employer. *Shiplett v. Moran*, 58 Ga. App. 854, 200 S.E. 449 (1938).

Willful misconduct or intoxication of an employee which would bar a recovery for injuries sustained by the employee must be such willful misconduct or intoxication as proximately caused injury or death of the employee. *Parks v. Maryland Cas. Co.*, 69 Ga. App. 720, 26 S.E.2d 562 (1943).

Testimony on misconduct and intoxication to be considered. — It was error for hearing director of the board to disregard pertinent testimony offered by employer which tended to show that employee's death was the result of the employee's own intoxication and misconduct. *Hudson v. Taylor*, 88 Ga. App. 575, 77 S.E.2d 100 (1953).

Impeachment. — A misdemeanor conviction for marijuana could not be used to

General Consideration (Cont'd)

impeach the employee's testimony regarding drug use prior to an accident. *Lastinger v. Mill & Mach., Inc.*, 236 Ga. App. 430, 512 S.E.2d 327 (1999).

Burden of proof. — Burden of proof under this section need be carried only by a preponderance of the evidence. *Borden Co. v. Dollar*, 96 Ga. App. 489, 100 S.E.2d 607 (1957) (see O.C.G.A. § 34-9-17).

Employer has the burden when raising an affirmative defense, such as willful misconduct. *Cornell-Young v. Minter*, 168 Ga. App. 325, 309 S.E.2d 159 (1983).

Questions of fact for board. — Whether employee was guilty of willful misconduct or other acts of forfeiture, as contemplated by this section, was a question of fact for the board, and the findings of the director and the board upon such questions are final, and will not be disturbed where there was evidence to support them. *Herman v. Aetna Cas. & Sur. Co.*, 71 Ga. App. 464, 31 S.E.2d 100 (1944) (see O.C.G.A. § 34-9-17).

Whether the statutory infraction results from negligence or willfulness is a question of fact, and the finding of the board that the facts proved constitute one or the other of these circumstances is final and may not be disturbed by an appellate court if supported by evidence. *Steed v. Liberty Mut. Ins. Co.*, 157 Ga. App. 273, 277 S.E.2d 278 (1981).

Cited in *Fulton Bakery, Inc. v. Williams*, 37 Ga. App. 780, 141 S.E. 922 (1928); *Aetna Life Ins. Co. v. Carroll*, 169 Ga. 333, 150 S.E. 208 (1929); *American Mut. Liab. Ins. Co. v. Smith*, 67 Ga. App. 581, 21 S.E.2d 343 (1942); *Reid v. Raper*, 86 Ga. App. 277, 71 S.E.2d 735 (1952); *American Mut. Liab. Ins. Co. v. King*, 88 Ga. App. 176, 76 S.E.2d 81 (1953); *GMC v. Craig*, 91 Ga. App. 239, 85 S.E.2d 441 (1954); *Aetna Cas. & Sur. Co. v. Watson*, 91 Ga. App. 657, 86 S.E.2d 656 (1955); *Beck v. Brower*, 101 Ga. App. 227, 113 S.E.2d 220 (1960); *Southern Wire & Iron, Inc. v. Fowler*, 217 Ga. 727, 124 S.E.2d 738 (1962); *Travelers Ins. Co. v. Neal*, 124 Ga. App. 750, 186 S.E.2d 346 (1971); *Smith v. American Mut. Liab. Ins. Co.*, 125 Ga. App. 273, 187 S.E.2d 299 (1972); *Castleberry v. U.S. Fid. & Guar. Co.*, 126 Ga. App. 425, 190 S.E.2d 831 (1972); *Barry v. Aetna Life & Cas. Co.*, 133 Ga. App. 527, 211 S.E.2d 595 (1974); *Chancy v. Pope*, 136 Ga. App. 826,

222 S.E.2d 667 (1975); *Lumbermens Mut. Cas. Co. v. Amerine*, 139 Ga. App. 702, 229 S.E.2d 516 (1976); *West Point Pepperell, Inc. v. McEntire*, 150 Ga. App. 728, 258 S.E.2d 530 (1979); *Seitzingers, Inc. v. Barnes*, 161 Ga. App. 855, 289 S.E.2d 315 (1982); *Fountain v. Shoney's Big Boy, Inc.*, 168 Ga. App. 489, 309 S.E.2d 671 (1983); *Dan River, Inc. v. Shinall*, 186 Ga. App. 572, 367 S.E.2d 846 (1988); *H & H Trucking Co. v. Davis*, 190 Ga. App. 754, 380 S.E.2d 301 (1989); *Thomas v. Helen's Roofing Co.*, 199 Ga. App. 161, 404 S.E.2d 331 (1991).

Willful Misconduct Generally

Finding of willful misconduct bars recovery. — Once finding is made that claimant's injuries were caused by willful misconduct, compensation must be denied under this section. *Hanover Ins. Co. v. Rollins*, 136 Ga. App. 595, 222 S.E.2d 91 (1975) (see O.C.G.A. § 34-9-17).

"Willful misconduct" is more than mere negligence. *Shiplett v. Moran*, 58 Ga. App. 854, 200 S.E. 449 (1938).

More than mere negligence in failing to obey statute required. — To constitute a violation of O.C.G.A. § 34-9-17 resulting in denial of compensation, there must be more than mere negligence in failing to obey some statute. *Steed v. Liberty Mut. Ins. Co.*, 157 Ga. App. 273, 277 S.E.2d 278 (1981).

Negligence of employee, no matter how gross, will not bar compensation where injury is otherwise compensable. *Lumbermen's Mut. Cas. Co. v. Lynch*, 63 Ga. App. 530, 11 S.E.2d 699 (1940).

Mere violations not generally "willful misconduct." — General rule is that mere violations of instructions, orders, rules, ordinances, and statutes and the doing of hazardous acts, where the danger is obvious, do not, without more, as a matter of law, constitute willful misconduct. *Shiplett v. Moran*, 58 Ga. App. 854, 200 S.E. 449 (1938); *Pacific Indem. Ins. Co. v. Eberhardt*, 107 Ga. App. 391, 130 S.E.2d 136 (1963); *Wilbro v. Mossman*, 207 Ga. App. 387, 427 S.E.2d 857 (1993), for comment, see 26 Ga. B.J. 111 (1963).

Mere violations generally constitute mere negligence. — General rule is that mere violations of instructions, orders, rules, ordinances, and statutes, and the doing of hazardous acts where the danger is obvious, do

not, without more, as a matter of law, constitute willful misconduct; such violations, failures, or refusals generally constitute mere negligence, and such negligence, however great, does not constitute willful misconduct or willful failure or refusal to perform a duty required by statute, and will not defeat recovery of compensation by an employee or an employee's dependents. *Gooseby v. Pinson Tire Co.*, 65 Ga. App. 837, 16 S.E.2d 767 (1941); *Armour & Co. v. Little*, 83 Ga. App. 762, 64 S.E.2d 707 (1951); *Merry Bros. Brick & Tile Co. v. Neely*, 103 Ga. App. 616, 120 S.E.2d 137 (1961); *Georgia Dep't of Pub. Safety v. Collins*, 140 Ga. App. 884, 232 S.E.2d 160 (1970); *Barry v. Aetna Life & Cas. Co.*, 133 Ga. App. 527, 211 S.E.2d 595 (1974); *Terry v. Liberty Mut. Ins. Co.*, 152 Ga. App. 583, 263 S.E.2d 475 (1979).

Where misconduct consists of a failure or refusal to perform a duty required by statute, a bare failure or refusal, without more, does not constitute a willful failure or refusal to perform such duty. *Gooseby v. Pinson Tire Co.*, 65 Ga. App. 837, 16 S.E.2d 767 (1941); *Pacific Indem. Ins. Co. v. Eberhardt*, 107 Ga. App. 391, 130 S.E.2d 136 (1963), for comment, see 26 Ga. B.J. 111 (1963).

Disregarding rule or order as "willful misconduct." — Where worker is acting within the scope of the worker's employment, mere disregard of a rule or order is not willful misconduct unless the disobedience is in fact willful or deliberate, and not a mere thoughtless act, done on the spur of the moment. *Aetna Life Ins. Co. v. Carroll*, 169 Ga. 333, 150 S.E. 208 (1929); *Pullman Co. v. Carter*, 61 Ga. App. 543, 6 S.E.2d 351 (1939).

Willful misconduct includes all conscious or intentional violations of definite law or rules of conduct, as distinguished from inadvertent, unconscious, or involuntary violations. *Liberty Mut. Ins. Co. v. Perry*, 53 Ga. App. 527, 186 S.E. 576 (1936); *Shiplett v. Moran*, 58 Ga. App. 854, 200 S.E. 449 (1938); *Pullman Co. v. Carter*, 61 Ga. App. 543, 6 S.E.2d 351 (1939); *Herman v. Aetna Cas. & Sur. Co.*, 71 Ga. App. 464, 31 S.E.2d 100 (1944); *U.S. Fid. & Guar. Co. v. Davis*, 99 Ga. App. 45, 107 S.E.2d 571 (1959); *Travelers Ins. Co. v. Gaither*, 148 Ga. App. 251, 251 S.E.2d 66 (1978).

Misconduct is improper or wrong conduct, and when improper or wrong conduct is intentionally or deliberately done, it be-

comes willful misconduct. *Aetna Life Ins. Co. v. Carroll*, 169 Ga. 333, 150 S.E. 208 (1929).

Willful misconduct requires that obedience is not discretionary. — Willful misconduct includes all conscious or intentional violations of definite law or rules of conduct, obedience to which is not discretionary, as distinguished from inadvertent, unconscious, or involuntary violations. *Aetna Life Ins. Co. v. Carroll*, 169 Ga. 333, 150 S.E. 208 (1929); *Pullman Co. v. Carter*, 61 Ga. App. 543, 6 S.E.2d 351 (1939); *Armour & Co. v. Little*, 83 Ga. App. 762, 64 S.E.2d 707 (1951); *Georgia Dep't of Pub. Safety v. Collins*, 140 Ga. App. 884, 232 S.E.2d 160 (1977); *Home Indem. Co. v. White*, 154 Ga. App. 225, 267 S.E.2d 846 (1980).

Willfulness contemplated by this section amounts to more than mere act of will, and carries with it the idea of premeditation, obstinacy, and intentional wrongdoing, so that the mere doing of a thoughtless act which does not constitute deliberate disobedience does not deprive one of compensation. *Armour & Co. v. Little*, 83 Ga. App. 762, 64 S.E.2d 707 (1951) (see O.C.G.A. § 34-9-17).

Meaning of "willful", as used in this section, included element of intractableness, the headstrong disposition to act by the rule of contradiction. *Pullman Co. v. Carter*, 61 Ga. App. 543, 6 S.E.2d 351 (1939) (see O.C.G.A. § 34-9-17).

Quasi-criminal conduct involved in "willful misconduct." — Willful misconduct is much more than mere negligence or even gross negligence; it involves conduct of a quasi-criminal nature, the intentional doing of something, either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences. *Aetna Life Ins. Co. v. Carroll*, 169 Ga. 333, 150 S.E. 208 (1929); *Gooseby v. Pinson Tire Co.*, 65 Ga. App. 837, 16 S.E.2d 767 (1941).

Statutory bar requires conduct of a criminal or quasi-criminal nature; negligent conduct, even though grossly so, does not equate with the former. *Argonaut Ins. Co. v. Almon*, 120 Ga. App. 869, 172 S.E.2d 624 (1969).

Willful misconduct, or willful failure or refusal to perform a duty required by statute, is more than negligence, or even gross neg-

Willful Misconduct Generally (Cont'd)

ligence; it involves conduct of a criminal or quasi-criminal nature. *Travelers Ins. Co. v. Gaither*, 148 Ga. App. 251, 251 S.E.2d 66 (1978).

Commission of a crime by employee was "willful misconduct" within the meaning of this section, and the employer should not be required to pay compensation for the employee's injury or death, due to the employee's violation of a criminal statute, such violation being the proximate cause of the employee's injury or death. *Hall v. Kendall*, 81 Ga. App. 592, 59 S.E.2d 421 (1950), for comment, see 13 Ga. B.J. 245 (1950); *Pacific Indem. Ins. Co. v. Eberhardt*, 107 Ga. App. 391, 130 S.E.2d 136 (1963), for comment, see 26 Ga. B.J. 111 (1963); *Liberty Mut. Ins. Co. v. Bray*, 136 Ga. App. 587, 222 S.E.2d 70 (1975) (see O.C.G.A. § 34-9-17).

Employee who commits a crime and is thereby injured or killed, its commission being the proximate cause of the employee's injury or death, is guilty of willful misconduct; and where an employee fails or refuses to perform a duty required by statute, such failure or refusal constituting a crime, the employee is guilty of willful failure or refusal. *Aetna Life Ins. Co. v. Carroll*, 169 Ga. 333, 150 S.E. 208 (1929).

While generally mere violation of a statute is negligence, if such statute is a penal statute, and its violation is a crime, the transaction loses its character of negligence, and becomes "willful misconduct" within the meaning of this section. *Gooseby v. Pinson Tire Co.*, 65 Ga. App. 837, 16 S.E.2d 767 (1941); *Pacific Indem. Ins. Co. v. Eberhardt*, 107 Ga. App. 391, 130 S.E.2d 136 (1963), for comment, see 26 Ga. B.J. 111 (1963). (see O.C.G.A. § 34-9-17).

Willful and conscious doing of an act which was in violation of a penal statute constitutes willful misconduct, and when the violation of such penal statute by an employee is the proximate cause of the employee's injury or death, compensation was barred under this section. *Pacific Indem. Ins. Co. v. Eberhardt*, 107 Ga. App. 391, 130 S.E.2d 136 (1963), for comment, see 26 Ga. B.J. 111 (1963). (see O.C.G.A. § 34-9-17).

Violation of a penal statute was "willful misconduct"; however, the violation must be the proximate cause of the injury or death,

and the burden was on the one who claimed an exemption or forfeiture under this section. *Smith v. Liberty Mut. Ins. Co.*, 111 Ga. App. 616, 142 S.E.2d 459 (1965) (see O.C.G.A. § 34-9-17).

Some willful acts may bar recovery even if they are not criminal acts. *Merry Bros. Brick & Tile Co. v. Neely*, 103 Ga. App. 616, 120 S.E.2d 137 (1961).

Enumeration of acts of "willful misconduct" not exhaustive. — This section does not define the meaning of willful misconduct, but rather, specifies certain instances thereof; this enumeration is not intended to be exhaustive of acts constituting willful misconduct, and many other things besides those enumerated may constitute willful misconduct. *Aetna Life Ins. Co. v. Carroll*, 169 Ga. 333, 150 S.E. 208 (1929) (see O.C.G.A. § 34-9-17).

Burden of proof on employer to show willful misconduct. — Defense is provided for employer if such injury or death resulted from employee's willful misconduct growing out of the employee's attempt to injure another, but employer must carry the burden of proof to establish this defense. *Hartford Accident & Indem. Co. v. Cox*, 101 Ga. App. 789, 115 S.E.2d 452 (1960).

Burden of establishing defense that claimant's disability resulted from claimant's own willful misconduct is on employer. *Borden Co. v. Dollar*, 96 Ga. App. 489, 100 S.E.2d 607 (1957).

Burden of proof is upon employer who claims that compensation is not payable because of employee's willful misconduct. *American Fire & Cas. Co. v. Gay*, 104 Ga. App. 840, 123 S.E.2d 287 (1961).

Burden of proving that employee's "willful misconduct" was proximate cause of injury is on employer. *Home Indem. Co. v. White*, 154 Ga. App. 225, 267 S.E.2d 846 (1980).

Employer need not show deliberation on breach of statute. — To require employer to show that employee thought of statute and deliberated as to its breach would take away defense of willful violation, and would unduly limit the scope or definition of willful misconduct. *Aetna Life Ins. Co. v. Carroll*, 169 Ga. 333, 150 S.E. 208 (1929).

No willful misconduct where statutory violation unintentional. — An employee, who may have violated a statute when the em-

ployee dispensed gasoline from a pump into a cup, did not engage in willful misconduct where, although the employee was burned when the employee used the gasoline to light a fire, the result was involuntary, unintentional, and negligent, not conscious or intentional. *Roy v. Norman*, 261 Ga. 303, 404 S.E.2d 117 (1991).

Violation of statute regulating highway traffic. — Mere violation by employee of criminal statute prescribing rules and regulations in regard to traffic upon a public highway cannot amount to willful misconduct or willful failure or refusal to perform a duty required by statute so as to bar compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Standard Accident Ins. Co. v. Pardue*, 39 Ga. App. 87, 146 S.E. 638 (1928).

Evidence of excessive speed, standing alone, is not enough to establish willful and wanton misconduct. *Georgia Dep't of Pub. Safety v. Collins*, 140 Ga. App. 884, 232 S.E.2d 160 (1977).

Showing of negligence, in driving too fast under the circumstances, did not establish that public officer, presumptively aware of the officer's obligation to obey the law, willfully violated the very law the officer was obligated to uphold. *Georgia Dep't of Pub. Safety v. Collins*, 140 Ga. App. 884, 232 S.E.2d 160 (1977).

Driving car at 60 or 65 miles per hour was not such willful and wanton conduct as is essential before denial of recovery because of a speed violation. *Adams v. U.S. Fid. & Guar. Co.*, 125 Ga. App. 232, 186 S.E.2d 784 (1971).

Willful misconduct in operating vehicle. — Where claimant was injured as a result of the overturning of a vehicle being operated by claimant, and the sole evidence as to speed was that claimant was operating the automobile at a speed of approximately 100 miles per hour after being requested to slow down by a fellow employee who was riding with claimant, the award denying compensation because of willful misconduct was authorized. *Young v. American Ins. Co.*, 110 Ga. App. 269, 138 S.E.2d 385 (1964).

Driving of truck despite coronary condition. — Where claimant's spouse died of a heart attack while on the job, having been advised by a physician following an earlier diagnosis of angina pectoris and coronary

insufficiency that the decedent could continue to drive a truck in the decedent's employment if the decedent felt like it, decedent's failure to notify the employer of decedent's heart condition and continuing to drive a loaded truck with knowledge of decedent's condition did not amount to such "willful misconduct" as to bar a claim for compensation. *Merry Bros. Brick & Tile Co. v. Neely*, 103 Ga. App. 616, 120 S.E.2d 137 (1961).

Fatal injury when thrown from fender of truck due to negligence and not willful misconduct. — Where employee, while riding on the fender of a truck, was thrown off by the swerving of the truck and was killed, although the employee had been ordered by the driver, with authority from the employer, not to ride there, an inference was authorized that the employee's death was caused by negligence of the employee or of the employer, and not by willful misconduct on the employee's part. *Integrity Mut. Cas. Co. v. Jones*, 33 Ga. App. 489, 126 S.E. 876 (1925).

Injury of hospital laundry worker. — In a claim against the city by an employee of the hospital laundry for compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) for injury which resulted in amputation of claimant's finger following infection caused by needle sticking into claimant's finger while claimant was handling clothes in discharge of claimant's duties, although assuming as contended by the city that the infection was due to claimant's refusal to accept immediate medical or surgical treatment which was offered claimant, the injury was not caused by a willful act of claimant as would bar claimant from compensation. *City Council v. Butler*, 50 Ga. App. 838, 179 S.E. 149 (1935).

Use of pistol as hammer. — No "willful misconduct" could be attributed to employee's unwise use of a loaded pistol to hammer an engine part in an effort to make automobile run to enable the employee to use it in covering extensive area of the city's cemetery. *City of Atlanta v. Madaris*, 130 Ga. App. 783, 204 S.E.2d 439 (1974).

Condonation of employer in watchman's possession of pistol. — Knowledge by employer, through employee's immediate supervisor, of regular and continued possession of pistol in performance of employee's

Willful Misconduct Generally (Cont'd)

duties as night watchman, and supervisor's condonation of such possession on city property, was sufficient to remove case from bar of willful misconduct. *City of Atlanta v. Madaris*, 130 Ga. App. 783, 204 S.E.2d 439 (1974).

Wearing shirt jacket loose. — Although there was a rule or regulation known to deceased employee prohibiting employees from wearing their jackets or jumpers loose and the tails thereof outside of the pants, it was clearly inferable from the evidence that the act of deceased in wearing deceased's jacket or jumper with the tail exposed, as it was when deceased went under the shaft and was caught in it, receiving fatal injury, was a mere act of negligence and not an act of willful misconduct. *Shiplett v. Moran*, 58 Ga. App. 854, 200 S.E. 449 (1938).

Misstatements as to prior injury when hired. — Where employee was hired as a nurse's aide by the employer without having disclosed a prior injury to the aide's back, although the aide had been asked if the aide had such an occurrence in the aide's past employment history, the aide's misstatements in securing employment were too attenuated to be considered as fraud in the procurement of an award of compensation, and the aide's willful misconduct was too remote to constitute the proximate cause of the aide's subsequent injury to the aide's back so as to bar the aide's claim under O.C.G.A. § 34-9-17. *Ledbetter v. Pine Knoll Nursing Home*, 180 Ga. App. 654, 350 S.E.2d 299 (1986).

Self-Inflicted Injury

Self-inflicted injury due to disturbance caused by work-related injury not "intentional." — Where original work-connected injuries suffered by employee resulted in the employee becoming devoid of normal judgment and dominated by disturbance of mind directly caused by the employee's injury and its consequences, such as severe pain and despair, self-inflicted injury by employee cannot be considered intentional. *Bullington v. Aetna Cas. & Sur. Co.*, 122 Ga. App. 842, 178 S.E.2d 901 (1970), rev'd on other grounds, 227 Ga. 485, 181 S.E.2d 495 (1971), for comment, see 8 Ga. St. B.J. 107 (1971).

"Willful." — One whose mind has become devoid of normal judgment and dominated by a mental disorder caused by a work-connected injury cannot be said to have "willfully" committed an act of self-destruction within the meaning of this section. *McDonald v. Atlantic Steel Co.*, 133 Ga. App. 157, 210 S.E.2d 344 (1974) (see O.C.G.A. § 34-9-17).

Suicide not insuperable barrier to recovery. — If it can be clearly shown that but for accident employee would not have committed suicide and that the employee was driven to take the employee's life by the injury inflicted, then this section would not be an insuperable barrier to recovery. *McDonald v. Atlantic Steel Co.*, 133 Ga. App. 157, 210 S.E.2d 344 (1974) (see O.C.G.A. § 34-9-17).

Although suicide is by definition self-inflicted, suicide does not ipso facto preclude compensation where injury is its proximate cause, that is, where it is caused by severe pain and despair proximately resulting from the accident, sufficient to cause a disturbance of the mind and the overriding of normal judgment to the extent that the act, although "purposeful" is found to be not "intentional." *McDonald v. Atlantic Steel Co.*, 133 Ga. App. 157, 210 S.E.2d 344 (1974).

Pattern of progressive alcoholism. — In terms of proximate cause, pattern of progressive alcoholism falls within intentionally self-inflicted injury category of this section rather than "intoxication." *Bullington v. Aetna Cas. & Sur. Co.*, 122 Ga. App. 842, 178 S.E.2d 901 (1970), rev'd on other grounds, 227 Ga. 485, 181 S.E.2d 495 (1971), for comment, see 8 Ga. St. B.J. 107 (1971), (see O.C.G.A. § 34-9-17).

Where medical cause of death was due to alcoholism, which in turn was allegedly brought on by a work-connected injury, defense may be raised under this section that this was an intentionally self-inflicted injury. *Bullington v. Aetna Cas. & Sur. Co.*, 122 Ga. App. 842, 178 S.E.2d 901 (1970), rev'd on other grounds, 227 Ga. 485, 181 S.E.2d 495 (1971), for comment, see 8 Ga. St. B.J. 107 (1971). (see O.C.G.A. § 34-9-17).

Attempt to Injure Another

Compensation barred where claimant is aggressor. — Where claimant is injured in an attack by another employee, claimant must

not have been the aggressor. *State v. Purmort*, 143 Ga. App. 269, 238 S.E.2d 268 (1977).

Aggressive action did not arise out of employment. — Claimant is not entitled to compensation where injury to deceased employee was the result of a fight between the deceased and a fellow employee in which deceased employee was the aggressor, as in such a case the injury was not an accident arising out of the employment within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Liberty Mut. Ins. Co. v. Reed*, 56 Ga. App. 68, 192 S.E. 325 (1937).

Intoxication

"Intoxication" defined. — "Intoxication" is a condition where one is under the influence of intoxicating liquors to the extent that one is not entirely oneself, or one's judgment is impaired, and one's acts, words, or conduct are visibly and noticeably affected. *Parks v. Maryland Cas. Co.*, 69 Ga. App. 720, 26 S.E.2d 562 (1943); *Fidelity & Cas. Co. v. Hodges*, 108 Ga. App. 474, 133 S.E.2d 406 (1963).

Intoxication does not consist merely in having partaken of intoxicating liquor, or in being to some extent under the influence of it. *Parks v. Maryland Cas. Co.*, 69 Ga. App. 720, 26 S.E.2d 562 (1943).

Intoxication which produces injury must be that of employee personally. *Home Indem. Co. v. White*, 154 Ga. App. 225, 267 S.E.2d 846 (1980).

Injury due to willful misconduct. — Injury due to intoxication is, as a matter of definition, injury due to willful misconduct; and once a finding is made that death was due to intoxication, which finding is sufficiently supported by the evidence, compensation must be denied. *Reynolds v. Georgia Ins. Co.*, 149 Ga. App. 162, 253 S.E.2d 839 (1979).

Accident resulting in injury proximately caused by claimant's intoxication does not arise out of employment, although occurring during the course of the employment. *Stephens v. Hartford Accident & Indem. Co.*, 116 Ga. App. 15, 156 S.E.2d 100 (1967).

Showing of proximate cause required. — Burden was upon employer to establish that death of claimant's spouse was due to the spouse's intoxication, and it was not suffi-

cient to show merely that the spouse was intoxicated, but rather, it was essential, in order to constitute a bar to compensation, to show that the spouse's death was caused by the spouse's intoxication, and that intoxication was the proximate cause of death. *General Accident Fire & Life Assurance Corp. v. Prescott*, 80 Ga. App. 421, 56 S.E.2d 137 (1949).

Burden is on one who claims an exemption or forfeiture to show that intoxication was the proximate cause of the injury or death of employee. *Fidelity & Cas. Co. v. Hodges*, 108 Ga. App. 474, 133 S.E.2d 406 (1963).

Determination as to intoxication necessary. — Determination as to whether employee was intoxicated and whether the employee's intoxication was a proximate cause of the employee's injury is required by law before denying compensation. *Bloodworth v. Continental Ins. Co.*, 151 Ga. App. 576, 260 S.E.2d 536 (1979).

Board's findings as to intoxication conclusive. — Findings of fact of State Board of Workers' Compensation are conclusive, and where the board failed to make a determination as to whether defendant's alleged intoxication was a proximate cause of the injury, neither trial court nor appellate court could make that determination. *Bloodworth v. Continental Ins. Co.*, 151 Ga. App. 576, 260 S.E.2d 536 (1979).

Evidence as to intoxication held insufficient. — Where the only evidence respecting drinking of intoxicating liquors by deceased consisted in testimony of a friend to the effect that the deceased, when the friend first saw the deceased, had been drinking but had not had more than one drink, that the deceased later took two small drinks, and that this liquor did not cause the deceased to become drunk or in any way impair the deceased's faculties, and in testimony of a doctor that deceased suffered from alcoholism, and that alcohol could be smelled on the deceased's breath, but that the doctor could not say that deceased was drunk, the evidence was not sufficient to authorize the conclusion that the deceased was in a state of intoxication at the time of the fatal accident. *Parks v. Maryland Cas. Co.*, 69 Ga. App. 720, 26 S.E.2d 562 (1943).

Drunk driving barred recovery. — Workers' Compensation Board was authorized to

Intoxication (Cont'd)

find employee acted in willful misconduct in driving with a blood alcohol level of .23 percent, proceeding the wrong way onto an exit ramp marked with signs indicating that the employee was going the wrong way, and then driving southbound for approximately 11.5 miles in the northbound lane of an interstate highway and in determining the employee's death resulting from a head-on automobile collision was not compensable. *Communications, Inc. v. Cannon*, 174 Ga. App. 820, 331 S.E.2d 112 (1985).

Safety Appliances

Meaning of "safety appliance." — Any instrumentality provided by master for use by employee in operation of machine, use of which, in operation of the machine, would reduce danger or hazard to employee from machine's operation, was a "safety appliance" within the meaning of this section. *Liberty Mut. Ins. Co. v. Perry*, 53 Ga. App. 527, 186 S.E. 576 (1936); *Herman v. Aetna Cas. & Sur. Co.*, 71 Ga. App. 464, 31 S.E.2d 100 (1944) (see O.C.G.A. § 34-9-17).

Safety appliance need not be physically attached to machine. — "Safety appliance", within the meaning of this section, was not necessarily an appliance physically attached to or physically connected with the machine from the use of which the injury arose. *Liberty Mut. Ins. Co. v. Perry*, 53 Ga. App. 527, 186 S.E. 576 (1936) (see O.C.G.A. § 34-9-17).

"Willfulness" in failure to use safety appliance. — Mere intentional and voluntary failure to use a proper safety appliance does not necessarily make the act willful; willfulness contemplated amounts to more than a mere act of the will, and carries with it the idea of premeditation, obstinacy, and intentional wrongdoing. *Pullman Co. v. Carter*, 61 Ga. App. 543, 6 S.E.2d 351 (1939).

Failure to use easily accessible safety appliance as "willful". — Where safety appliance provided by master is located in proximity to the machine and is easily accessible to employee operating the machine, and its location is known to the employee, and the employee has received specific instructions not to operate the machine without use of such appliance, operation of the machine by an employee without use of the appliance

constitutes a willful failure or refusal to use the safety appliance; and where the employee is injured in operation of the machine by reason of not having used the appliance, the employee is barred the right to compensation. *Liberty Mut. Ins. Co. v. Perry*, 53 Ga. App. 527, 186 S.E. 576 (1936); *Herman v. Aetna Cas. & Sur. Co.*, 71 Ga. App. 464, 31 S.E.2d 100 (1944).

Sudden emergency theory held no excuse where safety articles were in close proximity.

— Employee was not excused from complying with requirements for use of rubber gloves and boots in starting, operating, or working upon or about electric motors using high voltages, upon a theory that the employee was confronted with a sudden necessity or emergency or acted inadvertently, unconsciously, or involuntarily, where it appeared that within close proximity of the place of the employee's electrocution both gloves and boots were accessible and available for the employees, and that the employee had constantly stressed upon the employee's subordinates the danger of working with the motors without using the safety articles. *Herman v. Aetna Cas. & Sur. Co.*, 71 Ga. App. 464, 31 S.E.2d 100 (1944).

Superintendent who promulgated and enforced rules not excused from complying therewith.

— Employee was not excused from complying with requirements for use of rubber gloves and boots in starting, operating, or working upon or about electric motors using high voltages by reason of the fact that the employee, as superintendent, promulgated and enforced such requirements. *Herman v. Aetna Cas. & Sur. Co.*, 71 Ga. App. 464, 31 S.E.2d 100 (1944).

Finding of board as to willfulness conclusive.

— Where conduct of employee may be a conscious and intentional violation of a known rule so as to constitute willful misconduct, or may be merely inadvertent or an involuntary violation so as to constitute negligence only, decision of the board on the point must be honored by the appellate court. *North Ga. Technical & Vocational Sch. v. Boatwright*, 144 Ga. App. 66, 240 S.E.2d 563 (1977).

In interpreting this section as to use of safety appliances, the court should give it a reasonable interpretation and should give the words thereof their usual and most known signification, not so much regarding

the propriety of grammar, as their general and popular use. *Pullman Co. v. Carter*, 61 Ga. App. 543, 6 S.E.2d 351 (1939) (see O.C.G.A. § 34-9-17).

Breach of Rule Approved by Board

Violation of rule which is not approved by the board is not willful misconduct. *Liberty Mut. Ins. Co. v. Scoggins*, 72 Ga. App. 263, 33 S.E.2d 534 (1945) (decided prior to 1996 amendment).

Claim not barred where rule not approved. — Although at the time of fatal injury employee was riding on fender of truck, where the employee had voluntarily placed oneself after having been warned of the danger and although employer had issued a rule to the effect that the employees riding upon the truck should not ride in such position, yet where such rule had not

been approved by the commission (now the board), employee was not barred from a recovery of compensation by reason of any breach by the employee of the rule, since such bar applies only where the rule has the approval of the commission (board). *Integrity Mut. Cas. Co. v. Jones*, 33 Ga. App. 489, 126 S.E. 876 (1925) (decided prior to 1996 amendment).

Rule as to safety of money and valuables. — Any rule governing the safety of money and valuables would not be approved by the commission (now the board), as the commission (board) would regard these rules as outside the limitations of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), since rules governing the safety of money in no way tend to prevent industrial accidents. *Southeastern Express Co. v. Edmondson*, 30 Ga. App. 697, 119 S.E. 39 (1923) (decided prior to 1996 amendment).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, §§ 576, 635 et seq.

C.J.S. — 100A C.J.S., Workers' Compensation, § 1351 et seq.

ALR. — Serious and willful misconduct of employee as bar to compensation, 4 ALR 116.

Workmen's compensation: compensation to workmen injured through smoking, 5 ALR 1521.

Presumption against suicide in workmen's compensation cases, 5 ALR 1680; 36 ALR 397.

Workmen's compensation: provision denying compensation for injury through willful failure to use guard, or safety appliance, 9 ALR 1377.

Workmen's compensation: right to compensation in case of injuries sustained through horseplay, or fooling, 13 ALR 540; 20 ALR 882; 36 ALR 1469; 43 ALR 492; 159 ALR 319.

Workmen's compensation: injury from assault, 15 ALR 588; 21 ALR 758; 29 ALR 437; 40 ALR 1122; 72 ALR 110; 112 ALR 1258; 172 ALR 997.

Workmen's compensation: injury received while doing prohibited act, 23 ALR 1161; 26 ALR 166; 58 ALR 197; 83 ALR 1211; 119 ALR 1409.

Workmen's compensation: injury to em-

ployee temporarily leaving car or vehicle of employer for reasons personal to himself, 32 ALR 806.

Presumption against suicide in workmen's compensation cases, 36 ALR 397.

Workmen's compensation: effect of employee's intoxication, 43 ALR 421.

Workmen's compensation: right of employee to compensation for injuries received while acting in an emergency, 50 ALR 1148.

Workmen's compensation: neglect or improper self-treatment as affecting right to or amount of compensation, 54 ALR 637.

Workmen's compensation: employee temporarily engaged in personal business, 66 ALR 756.

Workmen's compensation: deviation on personal errand as affecting question whether injury to employee on street or highway arose out of and in the course of employment, 76 ALR 356.

Workmen's compensation: presumption or inference that accidental death of employee arose out of and in course of employment, 120 ALR 683.

Workmen's compensation: injury or death of employee resulting from conduct of one to whom he had delegated performance of his duty, 148 ALR 708.

Workmen's compensation: what amounts to "culpable negligence," or negligence

other than “wilful,” or “serious and wilful misconduct,” within provision of act precluding compensation, 149 ALR 1004.

Suicide as compensable under Workmen’s Compensation Act, 15 ALR3d 616.

Workers’ compensation: injuries incurred during labor activity, 61 ALR4th 196.

Eligibility for workers’ compensation as affected by claimant’s misrepresentation of health or physical condition at the time of hearing, 12 ALR5th 658.

Workers’ compensation: coverage of employee’s injury or death from exposure to the elements—modern cases, 20 ALR5th 346.

Violation of employment rule barring claim for workers’ compensation, 61 ALR5th 375.

Right to workers’ compensation for physical injury or illness suffered by claimant as result of sudden mental stimuli — Right to compensation under particular statutory

provisions and requisites of, and factors affecting, compensability, 109 ALR5th 161.

Right to workers’ compensation for physical injury or illness suffered by claimant as result of nonsudden mental stimuli — Compensability of particular physical injuries or illnesses, 112 ALR5th 509.

Compensability under occupational disease statutes of emotional distress or like injury suffered by claimant as result of nonsudden stimuli, 113 ALR5th 115.

Right to workers’ compensation for physical injury or illness suffered by claimant as result of nonsudden mental stimuli — Requisites of, and factors affecting, compensability, 13 ALR6th 209.

Workers’ compensation: Validity, construction, and application of statutes providing that worker who suffers workplace injury and subsequently tests positive for alcohol impairment or illegal drug use is not eligible for workers’ compensation benefits, 22 ALR6th 329.

34-9-18. Civil penalties; costs of collection.

(a) Any person who willfully fails to file any form or report required by the board, fails to follow any order or directive of the board or any of its members or administrative law judges, or violates any rule or regulation of the board shall be assessed a civil penalty of not less than \$100.00 nor more than \$1,000.00 per violation.

(b) Any person who knowingly and intentionally makes any false or misleading statement or representation for the purpose of facilitating the obtaining or denying of any benefit or payment under this chapter may be assessed a civil penalty of not less than \$1,000.00 nor more than \$10,000.00 per violation.

(c) In addition to the penalty and assessed fees as defined in subsection (b) of Code Section 34-9-126, the board may assess a civil penalty of not less than \$500.00 nor more than \$5,000.00 per violation for the violation by any person of Code Section 34-9-121 or subsection (a) of Code Section 34-9-126.

(d) Any penalty assessed under subsections (a), (b), and (c) of this Code section shall be final unless within ten days of the date of the assessment the person fined files a written request with the board for a hearing on the matter.

(e) Any person, firm, or corporation who is assessed a civil penalty pursuant to this Code section may also be assessed the cost of collection. The cost of collection may also include reasonable attorneys’ fees.

(f) All penalties and costs assessed under this Code section shall be tendered and made payable to the State Board of Workers’ Compensation.

All such penalties shall be deposited in the general fund of the state treasury. (Code 1933, § 114-719, enacted by Ga. L. 1978, p. 2220, § 16; Ga. L. 1992, p. 1942, § 5; Ga. L. 1994, p. 887, § 3; Ga. L. 1995, p. 642, § 3; Ga. L. 1996, p. 1291, § 5; Ga. L. 1997, p. 1367, § 1.)

Editor's notes. — Ga. L. 1995, p. 642, § 13, not codified by the General Assembly, provides for severability.

Law reviews. — For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992).

JUDICIAL DECISIONS

Subsection (f) not applied retroactively. — The provision of O.C.G.A. § 34-9-18(f), directing that all penalties be paid to the state, as opposed to an earlier interpretation of the statute allowing the board to direct the payment of penalties to others, could not be applied retroactively. *Mullis v. NC-CNH, Inc.*, 218 Ga. App. 332, 461 S.E.2d 237 (1995) (decided prior to 1996 amendment).

Notice and hearing. — An administrative law judge's imposition of civil penalties against an employer and its insurer without notice and opportunity to be heard violated their rights to constitutional due process. *Atlanta Janitorial Serv., Inc. v. Jackson*, 182 Ga. App. 155, 355 S.E.2d 93 (1987).

"Willfulness." — The employer's conscious indifference in failing to file a form required when salary was paid in lieu of benefits was the equivalent of "willfulness." *State v. Graul*, 181 Ga. App. 573, 353 S.E.2d 70 (1987).

The board's finding that a penalty was authorized under O.C.G.A. § 34-9-18 constituted an implicit finding of "willfulness." *State v. Graul*, 181 Ga. App. 573, 353 S.E.2d 70 (1987).

Where a self-insurer temporarily ceased benefits payments, but notified the Board and the Insurance Commissioner, and where there was no evidence in the claimant's record authorizing a finding of willfulness or the imposition of a civil penalty, there was no error of fact or of law made by the administrative law judge or the board in failing to assess a civil penalty or to award attorney's fees. *Grier v. Proctor*, 195 Ga. App. 116, 393 S.E.2d 18 (1990).

Penalties improper where employer not notified. — The assessment of civil penalties against an employer was improper since the claimant's request for a hearing did not contain notice that penalties were being

sought, and since the administrative law judge failed to notify the employer that this issue would be considered at the hearing. *Atlanta Care Convalescence Center v. Travelers Ins. Co.*, 187 Ga. App. 283, 370 S.E.2d 40 (1988).

Penalties assessed against employer upheld on appeal. — State Board of Workers' Compensation was authorized under O.C.G.A. § 34-9-18(a) to assess civil penalties and attorney fees against an employer for its willful violation of Ga. Bd. Workers' Comp. R. 205, after the employer failed to timely respond to a request for preauthorization of a referral made by the employee's authorized physician. *Caremore, Inc./Wooddale Nursing Home v. Hollis*, 283 Ga. App. 681, 642 S.E.2d 375 (2007).

Exposure to civil penalties. — Superior court erroneously reversed the decision of the Georgia Board of Workers' Compensation's Appellate Division that the former employer had not shown under O.C.G.A. § 34-9-104(a) that suitable work was available; evidence supported the Division's decision, as many of the jobs recommended by the rehabilitation counselor were unsuitable, and even if the Division found that the counselor failed to take actions that would have violated Board rules and subjected the counselor to civil penalties under O.C.G.A. § 34-9-18, this did not render insufficient evidence sufficient. *Korner v. Educ. Mgmt. Corp.*, 281 Ga. App. 322, 635 S.E.2d 892 (2006), cert. denied, 2007 Ga. LEXIS 104 (Ga. 2007).

"Any evidence" rule. — Based on ample evidence that an employee performed work for the company and derived income therefrom while at the same time receiving temporary total disability benefits, an award of attorney fees to the employer's insurer pursuant to O.C.G.A. § 34-9-108(b)(1), the as-

assessment of a civil penalty against the employee pursuant to O.C.G.A. § 34-9-18(b), and the referral of the matter to the Enforcement Division of the Board pursuant to O.C.G.A. § 34-9-24 should have been affirmed by a trial court under the “any evidence” standard of review. *Trax-Fax, Inc. v. Hobba*, 277 Ga. App. 464, 627 S.E.2d 90 (2006).

Cited in *Caldwell v. Perry*, 179 Ga. App. 682, 347 S.E.2d 286 (1986); *Davis v. Union Camp Corp.*, 188 Ga. App. 36, 371 S.E.2d 898 (1988); *Doss v. Food Lion, Inc.*, 267 Ga. 312, 477 S.E.2d 577 (1996); *Stewart v. Auto-Owners Ins. Co.*, 230 Ga. App. 265, 495 S.E.2d 882 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers’ Compensation, § 583.

C.J.S. — 100 C.J.S., Workers’ Compensation, § 618 et seq.

ALR. — Statutory provisions regarding action against employer who does not assent

to Workmen’s Compensation Act as affirmative support for right of action by employee, not otherwise existing, 97 ALR 1297.

Recovery of cumulative statutory penalties, 71 ALR2d 986.

34-9-19. Penalty for false or misleading statements when obtaining or denying benefits.

Any person, firm, or corporation who willfully makes any false or misleading statement or representation for the purpose of obtaining or denying any benefit or payment under this chapter shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than \$1,000.00 or more than \$10,000.00 or by imprisonment not to exceed 12 months, or by both such fine and imprisonment. Additionally, any person, firm, or corporation who violates this Code section may also be assessed the cost of investigation or prosecution, or both, in accordance with Chapter 11 of Title 17, relating to the assessment and payment of costs of criminal proceedings. All penalties and costs assessed under this Code section shall be tendered and made payable to the State Board of Workers’ Compensation. All such penalties shall be deposited in the general fund of the state treasury. (Code 1933, § 114-9905, enacted by Ga. L. 1973, p. 232, § 10; Ga. L. 1995, p. 642, § 4; Ga. L. 1996, p. 1291, § 6.)

Editor’s notes. — Ga. L. 1995, p. 642, § 13, not codified by the General Assembly, provides for severability.

JUDICIAL DECISIONS

Cited in *Fox v. Stanish*, 150 Ga. App. 537, 258 S.E.2d 190 (1979); *Samuel v. Baitcher*, 154 Ga. App. 602, 269 S.E.2d 96 (1980);

O’Neal v. Cincinnati Ins. Co., 169 Ga. App. 483, 313 S.E.2d 501 (1984).

RESEARCH REFERENCES

C.J.S. — 101 C.J.S., Workers’ Compensation, § 1577 et seq.

ALR. — Relief from settlement or compromise of claim under Workmen’s Com-

pensation Act upon ground of fraud or mistake respecting amount of compensation to which employee was entitled, 121 ALR 1270.

34-9-20. Giving of false evidence to board member.

Any person who shall knowingly make, give, or produce any false statements or false evidence, under oath, to any member of the board or to any administrative law judge commits the offense of perjury. (Ga. L. 1937, p. 230, § 18; Code 1933, § 114-9906, enacted by Ga. L. 1975, p. 198, § 13; Ga. L. 1988, p. 1679, § 3.)

Cross references. — Perjury, § 16-10-70.

JUDICIAL DECISIONS

Cited in Fox v. Stanish, 150 Ga. App. 537, 258 S.E.2d 190 (1979).

RESEARCH REFERENCES

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| Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, §§ 575, 591. | C.J.S. — 100A C.J.S., Workers' Compensation, § 1014 et seq. |
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34-9-21. Penalty for receiving unentitled to benefits.

Any employee who, with the intent to defraud, receives and retains any income benefits to which he or she is not entitled shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished for each offense by a fine of not less than \$1,000.00 nor more than \$10,000.00 or by imprisonment not to exceed one year, or by both such fine and imprisonment. (Ga. L. 1937, p. 230, § 18; Code 1933, § 114-9907, enacted by Ga. L. 1975, p. 198, § 13; Ga. L. 1998, p. 1508, § 1.)

Law reviews. — For review of 1998 legislation relating to labor and industrial relations, see 15 Ga. St. U. L. Rev. 185 (1998).

JUDICIAL DECISIONS

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| Cited in Samuel v. Baitcher, 154 Ga. App. 602, 269 S.E.2d 96 (1980); Holt Serv. Co. v. Modlin, 163 Ga. App. 283, 293 S.E.2d 741 | (1982); Meredith v. Atlanta Intermodal Rail Servs., 274 Ga. 809, 561 S.E.2d 67 (2002). |
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| Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, §§ 530, 629. | C.J.S. — 100 C.J.S., Workmen's Compensation, §§ 718, 719. |
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34-9-22. Penalty for receipt of unapproved fees or for solicitation of employment for lawyer or physician.

Any physician, attorney, or hospital which receives any fee, other consideration, or any gratuity on account of services rendered under this chapter, unless such consideration or gratuity is approved by the board or, upon appeal, by the superior court, or any person who makes it a business to solicit employment for a lawyer or physician or for himself with respect to any claim or award for compensation under this chapter shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished for each offense by a fine not to exceed \$5,000.00 or by imprisonment not to exceed one year, or by both such fine and imprisonment. (Ga. L. 1937, p. 528.)

JUDICIAL DECISIONS

Board has authority to examine and approve contracts between claimants and counsel as to the amount of attorneys' fees, but it has no authority, statutory or otherwise, to set the fees of the attorneys, nor to examine and approve contracts between attorneys as to the division of their fees when they associate to represent claimants. *Feldman v. Edwards*, 107 Ga. App. 397, 130 S.E.2d 350 (1963).

Approval prerequisite to collection of fee. — Before attorney may collect a fee from a claimant for services rendered in connection with a claimant's case, a contract of employment must be approved by the board. *Fletcher v. Aetna Cas. & Sur. Co.*, 95 Ga. App. 23, 96 S.E.2d 650 (1957).

RESEARCH REFERENCES

ALR. — Handling, preparing, presenting, or trying workmen's compensation claims or cases as practice of law, 2 ALR3d 724; 58 ALR5th 449.

34-9-23. Liberal construction of chapter; purpose.

This chapter shall be liberally construed only for the purpose of bringing employers and employees within the provisions of this chapter and to provide protection for both. This chapter is intended to provide a complete and exclusive system and procedure for the resolution of disputes between employers and employees who are subject to this chapter concerning accidents and injuries arising out of and in the course of employment as defined by this chapter. The provisions of this chapter shall be construed and applied impartially to both employers and employees. (Code 1981, § 34-9-23, enacted by Ga. L. 1994, p. 887, § 4.)

Law reviews. — For article, "Workers' Compensation," see 53 *Mercer L. Rev.* 521 (2001). For annual survey of workers' compensation law, see 58 *Mercer L. Rev.* 453 (2006).

JUDICIAL DECISIONS

Authority of board. — Insurer's argument that there should be an exception to the rule making declaratory judgments unavailable where there was no future act to which such a judgment could be applied had to be rejected; the premise for the exception was that the State Board of Workers' Compensation (board) lacked subject matter jurisdiction to resolve the underlying coverage issue, but, in fact, the board had the authority to resolve ancillary issues such as workers' com-

pensation insurance coverage. *Builders Ins. Group, Inc. v. Ker-Wil Enters.*, 274 Ga. App. 522, 618 S.E.2d 160 (2005).

Cited in *Pringle v. Mayor of Savannah*, 223 Ga. App. 751, 478 S.E.2d 139 (1996); *England v. Beers Constr. Co.*, 224 Ga. App. 44, 479 S.E.2d 420 (1996); *Cartersville Ready Mix Co. v. Hamby*, 224 Ga. App. 116, 479 S.E.2d 767 (1996); *Woodgrain Millwork v. Millender*, 250 Ga. App. 204, 551 S.E.2d 78 (2001).

34-9-24. Fraud and compliance unit; creation and duties; limitation on liability; authority; whistle blower protection.

(a) There is established within the office of the State Board of Workers' Compensation a fraud and compliance unit. This unit shall assist the chairperson in administratively investigating allegations of fraud and non-compliance and in developing and implementing programs to prevent fraud and abuse. The unit shall promptly notify the appropriate prosecuting attorney's office of any action which involves criminal activity. When so required or requested by the chairperson or the specific district attorney, the unit shall cooperate with the district attorney in the investigation and prosecution of criminal violations.

(b) The State Board of Workers' Compensation or any employee or agent thereof is not subject to civil liability for libel, slander, or any other relevant tort, and no civil cause of action of any nature exists against such persons by virtue of the execution of activities or duties under this Code section or by virtue of the publication of any report or bulletin related to the activities or duties under this Code section.

(c) Fraud investigators employed in the fraud and compliance unit who are certified in compliance with Chapter 8 of Title 35 shall have the authority to execute search warrants and make arrests pursuant to warrants only if such warrants have been issued as the result of a criminal investigation of an alleged violation of this chapter. Such fraud investigators are authorized to serve subpoenas in connection therewith.

(d) In the absence of fraud or malice, no person or entity who furnishes to the board information relevant and material to suspected fraud under or noncompliance with the workers' compensation laws of this state shall be liable for damages in a civil action or subject to criminal prosecution for the furnishing of such information. (Code 1981, § 34-9-24, enacted by Ga. L. 1995, p. 642, § 5; Ga. L. 1997, p. 1367, § 2; Ga. L. 1998, p. 128, § 34.)

Editor's notes. — Ga. L. 1995, p. 642, § 13, not codified by the General Assembly, provides for severability.

JUDICIAL DECISIONS

Referral to fraud and compliance unit. — The fact that the Workers' Compensation Fraud Unit was not established until three years after the claimant's alleged fraud occurred did not bar referral of claimant's case to the unit. *Bahadori v. Sizzler*, 230 Ga. App. 52, 505 S.E.2d 23 (1998).

"Any evidence" rule. — Based on ample evidence that an employee performed work for the company and derived income therefrom while at the same time receiving temporary total disability benefits, an award of

attorney fees to the employer's insurer pursuant to O.C.G.A. § 34-9-108(b)(1), the assessment of a civil penalty against the employee pursuant to O.C.G.A. § 34-9-18(b), and the referral of the matter to the Enforcement Division of the Board pursuant to O.C.G.A. § 34-9-24 should have been affirmed by a trial court under the "any evidence" standard of review. *Trax-Fax, Inc. v. Hobba*, 277 Ga. App. 464, 627 S.E.2d 90 (2006).

OPINIONS OF THE ATTORNEY GENERAL

Records of the State Board of Workers' Compensation Fraud and Compliance Division are subject to disclosure under the Open Records Act, O.C.G.A. § 50-18-70 et seq., except where such disclosure is exempted by the Act, prohibited by law, or prohibited by court order. 1997 Op. Att'y Gen. No. 97-20.

Files and records that would otherwise be confidential under O.C.G.A. § 34-9-24(b)

should be furnished to prosecutors in furtherance of a Fraud and Compliance Division investigation. 1997 Op. Att'y Gen. No. 97-20.

Exculpatory information in files should be made available to criminal defendants being prosecuted as a result of an investigation under O.C.G.A. § 34-9-24. 1997 Op. Att'y Gen. No. 97-20.

34-9-25. Patient self-referral.

Physicians treating workers' compensation claimants shall comply with the provisions against patient self-referral as set forth in Chapter 1B of Title 43. (Code 1981, § 34-9-25, enacted by Ga. L. 2006, p. 676, § 1/HB 1240.)

Effective date. — This Code section became effective July 1, 2006.

ARTICLE 1A

WORKERS' COMPENSATION TRUTH IN ADVERTISING ACT

Editor's notes. — Ga. L. 1995, p. 642, § 13, not codified by the General Assembly, provides for severability.

Law reviews. — For note on the 1995 enactment of this article, see 12 Ga. St. U.L. Rev. 280 (1995).

JUDICIAL DECISIONS

Constitutionality. — The notice requirement of O.C.G.A. § 34-9-31 of the Workers' Compensation Truth in Advertising Act vio-

lated the first amendment. *Tillman v. Miller*, 133 F.3d 1402 (11th Cir. 1998).

34-9-30. Short title; purpose.

(a) This article shall be known and may be cited as the "Workers' Compensation Truth in Advertising Act of 1995."

(b) The purpose of this article is to assure truthful and adequate disclosure of all material and relevant information in advertising which solicits persons to engage or consult an attorney or a medical care provider for the purpose of asserting a workers' compensation claim. (Code 1981, § 34-9-30, enacted by Ga. L. 1995, p. 642, § 6.)

JUDICIAL DECISIONS

Temporary restraining order against enforcement. — An attorney who provided workers' compensation claim services and used television to advertise the attorney's services had a substantial likelihood of success on the merits of the attorney's first

amendment challenge to the Workers' Compensation Truth in Advertising Act, O.C.G.A. § 34-9-30 et seq., and met the four-part test for issuance of a restraining order against enforcement thereof. *Tillman v. Miller*, 917 F. Supp. 799 (N.D. Ga. 1995).

34-9-31. Notice required as part of television advertisement.

Any television advertisement, with broadcast originating in this state, which solicits persons to file workers' compensation claims or to engage or consult an attorney, a medical care provider, or clinic for the purpose of giving consideration to a workers' compensation claim or to market workers' compensation insurance coverage shall contain a notice, which shall be in boldface Roman font 36 point type and appear in a dark background and remain on the screen for a minimum of five seconds as follows:

NOTICE

Willfully making a false or misleading statement or representation to obtain or deny workers' compensation benefits is a crime carrying a penalty of imprisonment and/or a fine of up to \$10,000.00. (Code 1981, § 34-9-31, enacted by Ga. L. 1995, p. 642, § 6.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1995, the subsection

designation "(a)" was deleted from the beginning, as there is no subsection (b).

34-9-32. Penalty for violation of notice requirement; advertiser defined.

(a) Any advertiser who violates Code Section 34-9-31 is guilty of a misdemeanor and may be subject to a fine of not less than \$1,000.00 nor more than \$10,000.00 for each violation.

(b) For the purposes of this article, "advertiser" means any person who provides workers' compensation claims services which are described in advertisements; any person to whom persons solicited by advertisements are directed to for injuries or the provision of workers' compensation claims related services; or any person paying for the preparation, broadcast, dissemination, or placement of such advertisements. (Code 1981, § 34-9-32, enacted by Ga. L. 1995, p. 642, § 6.)

ARTICLE 2**ADMINISTRATION****34-9-40. State Board of Workers' Compensation created; appointment of members; powers and duties of board generally.**

There is created and established within the executive branch a board to be known as the State Board of Workers' Compensation, composed of three members who shall be appointed by the Governor for a term of four years. Each member shall hold office until his or her successor shall have been appointed and qualified. An individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he or she shall succeed. The board shall have full authority, power, and the duty to promulgate policies, rules, and regulations for the administration of this chapter. The board may promulgate policies, rules, and regulations concerning the electronic submission to and transmission from the board of documents and filings. Additionally, the board shall have full authority to conduct training seminars for the purpose of educating various employers as to their liability regarding workers' compensation claims. Such seminars may be paid for by the board through funding provided from sources other than appropriations made by the General Assembly. Excess funds generated through seminars may be amended into the board's operating budget as approved by the Office of Planning and Budget. Excess funds generated through seminars not amended into the board's operating budget, as determined by the state auditor, shall lapse to the Office of Treasury and Fiscal Services. (Ga. L. 1920, p. 167, § 50; Ga. L. 1922, p. 77, § 1; Ga. L. 1931, p. 7, § 108; Code 1933, § 114-701; Ga. L. 1937, p. 230, §§ 3, 5; Ga. L. 1943, p. 167, § 3; Ga. L. 1975, p. 198, § 5; Ga. L. 1988, p. 1679, § 4; Ga. L. 1996, p. 1291, § 7; Ga. L. 1997, p. 143, § 34; Ga. L. 2005, p. 1210, § 2/HB 327.)

Cross references. — Reimbursement of Department of Law by board for legal services provided to board by assistant attorney general, and others, § 45-15-37. Leave to appeal decision of State Board of Workers'

Compensation, Rules of the Court of Appeals of the State of Georgia, Rule 40.

Law reviews. — For annual survey of workers' compensation law, see 57 Mercer L. Rev. 419 (2005).

JUDICIAL DECISIONS

Board of Workers' Compensation is not a court at all, but an administrative body with only those powers and duties given it by statute. *Bishop v. Weems*, 118 Ga. App. 180, 162 S.E.2d 879 (1968).

Board is not a court authorized to render judgments on contracts or to render a declaratory judgment, since it merely determines the amount of compensation and the time of payment in accordance with the workers' compensation law (see O.C.G.A. § 24-9-1 et seq.). *Fireman's Fund Ins. Co. v. Crowder*, 123 Ga. App. 469, 181 S.E.2d 530 (1971).

Board is a mere creature of statute. — Industrial Board (now Board of Workers' Compensation) is a mere creature of statute, brought into being by the legislature as an administrative body, and has no inherent powers and no lawful right to act except as directed by law. *Milledgeville State Hosp. v. Clodfelter*, 99 Ga. App. 49, 107 S.E.2d 289 (1959).

Board of Workers' Compensation is an administrative body. *Plummer v. State*, 90 Ga. App. 773, 84 S.E.2d 202 (1954).

Board has limited jurisdiction, power, and authority. — Industrial Commission (now Board of Workers' Compensation) is not a court of general jurisdiction, nor even of limited common-law jurisdiction; it possesses only such jurisdiction, powers, and authority as are conferred upon it by the legislature, or such as arise therefrom by necessary implication to carry out the full and complete exercise of the powers granted to it. *Gravitt v. Georgia Cas. Co.*, 158 Ga. 613, 123 S.E. 897 (1924); *Globe Indem. Co. v. Lankford*, 35 Ga. App. 599, 134 S.E. 357 (1926).

Department of Industrial Relations (now Board of Workers' Compensation) is purely an administrative body, created solely for the purpose of administering the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.); it possesses only such jurisdiction, powers, and authority as are conferred upon it

by the legislature, or such as arise therefrom by necessary implication to carry out the full and complete exercise of the powers granted. *Southern Cotton Oil Co. v. McLain*, 49 Ga. App. 177, 174 S.E. 726 (1934).

Board of Workers' Compensation is an administrative body possessing only the power conferred upon it by statute to administer the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Wilson v. Maryland Cas. Co.*, 71 Ga. App. 184, 30 S.E.2d 420 (1944).

Board of Workers' Compensation is an administrative commission with such jurisdiction, powers, and authority as may be conferred upon it by the General Assembly. *National Sur. Corp. v. Orvin*, 209 Ga. 878, 76 S.E.2d 705 (1953).

Board of Workers' Compensation, being an administrative body clothed with quasi-judicial functions, has no power save that conferred on it by statute. *Hyde v. Atlantic Steel Co.*, 112 Ga. App. 136, 144 S.E.2d 232 (1965).

Board of Workers' Compensation is an administrative body, and it possesses only the jurisdiction, power, and authority granted to it by the legislature. *Robinson v. Zurich Ins. Co.*, 131 Ga. App. 795, 207 S.E.2d 209 (1974); *Cotton States Ins. Co. v. Bates*, 140 Ga. App. 428, 231 S.E.2d 445 (1976).

Board's administration confined to authorized activities. — Although Department of Industrial Relations (now Board of Workers' Compensation) is charged by law with the responsibility of administering the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), its administration must be confined to such activities as are expressly or impliedly authorized. *Department of Indus. Relations v. Travelers' Ins. Co.*, 177 Ga. 669, 170 S.E. 883, answer conformed to, 47 Ga. App. 553, 171 S.E. 169 (1933).

Board not a corporation. — Department of Industrial Relations (now Board of Workers' Compensation) is not endowed with the attributes of a corporation. Department of

Indus. Relations v. Travelers' Ins. Co., 177 Ga. 669, 170 S.E. 883, answer conformed to, 47 Ga. App. 553, 171 S.E. 169 (1933).

Board is an agency of the state. — Board of Workers' Compensation is not a natural person, partnership, or corporation, but an agency of the state; the state has not consented for the board to be sued, and an action cannot be maintained against the state without its consent. *Cardin v. Riegel Textile Corp.*, 219 Ga. 695, 135 S.E.2d 284 (1964).

Board may not sue or be sued. — Department of Industrial Relations (now Board of Workers' Compensation) is not such a legal entity as may sue and be sued. Department of *Indus. Relations v. Travelers' Ins. Co.*, 177 Ga. 669, 170 S.E. 883, answer conformed to, 47 Ga. App. 553, 171 S.E. 169 (1933).

No authority in board to limit or restrict meaning of words. — General Assembly has not conferred upon the Board of Workers' Compensation, or the chairman thereof, any authority to limit or restrict the generally approved and accepted meaning of words, phrases, and clauses of the English language. *National Sur. Corp. v. Orvin*, 209 Ga. 878, 76 S.E.2d 705 (1953).

Damage action not within jurisdiction of board. — Action seeking damages against procurers of fraud, as opposed to an action seeking to set aside an order procured by fraud, does not lie within the jurisdiction of the Workers' Compensation Board. *Cline v. Aetna Cas. & Sur. Co.*, 137 Ga. App. 76, 223 S.E.2d 14 (1975).

Jurisdiction applies to injuries occurring in state. — The workers' compensation board has jurisdiction to award compensation where the injury occurs within the state regardless of the place of signing of the contract. *Guinn v. Conwood Corp.*, 185 Ga. App. 41, 363 S.E.2d 271 (1987), cert. denied, 185 Ga. App. 910, 363 S.E.2d 271 (1988).

Enforcement of statutory provisions for cancellation of insurance. — The workers' compensation board has the authority to enforce compliance with statutory provisions governing the cancellation of insurance policies in general. *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. O'Berry*, 184 Ga. App. 606, 362 S.E.2d 157 (1987).

Cited in *Thomas v. Macken*, 37 Ga. App. 624, 141 S.E. 316 (1928); *Stanley v. Sims*, 185 Ga. 518, 195 S.E. 439 (1937); *State Bd. of Educ. v. Board of Pub. Educ.*, 186 Ga. 783, 199 S.E.2d 641 (1938).

OPINIONS OF THE ATTORNEY GENERAL

Admission to practice of law. — There is no statutory requirement that members of the Board of Workers' Compensation be admitted to the practice of law in this state; however, a resolution of the board declares as a matter of policy that deputy directors and the secretary-treasurer, before appointment, be admitted to the practice of law for at least three years. 1970 Op. Att'y Gen. No. 70-45.

Practice of law by board members or deputy directors. — Members of the board or deputy directors are not prohibited from the practice of law; however, a resolution of

the board declares its policy to be that all officials, personnel, and employees of the board shall devote their entire time to their duties, and shall not be engaged in any occupation or business interfering or inconsistent with such duties. 1970 Op. Att'y Gen. No. 70-45.

Salaries of board members and officials. — State Personnel Board may receive power from General Assembly to fix salaries of the members of the Board of Workers' Compensation, the deputy directors, and secretary-treasurer of the board. 1970 Op. Att'y Gen. No. 70-45.

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workers' Compensation, § 720 et seq.

ALR. — Remedy for enforcement of award made under Workmen's Compensation Act in case of injury to public officer or employee, 10 ALR 190.

Handling, preparing, presenting, or trying workers' compensation claims or cases as practice of law, 58 ALR5th 449.

34-9-40.1. Workers' Compensation Advisory Council; appointment and terms of members; chairman; duties; service without compensation.

Repealed by Ga. L. 2001, p. 873, § 10, effective July 1, 2001.

Editor's notes. — This Code section was based on Code 1981, § 34-9-40.1, enacted by Ga. L. 1992, p. 1942, § 6.

34-9-41. Appointment and term of chairman of board.

The Governor shall appoint one member of the board as chairman, and the appointee shall hold his office for four years and until his successor shall have been appointed and shall have qualified. Any vacancy in the office shall be filled by the Governor for the unexpired portion of the term. (Code 1933, § 114-701.8, enacted by Ga. L. 1975, p. 198, § 6.)

OPINIONS OF THE ATTORNEY GENERAL

Duties of chairman. — Chairman of board is authorized to exercise two duties not common to the other members of the board: the chairman shall appoint and fix the salary of the secretary-treasurer, and shall approve, before payment, the expenses of the directors and their assistants which are incurred

by them while traveling on business of the department. 1945-47 Op. Att'y Gen. p. 659.

Chairman of the board is proper parliamentary officer to preside at meetings of the board for the purpose of regulating its proceedings. 1945-47 Op. Att'y Gen. p. 659.

34-9-42. Qualifications and roles of members.

(a) The chairperson of the board shall be a person who, on account of his or her previous employment, affiliation, or experience, shall be considered knowledgeable of the concerns of the public at large. One of the remaining two board members shall be a person who, on account of his or her previous employment, association, or affiliation, shall be knowledgeable of the concerns of employers; and the one remaining member of the board shall be a person whose previous employment or affiliation has been as a member of a group subject to this chapter as an employee, regardless of whether the employment of such person has been with a person, firm, or corporation actually operating under this chapter, and who shall be knowledgeable of the concerns of employees.

(b) The chairperson and each board member shall be a member of the State Bar of Georgia with at least seven years of practice experience and shall be subject to the Georgia Code of Judicial Conduct. (Code 1933, § 114-701.1, enacted by Ga. L. 1975, p. 198, § 6; Ga. L. 1994, p. 887, § 5.)

Law reviews. — For note on the 1994 amendment of this Code Section, see 11 Ga. St. U.L. Rev. 204 (1994).

JUDICIAL DECISIONS

Temporary deputy director need not meet qualifications. — A person appointed by the board to serve temporarily on the board as a deputy director pursuant to O.C.G.A. § 34-9-47 need not meet the qualifications of a regular director of the board selected by the governor pursuant to O.C.G.A. §§ 34-9-40 and 34-9-42. *Dougherty County Bd. of Educ. v. Lundy*, 183 Ga. App. 550, 359 S.E.2d 403, cert. denied, 183 Ga. App. 906, 359 S.E.2d 403 (1987).

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workers' Compensation, § 720 et seq.

34-9-43. Oath of office of members.

Each member of the board, including the chairman thereof, shall, before entering upon the duties of his office, take an oath for the faithful discharge of his duties. (Code 1933, § 114-701.2, enacted by Ga. L. 1975, p. 198, § 6.)

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workers' Compensation, §§ 701 et seq., 717.

34-9-44. Bond of members.

Each member of the board, including the chairman thereof, shall, before entering upon the duties of his office, execute such bond as may be required by the Governor for the protection of the state and those having business before the board. The expense of such bond is to be paid by the state, such bond to be conditioned upon the faithful discharge of the duties of such member of the board and his faithful accounting for all moneys coming within his custody or control, whether such funds shall be the property of the State of Georgia or of any other person, firm, or corporation. (Code 1933, § 114-701.3, enacted by Ga. L. 1975, p. 198, § 6.)

34-9-45. Removal of members.

Any member of the board may be removed by the Governor for neglect of duty or malfeasance in office, provided written charges are served upon the member at least ten days prior to a hearing thereon before the Governor and the constitutional officers of this state; provided, further, that a majority shall find that the member is guilty of the charges preferred under this chapter or that he has ceased to represent the interests on whose behalf he was appointed, but for no other cause. (Code 1933, § 114-701.4, enacted by Ga. L. 1975, p. 198, § 6.)

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workers' Compensation, § 720 et seq.

34-9-46. **Quorum.**

Any two members of the board shall constitute a quorum for the transaction of any business or the rendering of any decision required by this chapter to be made by all of the members. (Ga. L. 1920, p. 167, § 53; Ga. L. 1925, p. 282, § 4; Code 1933, § 114-703; Ga. L. 1973, p. 232, § 7.)

JUDICIAL DECISIONS

Participation by at least two members required. — Award not participated in by at least two members of the board is not an award of the full board. *Hartford Accident & Indem. Co. v. Mapp*, 96 Ga. App. 517, 100 S.E.2d 742 (1957).

Award participated in by only two of the three members of the board is valid. *Hayslip v. Liberty Mut. Ins. Co.*, 72 Ga. App. 509, 34 S.E.2d 319 (1945).

Director emeritus of the board cannot participate in rendering an award by such board, so as to make it a valid award thereof. *Hartford Accident & Indem. Co. v. Mapp*, 96 Ga. App. 517, 100 S.E.2d 742 (1957).

Cited in *Adams v. Utica Mut. Ins. Co.*, 88 Ga. App. 386, 76 S.E.2d 709 (1953); *Butler v. Fidelity & Cas. Co.*, 88 Ga. App. 620, 76 S.E.2d 813 (1953); *Ideal Mut. Ins. Co. v. Ray*, 94 Ga. App. 785, 96 S.E.2d 377 (1956); *American Cas. Co. v. Herron*, 102 Ga. App. 658, 117 S.E.2d 172 (1960); *Continental Ins. Co. v. McDaniel*, 118 Ga. App. 344, 163 S.E.2d 923 (1968); *Cameron v. American Can Co.*, 120 Ga. App. 236, 170 S.E.2d 267 (1969); *Bituminous Cas. Co. v. Renfro*, 130 Ga. App. 621, 204 S.E.2d 317 (1974).

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workers' Compensation, § 720 et seq.

ALR. — Validity of decision of workmen's compensation commission as affected by

nonparticipation of one or more members because of death, absence, resignation, or other cause, 148 ALR 327.

34-9-47. **Trial division and appellate division created; composition; sessions.**

(a) There is created and established within the State Board of Workers' Compensation a trial division and an appellate division, which shall exercise judicial functions in implementing this chapter.

(b) The appellate division shall be composed of the three members of the board who shall serve as appellate administrative law judges. The chairman of the board shall serve as chief administrative law judge of the appellate division. An administrative law judge may be appointed by the board to serve as a member of the board to review cases on appeal; provided, however, not more than one administrative law judge may serve as a member of the board on any case and an administrative law judge who

served as the hearing officer in a case may not serve as a member of the board to review the same case on appeal. An administrative law judge appointed to serve as a member of the board pursuant to this subsection shall be counted as a member for the purposes of the quorum requirement of Code Section 34-9-46.

(c) The trial division shall be composed of administrative law judges appointed by the board who shall serve as hearing officers and exercise judicial functions in implementing this chapter. Administrative law judges shall have the power to subpoena witnesses and administer oaths and may take testimony in those cases brought before the board. An administrative law judge hearing a case shall make an award, subject to review and appeal as provided in this chapter.

(d) The appellate division and trial division of the board may hold such sessions as may be deemed necessary at any place within the state, subject to other provisions of this chapter. (Ga. L. 1920, p. 167, § 52; Code 1933, § 114-702; Ga. L. 1937, p. 528; Ga. L. 1975, p. 198, § 7; Ga. L. 1988, p. 1679, § 5; Ga. L. 1992, p. 1942, § 7; Ga. L. 1993, p. 1365, § 1.)

Law reviews. — For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992). For note on 1993 amend-

ment of this Code section, see 10 Ga. St. U.L. Rev. 152 (1993).

JUDICIAL DECISIONS

In a case decided before the 1993 amendment of O.C.G.A. § 34-9-47(b), providing that an administrative law judge who served as the hearing officer in a case may not serve as a member of the review board on the same case, O.C.G.A. § 15-1-8(a)(3), by requiring the consent of the parties in such a situation, requires a knowing waiver; thus, an employer did waive its rights to challenge the review board's decision regarding a workers' compensation award where it was not disclosed that the administrative law judge who originally issued the award would be participating in the matter as a member of the review board. *Arrow Co. v. Hall*, 212 Ga. App. 365, 441 S.E.2d 794 (1994).

Temporary director need not meet regular qualifications. — A person appointed by the board to serve temporarily on the board as a deputy director pursuant to O.C.G.A. § 34-9-47 need not meet the qualifications of a regular director of the board selected by the governor pursuant to O.C.G.A. §§ 34-9-40 and 34-9-42. *Dougherty County Bd. of Educ. v. Lundy*, 183 Ga. App. 550, 359 S.E.2d 403, cert. denied, 183 Ga. App. 906,

359 S.E.2d 403 (1987) (decided prior to 1988 amendment which substituted references to administrative law judges for references to deputy directors).

This section did not make it mandatory that deputy (now judge) hearing case render award, but the intention was simply to give the deputy power to do so; award is not void because it was made by a director on evidence heard and taken down before a deputy. *Ware v. Swift & Co.*, 59 Ga. App. 836, 2 S.E.2d 128 (1939) (see O.C.G.A. § 34-9-47).

Summary disposition of claim. — An administrative law judge can summarily dispose of a claim for benefits when the underlying issues between the same parties have already been heard and determined. *Continental Baking Co. v. Brock*, 198 Ga. App. 578, 402 S.E.2d 331 (1991).

De novo hearing on appeal of award. — Where deputy director (now administrative law judge) is authorized to hear and determine claimant's application, and from the evidence heard by director, the director makes findings of fact and on such findings awards compensation to claimant, and em-

ployer and its insurance carrier appeal in due time to the board, such appeal opens the entire case for a de novo hearing before the board as a fact-finding body. *Pacific Employers Ins. Co. v. West*, 213 Ga. 296, 99 S.E.2d 89 (1957).

Cited in *Delta Air Lines v. McDaniel*, 176 Ga. App. 523, 336 S.E.2d 610 (1985); *MARTA v. Reid*, 282 Ga. App. 877, 640 S.E.2d 300 (2006).

OPINIONS OF THE ATTORNEY GENERAL

Admission to practice of law. — There is no statutory requirement that members of the board be admitted to the practice of law in this state; however, a resolution of the board declares as a matter of policy that deputy directors (now administrative law judges) and the secretary-treasurer, before appointment, be admitted to the practice of law for at least three years. 1970 Op. Att'y Gen. No. 70-45.

Practice of law. — Members of the board or deputy directors (now administrative law judges) are not prohibited from the practice of law; however, resolution of the board declares its policy to be that all officials, personnel, and employees of the board devote their entire time to their duties and shall not be engaged in any occupation or business interfering or inconsistent with such duties. 1970 Op. Att'y Gen. No. 70-45.

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workmen's Compensation, §§ 701, 706 et seq., 717, 720 et seq.

34-9-48. Designation of members as appellate administrative law judges.

All members of the board are designated as appellate administrative law judges in the appellate division of the State Board of Workers' Compensation for the purposes of serving as hearing officers and exercising judicial functions in the implementation of this chapter. (Code 1933, § 114-701.14, enacted by Ga. L. 1975, p. 198, § 6; Ga. L. 1988, p. 1679, § 6; Ga. L. 1992, p. 1942, § 8.)

Law reviews. — For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992).

JUDICIAL DECISIONS

Cited in *Fieldcrest Mills, Inc. v. Richard*, 141 Ga. App. 702, 234 S.E.2d 345 (1977); *Binswanger Glass Co. v. Brooks*, 160 Ga. App. 701, 288 S.E.2d 61 (1981).

OPINIONS OF THE ATTORNEY GENERAL

Applicability of Code of Judicial Conduct. — Directors of the State Board of Workers' Compensation are subject to the Code of Judicial Conduct when serving as hearing

officers or exercising judicial functions. Op. Jud. Quals. Comm. No. 66 (January 30, 1985).

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workers' Compensation, §§ 700, 701.

34-9-48.1. Senior administrative law judge of the board.

(a) There is created the office of senior administrative law judge of the board. Any director or administrative law judge who is retired on July 1, 1991, or who shall retire after such date shall be eligible for appointment as a senior administrative law judge if such person is not engaged in the practice of law.

(b) A senior administrative law judge shall be appointed by the chairman of the State Board of Workers' Compensation and shall serve at the pleasure of the chairman. All persons appointed to the office of senior administrative law judge as provided in this Code section shall receive allowances not to exceed \$150.00 per day plus actual and necessary expenses as provided for state employees while traveling on the business of the board, but the expenses shall be sworn to by such person incurring them and shall be approved by the chairman or his designee before payment is made. Said payment shall be made from the per diem and fee allocations in the budget of the State Board of Workers' Compensation. (Code 1981, § 34-9-48.1, enacted by Ga. L. 1991, p. 405, § 1.)

34-9-49. Appointment and removal of executive director.

(a) There is created the position of executive director of the board. The executive director shall be both appointed and removed by the board. Subject to the general policy established by the board, the executive director shall:

(1) Plan, organize, direct, supervise, account for, and execute the administrative functions vested in the board; and

(2) Employ such clerical and other assistants as may be needed.

(b) All of the salaries and expenses of the board members, executive director, administrative law judges, and assistants of the board shall be audited and paid out of funds appropriated by the General Assembly as prescribed by law and in accordance with rules and regulations prescribed by the board. (Ga. L. 1972, p. 1015, § 1303; Ga. L. 1988, p. 1679, § 7.)

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workers' Compensation, § 720 et seq.

34-9-50. Appointment of secretary-treasurer; employment of clerical and other assistants; payment of salaries and expenses of members, deputy directors, and assistants.

Reserved. Repealed by Ga. L. 1988, p. 1679, § 8, effective July 1, 1988.

Editor's notes. — This Code section was based on Code 1933, § 114-701.15, enacted by Ga. L. 1975, p. 198, § 6.

34-9-51. Payment by state of traveling expenses of members, administrative law judges, and assistants.

The members, administrative law judges, and assistants of the State Board of Workers' Compensation shall be entitled to receive their actual and necessary expenses while traveling on the business of the board, either within or without the State of Georgia, but the expenses shall be sworn to by such person incurring them and shall be approved by the chairman or his designee before payment is made. (Code 1933, § 114-701.9, enacted by Ga. L. 1975, p. 198, § 6; Ga. L. 1988, p. 1679, § 9.)

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workers' Compensation, §§ 700, 702, 716.

34-9-52. Officials, personnel, and employees subject to state merit system; compensation of board members and administrative law judges.

(a) All members of the board, including the chairman thereof, shall be in the unclassified service, as defined in Code Section 45-20-2, and shall not be subject to the laws and rules and regulations of the state merit system. The salaries of all members of the board, including the chairman thereof, shall be as provided in this Code section. The chairman and each member of the board shall receive an annual salary which is equal to 90 percent of the base annual salary plus cost-of-living adjustments provided in Code Section 45-7-4 for each Judge of the Court of Appeals.

(b) Each administrative law judge, whose method of appointment, removal, and terms of office shall remain as now provided by law, shall be in the unclassified service as defined in Code Section 45-20-2 and, except for certain compensation purposes, shall not be subject to the laws, rules, and regulations of the state merit system. The compensation of the administrative law judges shall be fixed by the board based on a pay grade of the general pay schedule of the state merit system and each administrative law judge shall be eligible for increases in compensation as established on the general pay schedule, subject to the review and approval of the board.

(1) Each administrative law judge employed by the board shall be entitled to any annual cost-of-living adjustment increases provided for all state employees.

(2) All administrative law judges appointed prior to January 1, 1990, shall be placed on the same pay grade of the general pay schedule and at the step which is the equivalent of one full step above their salary as established on July 1, 1989.

(c) As a cost-of-living adjustment, the annual base salary of all of the members of the board, including the chairman thereof, shall be increased by the same percentage provided to state officials by subsection (b) of Code Section 45-7-4.

(d) All other officials, personnel, and employees of the board are placed under the state merit system and shall be subject to the laws, rules, and regulations relative to that system. (Code 1933, § 114-701.5, enacted by Ga. L. 1975, p. 198, § 6; Ga. L. 1981, p. 114, §§ 1, 2; Ga. L. 1988, p. 1679, § 10; Ga. L. 1989, p. 579, § 1; Ga. L. 1990, p. 1409, § 2.)

Cross references. — State merit system generally, § 45-20-1 et seq.

Editor's notes. — Ga. L. 1989, p. 579, § 2, not codified by the General Assembly, pro-

vided that the 1989 amendment of this Code section "shall apply to all awards or decisions of the State Board of Workers' Compensation issued on or after July 1, 1989".

OPINIONS OF THE ATTORNEY GENERAL

Power of State Personnel Board to fix salaries. — See 1970 Op. Att'y Gen. No. 70-45.

Compensation of administrative law judges. — Effective July 1, 1989, administrative law judges for the State Board of Workers' Compensation received a \$6,000.00 pay increase, provided that their salary does not exceed the statutory ceiling; however, they will not receive any additional cost of living raise. 1989 Op. Att'y Gen. 89-28.

Outside employment of court reporters. — If no conflict with their state employment exists, court reporters employed by the State Board of Workers' Compensation may continue to provide court reporting services to

the public on their own time. 1983 Op. Att'y Gen. No. 83-56.

Annual leave. — Neither the chairman nor the members of the board may currently accrue annual leave under the provisions of O.C.G.A. § 34-9-52(a) for use as terminal leave. 1991 Op. Att'y Gen. No. 91-2.

Collection of unused terminal leave on separation. — Members of the State Board of Workers' Compensation who have been serving since before July 1, 1989, may collect the unused terminal leave to which they were entitled on June 30, 1989, upon separation from their employment. 1992 Op. Att'y Gen. No. 92-7.

34-9-53. Directors emeritus of board — Eligibility for appointment; procedure for appointment.

There is created the office of director emeritus of the board. Any director of the board now or hereafter in office shall be eligible for appointment as director emeritus, provided that such member of the board has reached the age of 60 years and has also attained 20 consecutive years of service in the capacity of chairman, director, deputy director or administrative law judge,

member of the General Assembly, or a combination of consecutive service in these offices; provided, further, that not more than five years' service in the General Assembly shall be allowed as service credit under this Code section. The Governor shall appoint to the position of director emeritus anyone eligible under this Code section who shall advise the Governor in writing that he desires to resign from the office of director of the board and accept appointment as director emeritus of the board, stating in such notice the date upon which the resignation as director and appointment as director emeritus shall become effective; and upon such notice the Governor shall make such appointment effective upon the date requested, and the resignation as director of the board shall be automatically effective as of the same date as the appointment as director emeritus. (Code 1933, § 114-701.10, enacted by Ga. L. 1975, p. 198, § 6; Ga. L. 1988, p. 1679, § 11; Ga. L. 2004, p. 631, § 34.)

34-9-54. Directors emeritus of board — Term of office; compensation.

All persons appointed to the office of director emeritus of the board, as provided and created by Code Section 34-9-53, shall hold such office for life. A director emeritus shall receive an annual salary in an amount equal to two-thirds of the annual salary provided by law for a director of the board at the time of appointment of the director emeritus, such salary to be paid to such director emeritus by the board in monthly or semimonthly installments out of the funds provided by law for the operation of the board. (Code 1933, § 114-701.11, enacted by Ga. L. 1975, p. 198, § 6.)

34-9-55. Directors emeritus of board — Duties.

It shall be the duty of a director emeritus of the board to serve in an advisory capacity to the board and to lend his advice and counsel concerning matters of administration of this chapter when called upon to do so by the board; provided, however, that a director emeritus shall not participate directly or indirectly in the hearing or the decision of any cases coming before the board for decision. (Code 1933, § 114-701.12, enacted by Ga. L. 1975, p. 198, § 6.)

JUDICIAL DECISIONS

Director emeritus of the board cannot participate in rendering an award by such board, so as to make it a valid award of the board. *Hartford Accident & Indem. Co. v. Mapp*, 96 Ga. App. 517, 100 S.E.2d 742 (1957).

34-9-56. Directors emeritus of board — Filling of board vacancies caused by appointment of director emeritus.

Vacancies on the board caused by the resignation of a member of the board and his appointment as director emeritus as provided in Code

Section 34-9-53 shall be filled in the manner prescribed by law for filling vacancies otherwise occurring on the board, but no vacancy shall be deemed to exist on the board because of the death or resignation of a director emeritus as defined and created by Code Section 34-9-53. (Code 1933, § 114-701.13, enacted by Ga. L. 1975, p. 198, § 6.)

34-9-57. Creation of administrative law judge emeritus of board; eligibility for appointment; manner of appointment; compensation.

There is created the office of administrative law judge emeritus of the board. Any administrative law judge, formerly known as deputy director, of the board now or hereafter in office shall be eligible for appointment as administrative law judge emeritus, provided he has reached the age of 70 years and has either (1) attained 20 years of service in the capacity of administrative law judge or deputy director or (2) attained 20 years of total service, aggregating his service as administrative law judge or deputy director with any years of prior service as director, member of the General Assembly of Georgia or the Georgia National Guard, or as special assistant attorney general, or any combination of services in these offices. Such administrative law judge emeritus shall be eligible for appointment by the Governor in the same manner as provided for appointment of a director emeritus under Code Section 34-9-53 and shall exercise the same duties as provided in Code Section 34-9-55 for a director emeritus. All persons appointed to the office of administrative law judge emeritus as provided in this Code section shall receive an annual salary equal to one-third of the annual salary provided by law for an administrative law judge of the board at the time of appointment of the administrative law judge emeritus under this Code section, such salary to be paid by the board in semimonthly installments from funds provided by law for the operation of the board. (Code 1933, § 114-702.1, enacted by Ga. L. 1975, p. 198, § 8; Ga. L. 1988, p. 1679, § 12.)

34-9-58. Powers and duties of board as to enforcement of chapter generally.

The State Board of Workers' Compensation shall exercise all powers and perform all the duties relating to the enforcement of this chapter. (Code 1933, § 114-701.6, enacted by Ga. L. 1975, p. 198, § 6.)

JUDICIAL DECISIONS

Exclusiveness of remedies. — Tort action by workers against health care providers who billed the workers for medical services in violation of O.C.G.A. § 34-9-205 was properly dismissed since the complaints were grounded upon an alleged violation of the

Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., and therefore redress was through the workers' compensation remedies. *Mullis v. NC-CNH, Inc.*, 218 Ga. App. 332, 461 S.E.2d 237 (1995).

Scope of authority. — Insurer's argument

that there should be an exception to the rule making declaratory judgments unavailable where there was no future act to which such a judgment could be applied had to be rejected; the premise for the exception was that the State Board of Workers' Compensation (board) lacked subject matter jurisdic-

tion to resolve the underlying coverage issue, but, in fact, the board had the authority to resolve ancillary issues such as workers' compensation insurance coverage. *Builders Ins. Group, Inc. v. Ker-Wil Enters.*, 274 Ga. App. 522, 618 S.E.2d 160 (2005).

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workers' Compensation, §§ 701, 706 et seq., 717.

34-9-59. Adoption of rules of procedure.

The board is empowered and authorized to adopt proper rules of procedure to govern the exercise of its functions and hearings before the board or any of its members or administrative law judges. (Code 1933, § 114-701.7, enacted by Ga. L. 1975, p. 198, § 6; Ga. L. 1988, p. 1679, § 13.)

JUDICIAL DECISIONS

Board exceeded authority. — State Board of Workers' Compensation exceeded its rule-making authority, as a matter of law, in creating an unpublished rule of appellate

procedure that was inconsistent with O.C.G.A. § 34-9-103(b). *MARTA v. Reid*, 282 Ga. App. 877, 640 S.E.2d 300 (2006).

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workers' Compensation, §§ 718, 719.

34-9-60. Rule-making and subpoena powers; service and enforcement of subpoenas.

(a) The board may make rules, not inconsistent with this chapter, for carrying out this chapter. Processes and procedure under this chapter shall be as summary and simple as reasonably possible; provided, however, that, in any proceeding under this chapter where the parties are represented by counsel, the board may require, by rule or regulation, on forms provided by the board, the filing of statements of contentions and points of agreement. The board may promulgate policies, rules, and regulations concerning the electronic submission to and transmission from the board of documents and filings. The board, any member of the board, or any administrative law judge shall have the power for the purposes of this chapter to issue and enforce subpoenas, to administer or cause to have administered oaths, and to examine or cause to be examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute. Article 2 of Chapter 10 of Title 24 shall govern the issuance and enforcement of subpoenas pursuant to this Code section, except that the board, any

member of the board, or any administrative law judge shall carry out the functions of the court and the executive director shall carry out the functions of the clerk of the court. The board shall not, however, have the power to order imprisonment as a means of enforcing a subpoena. The board shall have the power to issue writs of fieri facias in order to collect fines imposed pursuant to this Code section and such writs may be enforced in the same manner as a similar writ issued by a superior court.

(b) In addition to the enforcement procedures provided in subsection (a) of this Code section, the superior court of the county in which the hearing is held shall, on application of the board, any member of the board, or an administrative law judge, enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers, and records. (Ga. L. 1920, p. 167, § 53; Ga. L. 1925, p. 282, § 4; Code 1933, § 114-703; Ga. L. 1973, p. 232, § 7; Ga. L. 1988, p. 1679, § 14; Ga. L. 2005, p. 1210, § 3/HB 327.)

Law reviews. — For annual survey of workers' compensation law, see 57 Mercer L. Rev. 419 (2005).

JUDICIAL DECISIONS

Constitutionality. — This section was a normal delegation of legislative authority to an administrative agency, allowing it to run its own affairs, and does not violate due process. *Davis v. Caldwell*, 53 F.R.D. 373 (N.D. Ga. 1971) (see O.C.G.A. § 34-9-60).

Rule-making powers of the board are confined and limited to procedural and administrative matters. *Southern Coop. Foundry Co. v. Drummond*, 76 Ga. App. 222, 45 S.E.2d 687 (1947).

Board rules promulgated under O.C.G.A. § 34-9-60(a) may not enlarge, reduce, or otherwise affect substantive rights of parties, but must be confined and limited to procedural and administrative matters. *Holt Serv. Co. v. Modlin*, 163 Ga. App. 283, 293 S.E.2d 741 (1982).

State Board of Workers' Compensation exceeded the board's rule-making authority, as a matter of law, in creating an unpublished rule of appellate procedure that was inconsistent with O.C.G.A. § 34-9-103(b). *MARTA v. Reid*, 282 Ga. App. 877, 640 S.E.2d 300 (2006).

Establishment of presumption of compensability constituted a substantive rule. — Board rule providing claimant with rebuttable presumption of compensability

upon employer/insurer's failure to file notice to controvert within 21-day statutory period constituted substantive and thus impermissible exercise of board's rule-making authority. *Holt Serv. Co. v. Modlin*, 163 Ga. App. 283, 293 S.E.2d 741 (1982).

Rules not to be legislative in character. — The board has the authority to adopt rules not inconsistent with the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.); such rules must not be legislative in character, but are confined and limited to procedural and administrative matters. *Department of Pub. Safety v. Orr*, 122 Ga. App. 439, 177 S.E.2d 164 (1970).

Rule fixing amount of compensation not authorized. — Board is only authorized to make rules and regulations not inconsistent with the law and with regard to matters of procedure, and may not fix by an arbitrary rule the amount of compensation payable in any case. *Southern Coop. Foundry Co. v. Drummond*, 76 Ga. App. 222, 45 S.E.2d 687 (1947).

Rule promulgated by the board, which precluded a showing that a partial loss of the distal phalanx resulted in only a partial disability, was an attempt by the board to legislate as to the measure of compensation

payable, and as such was invalid. *Southern Coop. Foundry Co. v. Drummond*, 76 Ga. App. 222, 45 S.E.2d 687 (1947).

Power to direct claimant to report earnings. — The board, in administering the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), is empowered to direct claimant to furnish reports of earnings from other employment to an employer and insurer obligated to make payments to the claimant for partial disability, or in any situation where the information would serve a

needful purpose. *Hopper v. Continental Ins. Co.*, 121 Ga. App. 850, 176 S.E.2d 109 (1970).

Appellate court cannot take judicial notice of rule adopted by the commission (now board) on any given subject. *Crouch v. Fisher*, 43 Ga. App. 484, 159 S.E. 746 (1931).

Cited in *Whisenant v. Bostick*, 61 Ga. App. 447, 6 S.E.2d 146 (1939); *VMW, Inc. v. Foster*, 185 Ga. App. 405, 364 S.E.2d 301 (1987).

OPINIONS OF THE ATTORNEY GENERAL

Charge for summoning of witness by sheriff at request of the board, see 1965-66 Op. Att'y Gen. 66-75.

Summoning witness is different from serving copy of process and returning original. 1965-66 Op. Att'y Gen. No. 66-75.

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workers' Compensation, §§ 718, 719.

34-9-61. Publication of blank forms and literature; publication of tabulations of accident reports.

(a) The board shall prepare and cause to be printed and, upon request, shall furnish free of charge to any employee or employer such blank forms and literature as it shall deem necessary to facilitate or promote the efficient administration of this chapter.

(b) The board shall tabulate the accident reports received from employers in accordance with Code Section 34-9-12 and shall publish the same in its annual report and as often as it may deem advisable, in such detailed or aggregate form as it may deem best. The name of the employer or employee shall not appear in such publications, and the employers' reports themselves shall be private records of the board and shall not be open for public inspection except for the inspection of the parties directly involved, and then only to the extent of such interest. These reports shall not be used as evidence against any employer in any action at law brought by any employee for the recovery of damages or in any proceeding under this chapter. (Ga. L. 1920, p. 167, § 54; Code 1933, § 114-704; Ga. L. 1982, p. 3, § 34.)

JUDICIAL DECISIONS

Judicial notice of portion of report proper. — Administrative law judge's taking "judicial notice" of subsection C, of WC-1 form, the date of filing of employees' notice to controvert, did not violate O.C.G.A.

§ 34-9-61(b). *Hardee's v. Bailey*, 180 Ga. App. 332, 349 S.E.2d 211 (1986).

Exclusion of report proper. — The trial court did not abuse its discretion in excluding the "First Report" accident report filed

with the state board, since use of the report by the plaintiff as evidence against the defendant was barred by the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. *Mays v. Farah U.S.A., Inc.*, 236 Ga. App. 1, 510 S.E.2d 868 (1999).

Cited in *Jones v. American Mut. Liab. Ins. Co.*, 45 Ga. App. 392, 165 S.E. 167 (1932); *Bragan v. Lumbermen's Mut. Cas. Co.*, 59 Ga. App. 862, 2 S.E.2d 189 (1939); *Spengler v. Employers Com. Union Ins. Co.*, 131 Ga. App. 443, 206 S.E.2d 693 (1974).

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workers' Compensation, §§ 718, 719.

34-9-62. Limitations on authority of Commissioner of Labor with respect to officers or employees of board.

Reserved. Repealed by Ga. L. 1988, p. 1679, § 15, effective July 1, 1988.

Editor's notes. — This Code section was based on Code 1933, § 114-701.16, enacted by Ga. L. 1975, p. 198, § 6.

34-9-63. Proration of board's expenses; required annual reports and statements; audit of board; collection of delinquent assessments.

(a) The total expenses of the board shall be prorated among the qualified insurance companies writing compensation insurance in this state, hereinafter referred to as insurers, and employers subject to the provisions of this chapter whose workers' compensation insurance coverage is not written by these companies, hereinafter referred to as self-insurers, including, but not limited to, the state, counties, municipalities, and any political subdivisions or authorities thereof. Such proration shall be on the basis, in the case of the insurers, of the gross earned premium and, in the case of self-insurers, on the basis of the amount of premium which they would have had to pay in the event they had insured their liability with an insurer; provided, however, the board may establish by rule a minimum assessment, based upon the administrative cost necessary to provide licensure support and basic computer management reports for each insurer or self-insurer, to be paid by insurers and self-insurers whose actual prorated assessment otherwise would be less than the minimum assessment. Prorated assessments based on the experience of the previous calendar year shall be made on July 1, based on the budget of the board for that fiscal year.

(b) Sworn reports of the compensation premium writing of the insurers and sworn payroll statements of others for the preceding calendar year shall be filed with the board not later than March 1 of each year.

(c) The books of the board shall be audited annually and a copy of such audit shall be available for inspection during normal business hours by all parties among whom the expenses of the board are prorated. All moneys assessed against insurers and others under this chapter shall be paid into

the state treasury and held as a special fund solely for the operation of the board to administer this chapter.

(d) The Attorney General shall enforce collection against insurers and others failing to comply with this Code section, based on reports of violation furnished by the board and investigation; the costs of collection shall be borne by the delinquent party.

(e) Any insurer, private employer, or governing authority of a public employer that violates any provision of this Code section shall be guilty of a misdemeanor. (Ga. L. 1922, p. 77, § 2; Code 1933, § 114-717; Ga. L. 1974, p. 1143, § 11; Ga. L. 1988, p. 1679, § 16.)

Cross references. — Punishment for misdemeanors generally, § 17-10-3.

JUDICIAL DECISIONS

Cited in Petty v. Mayor of College Park, 63 Ga. App. 455, 11 S.E.2d 246 (1940).

OPINIONS OF THE ATTORNEY GENERAL

Payment of assessments into general fund. — Assessments made by the board pursuant to this section must be paid into the general fund of the state treasury, and the operating

expenses of the board may be funded only through an appropriation by the General Assembly. 1974 Op. Att'y Gen. No. 74-62 (see O.C.G.A. § 34-9-63).

ARTICLE 3

PROCEDURE

Law reviews. — For note on 1995 amendments of Code sections in this article, see 12 Ga. St. U.L. Rev. 280 (1995).

PART 1

CLAIMS AND NOTICE OF ACCIDENT

JUDICIAL DECISIONS

Essential elements which must be shown on an original award under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) are: (1) that the employee is covered by the law; (2) that there was an accidental injury; (3) that it arose out of and in the course of the employment; and (4) that the employee is entitled to benefits provided by the law. In considering a claim under the Act, the first three elements are preliminary

questions for decision; and if either is decided adversely to the claimant, the claimant is not entitled to anything under the Act and consideration of the claim is ended. Chevrolet Div., GMC v. Dempsey, 212 Ga. 560, 93 S.E.2d 703 (1956).

Distinction between claims based on accident, change of condition, and new accident. — See Dairymen, Inc. v. Wood, 162 Ga. App. 430, 291 S.E.2d 763 (1982).

RESEARCH REFERENCES

ALR. — Applicability of statutes of limitations to action or proceeding under Workmen's Compensation Acts, 40 ALR 495.

State workmen's compensation proceeding as within removal statute, 60 ALR2d 1262.

Workmen's compensation: recovery for discharge in retaliation for filing claim, 63 ALR3d 979.

Recovery for discharge from employment in retaliation for filing workers' compensation claim, 32 ALR4th 1221.

34-9-80. Procedure for giving notice of accident; requirements of written notice; effect of failure to give notice.

Every injured employee or his representative shall, immediately on the occurrence of any accident or as soon thereafter as practicable, give or cause to be given to the employer, his agent, representative, or foreman, or the immediate superior of the injured employee a notice of the accident. This notice shall be given by the employee either in person or by his representative, and until such notice is given the employee shall not be entitled to any physician's fees nor to any compensation which may have accrued under the terms of this chapter prior to the giving of such notice. In the event that, within 30 days after the accident, neither the employee nor his representative has given a notice in person to the employer, his agent, representative, or foreman, or to the immediate superior of the injured employee, a written notice must be given. This written notice will not be required where an injured employee or his representative has given notice in person to the employer, his agent, representative, or foreman, or to the immediate superior of the injured employee. No compensation will be payable unless such notice, either oral or written, is given within 30 days after the occurrence of an accident or within 30 days after death resulting from an accident unless it can be shown that the employee had been prevented from doing so by reason of physical or mental incapacity, or by fraud or deceit, or that the employer, his agent, representative, or foreman, or the immediate superior of the injured employee had knowledge of the accident, or unless a reasonable excuse is made to the satisfaction of the board for not giving such notice and it is reasonably proved to the satisfaction of the board that the employer had not been prejudiced thereby. (Ga. L. 1920, p. 167, §§ 23, 24; Ga. L. 1923, p. 92, §§ 1, 2; Code 1933, § 114-303.)

Law reviews. — For article discussing injury as a result of aggravation, see 14 Ga. St. B.J. 135 (1978). For annual survey of work-

ers' compensation, see 38 Mercer L. Rev. 431 (1986).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION NOTICE

1. NATURE AND SUFFICIENCY

2. EXAMPLES AND ILLUSTRATIONS

A. NOTICE INSUFFICIENT

B. NOTICE SUFFICIENT

REASONABLE EXCUSE

1. DETERMINATION BY BOARD

2. GROUNDS FOR EXCUSE

General Consideration

Purpose. — The purpose of this section was undoubtedly to prevent the belated filing of claims which might work a fraud or injustice upon the employer. *Federated Mut. Implement & Hdwe. Ins. Co. v. Elliott*, 88 Ga. App. 266, 76 S.E.2d 568 (1953); *Kresge v. Holley*, 104 Ga. App. 144, 121 S.E.2d 182 (1961) (see O.C.G.A. § 34-9-80).

The purpose of the notice requirement is to put the employer on notice of the injury so that it may make an investigation if it sees fit to do so. *Carey v. Travelers Ins. Co.*, 133 Ga. App. 657, 212 S.E.2d 13 (1975).

Liberal construction. — A liberal construction of O.C.G.A. § 34-9-80 is necessary to effectuate the humane purposes of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Jones v. Fieldcrest Mills, Inc.*, 162 Ga. App. 848, 292 S.E.2d 523 (1982).

Notice prerequisite for compensation. — This section provided in substance that every injured employee shall within 30 days give to the employer notice of the accident or no compensation shall be payable. *Federated Mut. Implement & Hdwe. Ins. Co. v. Elliott*, 88 Ga. App. 266, 76 S.E.2d 568 (1953) (see O.C.G.A. § 34-9-80).

Compliance with the notice provisions of this section was a necessary prerequisite to payment of compensation. *Complete Auto Transit, Inc. v. Reavis*, 105 Ga. App. 364, 124 S.E.2d 491 (1962); *Crews v. GMC*, 107 Ga. App. 592, 130 S.E.2d 925 (1963); *Griffith v. Coggins Granite Indus., Inc.*, 114 Ga. App. 537, 152 S.E.2d 15 (1966); *Jackson v. U.S. Fid. & Guar. Co.*, 119 Ga. App. 111, 166 S.E.2d 426 (1969) (see O.C.G.A. § 34-9-80).

Effect of failure to give notice. — Failure to give notice immediately or as soon after the accident as practicable disqualifies the claimant for physician's fees and compensation accruing prior to the claimant's giving notice. *Federated Ins. Group v. Pitts*, 118 Ga. App. 356, 163 S.E.2d 841 (1968).

Failure of an employee to prove fulfill-

ment of the notice requirements of O.C.G.A. § 34-9-80 does not result in a lack of jurisdiction of the matter, but instead results in a denial of the claim for compensation. *Dugger v. North Bros. Co.*, 172 Ga. App. 622, 323 S.E.2d 907 (1984).

Effect of defect in notice. — No defect or inaccuracy in the notice shall be a bar to compensation unless the employer shall prove that the employer's interest was prejudiced thereby, and then only to the extent of the prejudice. *Coulter v. Royal Indem. Co.*, 95 Ga. App. 124, 97 S.E.2d 358, rev'd on other grounds, 213 Ga. 277, 98 S.E.2d 899 (1957).

New injury. — Under the broad definition of the term "accident" as used in the workers' compensation law, if the employee continued to perform the duties of the employment and thereby aggravated the initial injury, this would amount to a new "injury by accident." *N.L. Indus. v. Childs*, 150 Ga. App. 866, 258 S.E.2d 667 (1979).

Notice required where original injury becomes disabling. — To hold that an employee who gives an employer notice of an employee's original accident but who continues to work to the point that the injury the employee received in the original accident results in a disability and who then files a disability claim within one year of the date of the original accident itself will be denied compensation unless the employee gives the employer a second notice that the original injury has become disabling would penalize "a claimant who attempted to continue working even though he was injured to some extent." *Mason, Inc. v. Gregory*, 161 Ga. App. 125, 291 S.E.2d 30 (1982).

If the employer is given notice of the employee's original accident and the employee's condition gradually worsens to the point of disability and a claim is filed for this subsequently occurring disability within one year of the original accident itself, the requirements of both O.C.G.A. §§ 34-9-80 and 34-9-82 are met. *Mason, Inc. v. Gregory*, 161 Ga. App. 125, 291 S.E.2d 30 (1982).

General Consideration (Cont'd)

Burden on employee. — The burden is on the employee to give requisite notice, or prove that for justifiable reason notice could not be given within the proper time, or that the employer was otherwise aware of the accident. Neither that notice nor that knowledge is to be presumed but remains a matter of proof resting upon the claimant. *Schwartz v. Greenbaum*, 138 Ga. App. 695, 227 S.E.2d 479 (1976); *Barron v. Pacific Employers Ins. Co.*, 149 Ga. App. 113, 253 S.E.2d 777 (1979).

This section did not place any burden upon the employer to become aware that its employee has experienced an accident. *Schwartz v. Greenbaum*, 138 Ga. App. 695, 227 S.E.2d 479 (1976); *Barron v. Pacific Employers Ins. Co.*, 149 Ga. App. 113, 253 S.E.2d 777 (1979) (see O.C.G.A. § 34-9-80).

Burden not removed by claiming employer had actual knowledge. — The burden of giving notice was placed by the statute on the claimant, and it is not removed under the exception dealing with knowledge on the part of the employer without proof that the employer knew, or had reasonable opportunity to know, that an accident of which the employer had knowledge caused an injury to the claimant. *Kresge v. Holley*, 104 Ga. App. 144, 121 S.E.2d 182 (1961).

When 30-day period begins to run. — The 30-day notice period does not begin to run until the day when the claimant first had reason to realize claimant had sustained a work related injury. *Commercial Union Ins. Co. v. Verner*, 150 Ga. App. 13, 256 S.E.2d 603 (1979).

Date of injury as date worked stopped. — Even if the date of injury is found to be the date of cessation of work, the employee is required to give notice that the employee's reason for ceasing work is because of a job-related injury. *Carey v. Travelers Ins. Co.*, 133 Ga. App. 657, 212 S.E.2d 13 (1975); *Mason, Inc. v. Gregory*, 161 Ga. App. 125, 291 S.E.2d 30 (1982).

Gradually acquired injury. — The date of a gradually acquired injury should be set at the first time the injury becomes extensive enough either to prevent the claimant from working or to constitute a disability as itemized in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Employers Mut.*

Liab. Ins. Co. v. Shipman, 108 Ga. App. 184, 132 S.E.2d 568 (1963).

If a claim is based on a gradual injury and where the evidence authorizes it, the date of the accident may be found to be the date the employee is required to cease work. *Carey v. Travelers Ins. Co.*, 133 Ga. App. 657, 212 S.E.2d 13 (1975); *Mason, Inc. v. Gregory*, 161 Ga. App. 125, 291 S.E.2d 30 (1982).

Claims based on new accidents asserted against current employer. — When the initial claim is based upon a "new accident" theory, it must be asserted against that employer in whose employment the proximate cause of the "new accident" — the aggravation of the original uncompensated injury — occurred. *Slattery Assocs. v. Hufstetler*, 161 Ga. App. 389, 288 S.E.2d 654 (1982).

Cited in Maryland Cas. Co. v. England, 34 Ga. App. 354, 129 S.E. 446 (1925); *Blanchard v. Savannah River Lumber Co.*, 40 Ga. App. 416, 149 S.E. 793 (1929); *State Hwy. Dep't v. Turner*, 198 Ga. 795, 32 S.E.2d 805 (1945); *Roberts v. Burnette*, 72 Ga. App. 775, 35 S.E.2d 201 (1945); *Shealy v. Benton*, 82 Ga. App. 514, 61 S.E.2d 582 (1950); *GMC v. Pruitt*, 83 Ga. App. 620, 64 S.E.2d 339 (1951); *Davison-Paxon Co. v. Ford*, 88 Ga. App. 890, 78 S.E.2d 257 (1953); *Padgett v. American Mut. Liab. Ins. Co.*, 96 Ga. App. 463, 100 S.E.2d 150 (1957); *Employers Mut. Liab. Ins. Co. v. Holloway*, 98 Ga. App. 265, 105 S.E.2d 370 (1958); *Patterson v. Employer's Mut. Liab. Ins. Co.*, 99 Ga. App. 325, 108 S.E.2d 146 (1959); *Rhodes v. Liberty Mut. Ins. Co.*, 101 Ga. App. 642, 115 S.E.2d 363 (1960); *New Amsterdam Cas. Co. v. Kidd*, 101 Ga. App. 910, 115 S.E.2d 427 (1960); *Davis v. Liberty Mut. Ins. Co.*, 110 Ga. App. 389, 138 S.E.2d 603 (1964); *Hyde v. Atlantic Steel Co.*, 112 Ga. App. 136, 144 S.E.2d 232 (1965); *Fireman's Fund Am. Ins. Co. v. Hester*, 115 Ga. App. 39, 153 S.E.2d 622 (1967); *Duchess Chenilles, Inc. v. Goswick*, 116 Ga. App. 384, 157 S.E.2d 304 (1967); *Mallory v. American Cas. Co.*, 116 Ga. App. 477, 157 S.E.2d 775 (1967); *Smith v. Columbus Transp.*, 116 Ga. App. 432, 157 S.E.2d 879 (1967); *Hoard v. Phoenix Assurance Co.*, 117 Ga. App. 383, 160 S.E.2d 621 (1968); *Savannah Elec. & Power Co. v. Edenfield*, 118 Ga. App. 531, 164 S.E.2d 366 (1968); *Aetna Cas. & Sur. Co. v. Davidson*, 121 Ga. App. 669, 175 S.E.2d 91 (1970); *Aetna Cas. & Sur. Co. v. Nix*, 122 Ga. App.

878, 179 S.E.2d 97 (1970); *Georgia Cas. & Sur. Co. v. Cochran*, 127 Ga. App. 55, 192 S.E.2d 547 (1972); *Employers Commercial Union Ins. Co. v. Offutt*, 129 Ga. App. 270, 199 S.E.2d 406 (1973); *Poston v. St. Paul Ins. Co.*, 131 Ga. App. 745, 206 S.E.2d 728 (1974); *Clark v. Fireman's Fund Ins. Co.*, 131 Ga. App. 809, 207 S.E.2d 222 (1974); *Continental Ins. Co. v. Peardon*, 132 Ga. App. 162, 207 S.E.2d 658 (1974); *Liberty Mut. Ins. Co. v. Carnley*, 135 Ga. App. 599, 218 S.E.2d 307 (1975); *Florida Plywood, Inc. v. Boyette*, 140 Ga. App. 383, 231 S.E.2d 79 (1976); *Pike v. Greyhound Bus Lines*, 140 Ga. App. 863, 232 S.E.2d 143 (1977); *Home Indem. Co. v. Howard*, 143 Ga. App. 327, 238 S.E.2d 288 (1977); *Williams v. Travelers Ins. Co.*, 153 Ga. App. 443, 265 S.E.2d 354 (1980); *West Point Pepperell v. Gordon*, 163 Ga. App. 837, 296 S.E.2d 155 (1982); *Whitaker v. Fieldcrest Mills, Inc.*, 174 Ga. App. 533, 330 S.E.2d 761 (1985); *Harper v. L & M Granite Co.*, 197 Ga. App. 157, 397 S.E.2d 739 (1990); *Satilla Regional Medical Ctr. v. Dixon*, 238 Ga. App. 619, 518 S.E.2d 723 (1999); *Georgia Pac. Corp. v. Cross*, 275 Ga. App. 664, 621 S.E.2d 586 (2005).

Notice

1. Nature and Sufficiency

Notice need not be given with a view to claiming compensation. *Skinner Poultry Co. v. Mapp*, 98 Ga. App. 772, 106 S.E.2d 825 (1958); *Employers Mut. Liab. Ins. Co. v. Shipman*, 108 Ga. App. 184, 132 S.E.2d 568 (1963); *Bryant v. J.C. Distribs., Inc.*, 108 Ga. App. 401, 133 S.E.2d 109 (1963); *Schwartz v. Greenbaum*, 236 Ga. 476, 224 S.E.2d 38 (1976); *Schwartz v. Greenbaum*, 138 Ga. App. 695, 227 S.E.2d 479 (1976); *McElhannon v. St. Paul Fire & Marine Ins. Co.*, 141 Ga. App. 169, 233 S.E.2d 28 (1977); *Home Indem. Co. v. Brown*, 141 Ga. App. 563, 234 S.E.2d 97 (1977); *Mason, Inc. v. Gregory*, 161 Ga. App. 125, 291 S.E.2d 30 (1982); *Jones v. Fieldcrest Mills, Inc.*, 162 Ga. App. 848, 292 S.E.2d 523 (1982); *State v. Mitchell*, 177 Ga. App. 333, 339 S.E.2d 384 (1985); *Wilson v. Manville Bldg. Materials Prods., Inc.*, 179 Ga. App. 408, 346 S.E.2d 851 (1986).

Required notice. — Notice required by this section need only be that notice that will put the employer on notice to make an

investigation if the employer sees fit to do so. *Fountain v. Georgia Marble Co.*, 95 Ga. App. 21, 96 S.E.2d 656, *aff'd*, 213 Ga. 352, 99 S.E.2d 144 (1957); *Skinner Poultry Co. v. Mapp*, 98 Ga. App. 772, 106 S.E.2d 825 (1958); *Employers Mut. Liab. Ins. Co. v. Shipman*, 108 Ga. App. 184, 132 S.E.2d 568 (1963); *Bryant v. J.C. Distribs., Inc.*, 108 Ga. App. 401, 133 S.E.2d 109 (1963); *Employers Mut. Liab. Ins. Co. v. Dyer*, 108 Ga. App. 623, 134 S.E.2d 49 (1963); *Cofield v. Liberty Mut. Ins. Co.*, 110 Ga. App. 225, 138 S.E.2d 115 (1964); *Schwartz v. Greenbaum*, 236 Ga. 476, 224 S.E.2d 38 (1976); *Schwartz v. Greenbaum*, 138 Ga. App. 695, 227 S.E.2d 479 (1976); *McElhannon v. St. Paul Fire & Marine Ins. Co.*, 141 Ga. App. 169, 233 S.E.2d 28 (1977); *Home Indem. Co. v. Brown*, 141 Ga. App. 563, 234 S.E.2d 97 (1977); *Mason, Inc. v. Gregory*, 161 Ga. App. 125, 291 S.E.2d 30 (1982); *Jones v. Fieldcrest Mills, Inc.*, 162 Ga. App. 848, 292 S.E.2d 523 (1982); *State v. Mitchell*, 177 Ga. App. 333, 339 S.E.2d 384 (1985); *Wilson v. Manville Bldg. Materials Prods., Inc.*, 179 Ga. App. 408, 346 S.E.2d 851 (1986) (see O.C.G.A. § 34-9-80).

This section did not require that notice of an injury or accident must show that it "arose out of and in the course of the employment." *Schwartz v. Greenbaum*, 236 Ga. 476, 224 S.E.2d 38 (1976); *McElhannon v. St. Paul Fire & Marine Ins. Co.*, 141 Ga. App. 169, 233 S.E.2d 28 (1977); *Wilson v. Manville Bldg. Materials Prods., Inc.*, 179 Ga. App. 408, 346 S.E.2d 851 (1986) (see O.C.G.A. § 34-9-80).

Required notice of injury need not show that injury arose out of and in the course of employment. *Jones v. Fieldcrest Mills, Inc.*, 162 Ga. App. 848, 292 S.E.2d 523 (1982).

Notice need not state injury occurred on job. — While the employee must timely inform an employer of the accident or injury in order to satisfy the notice requirement of O.C.G.A. § 34-9-80, it is not necessary for the employee to state that the accident or injury occurred on the job. *Gossage v. City of Dalton Fire Dep't*, 257 Ga. 430, 360 S.E.2d 249 (1987).

Notice must be of an injury by accident. *Snyder v. Employers Mut. Liab. Ins. Co.*, 115 Ga. App. 111, 153 S.E.2d 736 (1967).

Undiscovered injury. — It is illogical and unreasonable to hold that an employer has

Notice (Cont'd)**1. Nature and Sufficiency (Cont'd)**

sufficient notice of the existence of an injury that has not yet been discovered by either the employee or the employee's treating physician. *William L. Bonnell Co. v. McKoon*, 184 Ga. App. 516, 361 S.E.2d 680 (1987).

Statute does not require both personal and written notice as a condition of compensation; if the employee gives notice, personal or written, within 30 days and shows that the employee's accidental injury arose from employment, the employee is entitled to compensation. *Federated Ins. Group v. Pitts*, 118 Ga. App. 356, 163 S.E.2d 841 (1968).

Form not prescribed. — While it is not required that notice of the accident be in any prescribed form, there must be at least enough information about it imparted to put the employer on notice to make an investigation if the employer desires to do so. *Complete Auto Transit, Inc. v. Reavis*, 105 Ga. App. 364, 124 S.E.2d 491 (1962).

The notice need not be in a particular format, but the employee carries the burden of giving timely notice, which will indicate to the proper statutory recipient thereof that there exists at least a possibility that the injury complained of may be job-related so that the employer may make an investigation if it sees fit to do so. *Impress Communications, Inc. v. Stanley*, 202 Ga. App. 226, 414 S.E.2d 238 (1991), cert. denied, 202 Ga. App. 906, 414 S.E.2d 238 (1992).

Verbal notice was in compliance with the provisions of this section. *Reliance Ins. Co. v. Oliver*, 117 Ga. App. 466, 160 S.E.2d 615 (1968) (see O.C.G.A. § 34-9-80).

Notice may be given to plant manager. — Notice to an employee who receives reports of injuries for the employer and "if it is something showing, looks like it is bad or anything" reports such injuries to the plant manager or the manager's assistant is notice to an "agent" or "representative" as is required by this section. *Cofield v. Liberty Mut. Ins. Co.*, 110 Ga. App. 225, 138 S.E.2d 115 (1964) (see O.C.G.A. § 34-9-80).

Notice to foreman. — Under this section, a foreman in charge of the special work in which the employee is engaged is an "agent" or "representative" within the meaning of that section, whose knowledge of an acci-

dent, derived from the employee, within a day or two thereafter, makes written notice by the employee within 30 days, as provided by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), unnecessary. *Van Treeck v. Travelers Ins. Co.*, 157 Ga. 204, 121 S.E. 215 (1924) (see O.C.G.A. § 34-9-80).

Notice to immediate superior. — The evidence authorized the inference that the representative of the injured employee immediately gave notice of the injury to the immediate superior of the injured employee, and therefore a written notice to the employer was not necessary. *Ocean Accident & Guarantee Corp. v. Martin*, 35 Ga. App. 504, 134 S.E. 174 (1926).

Where an employee gave timely notice to the employee's immediate supervisor of an accident and such notice was sufficient to allow the employer to investigate, if the employer saw fit to do so, such notice complied with this section. *Liberty Mut. Ins. Co. v. Elrod*, 102 Ga. App. 548, 116 S.E.2d 890 (1960) (see O.C.G.A. § 34-9-80).

Telling fellow employee not sufficient. — Mention of the fact that claimant had hurt claimant's back in connection with lifting, made to a fellow employee rather than to claimant's foreman or superior, was not sufficient notice. *Jackson v. U.S. Fid. & Guar. Co.*, 119 Ga. App. 111, 166 S.E.2d 426 (1969).

2. Examples and Illustrations**A. Notice Insufficient**

Employer's knowledge of employee's general state of health. — Employer's knowledge of the general state of an employee's health on what turned out to be the employee's last working day did not fulfill the notice requirements of O.C.G.A. § 34-9-80. *Dugger v. North Bros. Co.*, 172 Ga. App. 622, 323 S.E.2d 907 (1984).

Mere fact that claimant's supervisor gave claimant a slip to go to the doctor is not an admission of notice and the fact that the doctor may have found claimant to be suffering from a condition that may have resulted from an accident was not sufficient to constitute the notice which the statute requires. *Complete Auto Transit, Inc. v. Reavis*, 105 Ga. App. 364, 124 S.E.2d 491 (1962); *Jackson v. U.S. Fid. & Guar. Co.*, 119 Ga. App. 111, 166 S.E.2d 426 (1969).

Vague, contradictory testimony by claimant. — Where the claimant's testimony, the only evidence offered to prove notice of accident, was equivocal, vague and contradictory, and showed that no notice of injury from the accident was given at all, the finding of the director, that the notice required by this section was not given cannot be said to be unsupported by the evidence. *Carden v. Liberty Mut. Ins. Co.*, 108 Ga. App. 829, 134 S.E.2d 879 (1964) (see O.C.G.A. § 34-9-80).

B. Notice Sufficient

Notice must alert employer to possibility of job-related injury. — The burden is clearly on the employee to give such notice as will alert the employer to the possibility of a job-related injury and to prompt the latter to make such investigation as the employer may see fit. Such notice need not be in a particular format, and need not state that it is being given for the express purpose of filing a workers' compensation claim. Either the language or the context of the notice, however, must be such as to indicate to the employer (or its agent or appropriate supervisory personnel) that there exists at least a possibility that the injury complained of may be job-related. *Carroll v. Dan River Mills, Inc.*, 169 Ga. App. 558, 313 S.E.2d 741 (1984).

Actual verbal notice. — Where the record demonstrates that claimant's injury was sustained on the day claimant ceased work, that the employer had specific knowledge of the toll claimant's work was taking on claimant's back before claimant's injury occurred and became aware, shortly after claimant's admission to the hospital, that claimant had suffered a slipped disk, the employer had sufficient notice of the injury to warrant an investigation as soon as it became aware that claimant could no longer perform claimant's work duties due to claimant's injury. This notice occurred after the injury and within the statutory time period. *Impress Communications, Inc. v. Stanley*, 202 Ga. App. 226, 414 S.E.2d 238 (1991), cert. denied, 202 Ga. App. 906, 414 S.E.2d 238 (1992).

Delivery of temporary medical limitation slip to supervisor after treatment by the company doctor in the employer's clinic was sufficient to authorize a finding of notice as

required by this section. *Employers Mut. Liab. Ins. Co. v. Dyer*, 108 Ga. App. 623, 134 S.E.2d 49 (1963) (see O.C.G.A. § 34-9-80).

Since the accident took place during working hours and was witnessed by fellow employees, the police were immediately notified, an ambulance was sent, and the employee died on the way to the hospital, there is sufficient circumstantial evidence in the absence of any indication to the contrary that the employer had knowledge of the accident under the exception to the provisions of this section. *Insurance Co. of N. Am. v. Ross*, 122 Ga. App. 760, 178 S.E.2d 762 (1970) (see O.C.G.A. § 34-9-80).

Evidence that employee reported injury to supervisor "when he was able to get around after his injury" where that employee was confined to the hospital for five weeks is sufficient to support the findings of the deputy director that the employer had timely notice of the injury. *U.S. Fire Ins. Co. v. Phillips*, 124 Ga. App. 7, 183 S.E.2d 13 (1971).

Official of employer having knowledge. — Where there was an official of the employer who had knowledge of the circumstances surrounding the deceased's death, the employer received notice of the accident as required by this section. *Georgia Power Co. v. Crutchfield*, 125 Ga. App. 488, 188 S.E.2d 140 (1972) (see O.C.G.A. § 34-9-80).

Investigation by foreman. — Where the evidence showed that the foreman of the two employees ordered them to report to work in another city the next day; knew that they were rooming in that city; found out on the day of the accident that they were injured on a direct route from their job to their lodging place and their next job site; talked with their fellow employees, who were following their automobile and who arrived shortly after the collision; and visited one of them in the hospital, discussing the details of the collision with the injured employee, the victims did not have to give formal notice, because the facts constituted knowledge of the accident under this section and were sufficient to put the employer on notice of the accident. *Wilson v. Georgia Power Co.*, 128 Ga. App. 352, 196 S.E.2d 693 (1973) (see O.C.G.A. § 34-9-80).

An employee's statement to a supervisor of the employee's symptoms and the employee's request for hospitalization was sufficient

Notice (Cont'd)

2. Examples and Illustrations (Cont'd)

B. Notice Sufficient (Cont'd)

notice of an accident. *American Motorists Ins. Co. v. Brown*, 128 Ga. App. 813, 198 S.E.2d 348 (1973).

Conversations between claimant and the foreman and a company nurse in which claimant attributed claimant's back pains to driving a piece of defective equipment is sufficient to constitute notice. *West Point Pepperell, Inc. v. Crow*, 129 Ga. App. 112, 198 S.E.2d 905 (1973).

Facts which arose through the doctor's testimony upon deposition were sufficient to put the employer on notice of the injury so that the employer could have made an investigation if the employer saw fit to do so. *U.S. Asbestos v. Hammock*, 140 Ga. App. 378, 231 S.E.2d 792 (1976).

Plaintiff's statement to a supervisor that plaintiff was becoming sick from working in a frozen food area, and that plaintiff was too ill to complete a work day, was sufficient notice of plaintiff's injury. *Colonial Stores, Inc. v. Hambrick*, 176 Ga. App. 544, 336 S.E.2d 617 (1985).

Notice prior to injury sufficient. — The claimant's January 13, 1989, statement that claimant's back was about to give out was not premature notice of the February 3 injury but merely served to inform the employer that claimant's back problem was work related. *Impress Communications, Inc. v. Stanley*, 202 Ga. App. 226, 414 S.E.2d 238 (1991), cert. denied, 202 Ga. App. 906, 414 S.E.2d 238 (1992).

Complaints to supervisors and calling out to make doctor's visit. — Although employee was unaware that the employee suffered a new accident and could therefore file a claim for workers' compensation, there was some evidence to indicate that the employer at least knew of the possibility that a job-related injury occurred, where the employer was aware of the employee's previous back injury; that the employee had been on a medical leave of absence due to the employee's back injury for about six months; that the employee returned to the regular work the employee did prior to the initial injury; that the employee had a back problem during the time the employee was working for employer; that the employee's super-

visor heard the employee mention a back problem and also heard several other employees mention it; and that the employee called in and left a message on the tape recorder that the employee would be out of work because the employee was having trouble with the employee's back again and was going back to the doctor. Therefore, the ruling of the superior court reversing the board's finding of sufficient notice was in error. *Wilson v. Manville Bldg. Materials Prods., Inc.*, 179 Ga. App. 408, 346 S.E.2d 851 (1986).

Since claimant timely stated that claimant had "sneezed and hurt his back", the employer then had the opportunity to make additional inquiries relating to the injury if it cared to do so, and the notice was sufficient under O.C.G.A. § 34-9-80. *Gossage v. City of Dalton Fire Dep't*, 257 Ga. 430, 360 S.E.2d 249 (1987).

Notice requirements met. — Where there was evidence to authorize findings that appellant-employer knew of appellee's pre-existing injury and of worsening of appellee's condition so that it could have made investigation had it chosen to do so, this was sufficient to meet the notice requirements of O.C.G.A. § 34-9-80. *Dairymen, Inc. v. Wood*, 162 Ga. App. 430, 291 S.E.2d 763 (1982).

Recovery despite statements that injury was not work-related. — Claimant's statements that the injury was not work related do not preclude claimant's recovery as there was evidence of at least a possibility that the injury was job related. *Impress Communications, Inc. v. Stanley*, 202 Ga. App. 226, 414 S.E.2d 238 (1991), cert. denied, 202 Ga. App. 906, 414 S.E.2d 238 (1992).

Admission of notice. — Where physician's testimony implied that within 30 days of the injury, the employer's representative told the physician about the accident and the employee's injury on the job, such a statement would constitute an admission by the employer inconsistent with its contention of no notice and would be evidence of the employer's knowledge. *Employers Ins. Co. v. Goss*, 107 Ga. App. 249, 129 S.E.2d 545 (1963).

Reasonable Excuse

1. Determination by Board

Whether or not the failure to give such notice comes within one of the excep-

tions set forth by the statute, so as to prevent such failure from operating as a bar to an award of compensation, is a question of fact, to be determined by the board, and its finding upon such a question of fact, if supported by the evidence, is, in the absence of fraud, conclusive. *Federated Mut. Implement & Hdwe. Ins. Co. v. Elliott*, 88 Ga. App. 266, 76 S.E.2d 568 (1953); *Dill v. Ocean Accident & Guarantee Co.*, 95 Ga. App. 60, 96 S.E.2d 638 (1957); *Kresge v. Holley*, 104 Ga. App. 144, 121 S.E.2d 182 (1961).

Reasonableness of the excuse offered for failure to give the notice is a matter for determination by the board. *Hardware Mut. Cas. Co. v. Sprayberry*, 69 Ga. App. 196, 25 S.E.2d 74 (1943); *Anderson v. Houston Fire & Cas. Ins. Co.*, 104 Ga. App. 680, 122 S.E.2d 589 (1961).

Whether or not delay in giving notice was excusable was peculiarly a matter for the determination of the board, it being best situated to determine both the extenuating causes and the prejudicial results of a failure to comply strictly with the provisions of this section. *Federated Mut. Implement & Hdwe. Ins. Co. v. Elliott*, 88 Ga. App. 266, 76 S.E.2d 568 (1953) (see O.C.G.A. § 34-9-80).

If evidence is offered tending to show one or more of these exceptions or a reasonable excuse, the board is authorized by the statute to find that the failure to give notice is excused. *Anderson v. Houston Fire & Cas. Ins. Co.*, 104 Ga. App. 680, 122 S.E.2d 589 (1961).

Failure of the board to make an affirmative finding that an exception or a reasonable excuse is present in a case is tantamount to a finding that no reasonable excuse or exception was proven to the satisfaction of the board. *Anderson v. Houston Fire & Cas. Ins. Co.*, 104 Ga. App. 680, 122 S.E.2d 589 (1961); *Crews v. GMC*, 107 Ga. App. 592, 130 S.E.2d 925 (1963).

If there is any competent evidence to support the board's findings, the findings must be accepted by the appellate courts. *Anderson v. Houston Fire & Cas. Ins. Co.*, 104 Ga. App. 680, 122 S.E.2d 589 (1961).

Where there is evidence from which the board might have found prevention from giving the notice by reason of physical or mental incapacity, but the evidence does not demand such a finding, the reviewing court will not disturb the order of the board

denying compensation. *Anderson v. Houston Fire & Cas. Ins. Co.*, 104 Ga. App. 680, 122 S.E.2d 589 (1961).

Conflicting evidence. — Where a finding of fact by the board on the question of adequate notice is supported by any evidence, though the evidence is in conflict, the finding is conclusive and on appeal must be affirmed by the court. *Bryant v. J.C. Distribs., Inc.*, 108 Ga. App. 401, 133 S.E.2d 109 (1963).

Absence of any finding on notice is not cause for reversal where the facts are undisputed that the employer was given timely notice of the injury. *Fulton Indus. v. Knight*, 127 Ga. App. 604, 194 S.E.2d 346 (1972).

Appellate court did not disturb the order denying compensation, which was based on the ground that the claim for compensation was barred by failure to give the required notice. *James v. Fite*, 38 Ga. App. 759, 145 S.E. 536 (1928).

Error to reverse. — Where the commission finds as a matter of fact that an agent or representative of an employer has actual notice of an injury to an employee it is error for the superior court to reverse such holding upon the grounds that no written notice was given. *Van Treeck v. Travelers Ins. Co.*, 31 Ga. App. 603, 121 S.E. 584 (1924).

2. Grounds for Excuse

Proof of employer's knowledge of injury would make proof of other notice unnecessary. *Employers Ins. Co. v. Goss*, 107 Ga. App. 249, 129 S.E.2d 545 (1963).

Actual knowledge found. — Where at the date on which the aggravation occurred, the appellant's attorney took part in the deposition upon which the board based its finding of the occurrence of the aggravated accident, the appellants' attorney had actual knowledge of the "accident." *U.S. Asbestos v. Hammock*, 140 Ga. App. 378, 231 S.E.2d 792 (1976).

Fraud not found. — The mere fact that an employee is an illiterate, and that the employer fails to advise the employee orally that the employee should notify the employer of any accident which the employee might sustain, does not constitute fraud so as to relieve the employee of the employee's obligation to report the accident. *Jeffers v. Liberty Mut. Ins. Co.*, 115 Ga. App. 528, 154 S.E.2d 801 (1967).

Reasonable Excuse (Cont'd)**2. Grounds for Excuse (Cont'd)**

Since a claimant was uneducated and did not understand the difference between insurance and workers' compensation the claimant would not be estopped from receiving the benefits of the workers' compensation law (see O.C.G.A. Ch. 9, T. 34). *Coulter v. Royal Indem. Co.*, 95 Ga. App. 124, 97 S.E.2d 358, rev'd on other grounds, 213 Ga. 277, 98 S.E.2d 899 (1957).

Ignorance of law. — In view of the fact that the claimant and claimant's spouse were ignorant regarding the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) and the possible benefits to be derived therefrom, the law must be construed to take care of this human element particularly in view of the fact that the claimant and the claimant's spouse did very well indeed in giving notice. *Coulter v. Royal Indem. Co.*, 95 Ga. App. 124, 97 S.E.2d 358, rev'd on other grounds, 213 Ga. 277, 98 S.E.2d 899 (1957).

Delay immaterial. — Where the evidence

demands that the employer was placed on notice of an injury to the employee arising out of and in the course of employment, but the employer did not receive notice that a claim for compensation would be made until more than 30 days after the employee's death, this delay is immaterial because the required notice need not be given with a view to claiming compensation. *Fulton Indus. v. Knight*, 127 Ga. App. 604, 194 S.E.2d 346 (1972).

Physical incapacity. — If the employer received no formal notice until more than 30 days after the employee's death, but the employer did have notice that the employee was "sick" on the job, and was too ill the following day to return to work, this was a circumstance which might have been considered by the board in finding, as a matter of fact, that failure to give the proper notice was excusable and that the claim should not thereby be barred. *Federated Mut. Implement & Hdwe. Ins. Co. v. Elliott*, 88 Ga. App. 266, 76 S.E.2d 568 (1953).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, §§ 490, 497 et seq., 602.

C.J.S. — 100 C.J.S., Workers' Compensation, § 862 et seq.

ALR. — Injury to muscles or nerves attributable to occupation, but not due to a sudden event, as within Workmen's Compensation Act, 29 ALR 510.

Accident and disability insurance: when insured deemed to be totally and continuously unable to transact all business duties, 37 ALR 151.

Workmen's compensation: duty of injured employee to submit to an examination, 41 ALR 866.

Requirement of Workmen's Compensation Act as to notice of accident or injury, 78 ALR 1232; 92 ALR 505; 107 ALR 816; 145 ALR 1263.

May notice of injury or claim contemplated by Workmen's Compensation Act be waived, 78 ALR 1306.

Construction and application of provisions of workmen's compensation acts regarding allowance for aggravation of injury from same accident after time limited for filing claim, 105 ALR 971.

Workmen's compensation: date of accident or date when injury becomes manifest as time from which period for filing claim commences to run, 108 ALR 316.

Workers' compensation: compensability of injuries incurred traveling to or from medical treatment of earlier compensable injury, 83 ALR4th 110.

34-9-81. Contents of written notice; manner of delivery.

The written notice provided for in Code Section 34-9-80 shall state in ordinary language the name and address of the employee, the time, place, nature, and cause of the accident and of the resulting injury or death and shall be signed by the employee or by a person in his behalf or, in the event

of his death, by any one or more of his dependents or by a person in their behalf. No defect or inaccuracy in the notice shall be a bar to compensation unless the employer shall prove that his interest was prejudiced thereby, and then only to the extent of the prejudice. Such notice shall be given personally to the employer, or his agent, representative, or foreman, or to the immediate superior of the injured employee or may be sent by registered or certified mail or statutory overnight delivery addressed to the employer at his last known residence or place of business. (Ga. L. 1920, p. 167, §§ 23, 24; Ga. L. 1923, p. 92, §§ 1, 2; Code 1933, § 114-304; Ga. L. 2000, p. 1589, § 3.)

JUDICIAL DECISIONS

Notice of an injury need not be given with a view to a claim of compensation at the time it is given, a notice is sufficient which will put the employer on notice of the injury so that the employer may make an investigation if the employer sees fit to do so, and an employee should not be penalized because the employee did not consider the injury serious enough to immediately contend that the employee was entitled to compensation. *Coulter v. Royal Indem. Co.*, 95 Ga. App. 124, 97 S.E.2d 358, rev'd, 213 Ga. 277, 98 S.E.2d 899 (1957). But see *Schwartz v. Greenbaum*, 236 Ga. 476, 224 S.E.2d 38 (1976).

The required notice need not be given with a view to claiming compensation and is sufficient if it puts the employer on notice of the injury so that it may make an investigation if it sees fit to do so. *Argonaut Ins. Co. v. Cline*, 138 Ga. App. 778, 227 S.E.2d 405 (1976).

If an employer fails to show it has been prejudiced by the failure of the written notice of a claim to state the place where the accident occurred, the defective notice will not bar compensation. *Hartford Accident & Indem. Co. v. Tribble*, 119 Ga. App. 120, 166 S.E.2d 410 (1969).

If the written notice of a claim fails to state the place where the accident occurred and there is an immediate request from the board for that information, a delay of one year and a half in giving the place of the accident is not equivalent to request that the employer not be notified of the hearing. *Hartford Accident & Indem. Co. v. Tribble*, 119 Ga. App. 120, 166 S.E.2d 410 (1969).

Fact that the letter of notice requested that no hearing be had until specifically

requested by the claimant does not prevent the letter from being a proper claim. *Hartford Accident & Indem. Co. v. Tribble*, 119 Ga. App. 120, 166 S.E.2d 410 (1969).

Since a claimant was uneducated and did not understand the difference between insurance and workers' compensation, the claimant would not be estopped from receiving the benefits of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Coulter v. Royal Indem. Co.*, 95 Ga. App. 124, 97 S.E.2d 358, rev'd on other grounds, 213 Ga. 277, 98 S.E.2d 899 (1957).

Claimant ignorant of the law. — In view of the fact that the claimant and the claimant's spouse were ignorant regarding the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) and the possible benefits to be derived therefrom, the law must be construed to take care of this humane element particularly in view of the fact that the claimant and claimant's spouse did very well indeed in giving notice. *Coulter v. Royal Indem. Co.*, 95 Ga. App. 124, 97 S.E.2d 358, rev'd on other grounds, 213 Ga. 277, 98 S.E.2d 899 (1957).

While the statute does not prescribe any particular form of claim for compensation to be filed by an injured employee, yet it cannot be held that a letter which did not ask for any hearing, but indicated that an offer of compensation had theretofore been received by the employee, and the answer of the commission that the employee was entitled to a certain sum per week during disability, and which was written five years before the employee appeared before the commission and urged that the employee was entitled to compensation, and three years after the employee reached the age of

18, constituted such a claim as was contemplated by the lawmakers would be filed by a claimant under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Folsom v. American Mut. Liab. Ins. Co.*, 48 Ga. App. 831, 173 S.E. 878 (1934).

Cited in *Threatt v. American Mut. Liab. Ins. Co.*, 173 Ga. 350, 160 S.E. 379 (1931);

GMC v. Pruitt, 83 Ga. App. 620, 64 S.E.2d 339 (1951); *Davison-Paxon Co. v. Ford*, 88 Ga. App. 890, 78 S.E.2d 257 (1953); *Georgia Cas. & Sur. Co. v. Cochran*, 127 Ga. App. 55, 192 S.E.2d 547 (1972); *McElhannon v. St. Paul Fire & Marine Ins. Co.*, 141 Ga. App. 169, 233 S.E.2d 28 (1977).

OPINIONS OF THE ATTORNEY GENERAL

Period of time a person has been retired from or has not been employed by a school system would not be of any particular significance as to a former employer's workers' compensation coverage; this is not to say that there are not notice of accident filing re-

quirements and filing of claim requirements which must be complied with in order for an employee or former employee to make a proper claim for compensation. 1977 Op. Att'y Gen. No. 77-38.

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 495 et seq.

C.J.S. — 100 C.J.S., Workers' Compensation, §§ 840, 841.

ALR. — Workmen's compensation: duty of injured employee to submit to an examination, 41 ALR 866.

Requirement of Workmen's Compensation Act as to notice of accident or injury, 92 ALR 505; 107 ALR 815; 145 ALR 1263.

Workmen's compensation: injury to servant who lives on employer's premises as arising out of and in the course of the employment, 158 ALR 606.

34-9-81.1. Board's duty to provide injured workers with notice of rights, benefits, and obligations.

(a) The board shall provide by rule for the publication of a summary of the rights, benefits, and obligations under this chapter and the distribution of such summary to employers and employees in this state. The board shall provide by rule for the display of such summary by employers in locations accessible to employees.

(b) Any person who fails or refuses to comply with a rule of the board promulgated pursuant to subsection (a) of this Code section shall be subject to an administrative fine not to exceed \$1,000.00 (Code 1981, § 34-9-81.1, enacted by Ga. L. 1983, p. 700, § 1; Ga. L. 1984, p. 22, § 34; Ga. L. 1990, p. 8, § 34; Ga. L. 1992, p. 1942, § 9.)

Law reviews. — For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992).

34-9-82. Limitation period and procedure for filing claims.

(a) The right to compensation shall be barred unless a claim therefor is filed within one year after injury, except that if payment of weekly benefits

has been made or remedial treatment has been furnished by the employer on account of the injury the claim may be filed within one year after the date of the last remedial treatment furnished by the employer or within two years after the date of the last payment of weekly benefits.

(b) The right to compensation for death shall be barred unless a claim therefor is filed within one year after the death of the employee.

(c) The claim shall be filed with the board and should contain such information as may be prescribed by rule or regulation of the board.

(d) The filing of any claim for injury or death under this chapter with any of the board's offices throughout the state shall be deemed proper filing with the board. (Ga. L. 1920, p. 167, § 25; Ga. L. 1925, p. 282, § 2; Code 1933, § 114-305; Ga. L. 1978, p. 2220, § 2.)

Cross references. — Time limitation on filing claims for disability or death resulting from occupational disease, § 34-9-281.

Law reviews. — For article discussing injury as a result of aggravation, see 14 Ga. St. B.J. 135 (1978). For article, "Change in Condition and New Accident: The Difference Between the Two, Elements of Each, and Burdens of Proof," see 46 Mercer L. Rev. 35 (1994). For article on annual survey of workers' compensation, see 38 Mercer L. Rev. 431 (1986). For annual survey article

discussing workers' compensation law, see 52 Mercer L. Rev. 505 (2000). For article, "Workers' Compensation," see 53 Mercer L. Rev. 521 (2001). For annual survey of law of workers' compensation, see 56 Mercer L. Rev. 479 (2004).

For note discussing compensation under the Georgia Workers' Compensation Act original injuries aggravated by subsequent injury, continued employment, or ordinary activity, see 31 Mercer L. Rev. 325 (1979).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

LIMITATION PERIOD

1. APPLICATION OF LIMITATION
2. DATE OF INJURY
3. WAIVER

TOLLING OF LIMITATION

1. FRAUD
2. PERSONS UNDER DISABILITY
3. ACTIONS NOT TOLLING STATUTE

PROCEDURE FOR FILING CLAIM

1. JURISDICTION OF BOARD
2. CLAIMANT
3. FORM OF CLAIM
4. DELIVERY

General Consideration

To be compensable, an "accident" claim must be filed within one year of the original job-related incident of which the employer was timely notified and requires a causal connection between the conditions under

which the work was required to be performed and the injury which forms the basis for the claim. *Slattery Assocs. v. Hufstetler*, 161 Ga. App. 389, 288 S.E.2d 654 (1982).

One-year limitation is for the benefit of the employer and insurance carrier in order

General Consideration (Cont'd)

to prevent claims from being filed after long lapses of time, which would result in much difficulty in establishing the truth and subject the employer and insurance carrier to greater risks. *St. Paul Mercury Indem. Co. v. Oakley*, 73 Ga. App. 97, 35 S.E.2d 562 (1945).

The one-year limitation is for the benefit of the employer and insurance carrier in order to prevent claims from being filed after long lapses of time. *State Hwy. Dep't v. Cooper*, 104 Ga. App. 130, 121 S.E.2d 258 (1961).

Two-year limitation triggered by weekly benefit payments. — O.C.G.A. § 34-9-82 does not distinguish between payments of weekly benefits made voluntarily and those made otherwise; all that is required to trigger the two-year limitation is that the payment, whether voluntarily made or not, was tendered as a weekly benefit on account of the injury. *Harper v. L & M Granite Co.*, 197 Ga. App. 157, 397 S.E.2d 739 (1990).

Word "claim" as used in this section was coextensive with "case" and embraces the counterclaim of an employee as well as the claim of the employer. The employer having instituted or filed a "case" seeking a hearing in regard to the matter at issue and the employee having responded, it was unnecessary for the employee to file a claim other than the one set up in the employee's answer so long as the "case" was pending. *Metropolitan Cas. Ins. Co. v. Maloney*, 56 Ga. App. 74, 192 S.E. 320 (1937) (see O.C.G.A. § 34-9-82).

Term "weekly benefits" under O.C.G.A. § 34-9-82(a) does not refer to only those weekly benefits provided under O.C.G.A. §§ 34-9-261 and 34-9-262, which compensate for income loss, but also includes permanent partial disability benefits paid pursuant to O.C.G.A. § 34-9-263 so as to extend the statute of limitation period for filing a claim to two years after the date of the last such payment. *Mickens v. Western Prob. Det. Ctr.*, 244 Ga. App. 268, 534 S.E.2d 927 (2000).

Issue of fact as to applicability of statute. — Because there was a genuine issue of fact as to whether the defendant's stepson was an employee thereby subjecting defendant to the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., there was no "admitted"

failure to comply with the Act's requirements for maintaining and posting a panel of physicians. The plaintiff's failure to properly file a claim within the statute of limitations resulted in the claim being time-barred. *Gann v. Poe*, 236 Ga. App. 138, 512 S.E.2d 1 (1999).

Construed with § 34-9-206. — Where a claimant was injured in 1985, but did not file a claim for Workers' Compensation benefits until July 1987, the claim was barred by the statute of limitations contained in O.C.G.A. § 34-9-82, and neither the employer nor its compensation carrier was liable. Thus, neither the employer nor its compensation carrier was liable to the group health provider under O.C.G.A. § 34-9-206 for medical expenses incurred by the claimant from 1985 to July 1987 for treatment of the 1985 work-related injury. *State Wholesalers, Inc. v. Parks*, 194 Ga. App. 900, 392 S.E.2d 64 (1990).

Adequate remedy at law. — Under the proviso of Ga. L. 1923, p. 282, § 2, the employee has an adequate remedy at law, and for this reason the employee cannot apply to a court of equity for relief. *Bishop v. Bussey*, 164 Ga. 642, 139 S.E. 212 (1927) (see O.C.G.A. § 34-9-82).

Section not applicable to occupational diseases. — There was ample evidence to support the determination that the claimant's pneumoconiosis was an occupational disease; therefore, the specific statute of limitation applicable to occupational diseases as set forth in O.C.G.A. § 34-9-281(b)(2) should control, instead of the statute generally applicable to compensable injuries found in O.C.G.A. § 34-9-82(a). *American Int'l Adjusting Co. v. Davis*, 202 Ga. App. 276, 414 S.E.2d 292 (1991).

Cited in *Clark v. Maryland Cas. Co.*, 39 Ga. App. 668, 148 S.E. 286 (1929); *Blanchard v. Savannah River Lumber Co.*, 40 Ga. App. 416, 149 S.E. 793 (1929); *Thigpen v. Hall*, 46 Ga. App. 356, 167 S.E. 728 (1933); *U.S. Fid. & Guar. Co. v. Youmans*, 49 Ga. App. 678, 176 S.E. 808 (1934); *Richey v. First Nat'l Bank*, 180 Ga. 751, 180 S.E. 740 (1935); *Hicks v. Standard Accident Ins. Co.*, 52 Ga. App. 828, 184 S.E. 808 (1936); *Foster v. First Nat'l Bank*, 56 Ga. App. 880, 194 S.E. 225 (1937); *City of Brunswick v. King*, 65 Ga. App. 44, 14 S.E.2d 760 (1941); *GMC v. Pruitt*, 83 Ga. App. 620, 64 S.E.2d 339

(1951); Davison-Paxon Co. v. Ford, 88 Ga. App. 890, 78 S.E.2d 257 (1953); Skinner Poultry Co. v. Mapp, 98 Ga. App. 772, 106 S.E.2d 825 (1958); Employers Mut. Liab. Ins. Co. v. Shipman, 108 Ga. App. 184, 132 S.E.2d 568 (1963); Sherrill v. U.S. Fid. & Guar. Co., 108 Ga. App. 591, 133 S.E.2d 896 (1963); Noles v. Aragon Mills, 110 Ga. App. 374, 138 S.E.2d 598 (1964); Davis v. Liberty Mut. Ins. Co., 110 Ga. App. 389, 138 S.E.2d 603 (1964); Benefield v. Harriett & Henderson Cotton Mills, Inc., 113 Ga. App. 556, 149 S.E.2d 196 (1966); Harrison v. Hartford Accident & Indem. Co., 117 Ga. App. 404, 160 S.E.2d 601 (1968); Mason v. City of Atlanta, 124 Ga. App. 849, 186 S.E.2d 285 (1971); Blackwell v. Liberty Mut. Ins. Co., 127 Ga. App. 146, 193 S.E.2d 43 (1972); House v. Echota Cotton Mills, Inc., 129 Ga. App. 350, 199 S.E.2d 585 (1973); Continental Ins. Co. v. Hickey, 139 Ga. App. 31, 227 S.E.2d 848 (1976); Travelers Ins. Co. v. Thigpen, 140 Ga. App. 179, 230 S.E.2d 341 (1976); U.S. Asbestos v. Hammock, 140 Ga. App. 378, 231 S.E.2d 792 (1976); Mayor of Savannah v. George, 145 Ga. App. 57, 243 S.E.2d 259 (1978); Hall v. Hartford Ins. Group, 146 Ga. App. 751, 247 S.E.2d 570 (1978); Walker v. Liberty Mut. Ins. Co., 147 Ga. App. 201, 248 S.E.2d 330 (1978); Strickland v. American Motorists Ins. Co., 149 Ga. App. 690, 256 S.E.2d 92 (1979); N.L. Indus. v. Childs, 150 Ga. App. 866, 258 S.E.2d 667 (1979); Joyce v. Paul Hayes Amoco Serv. Station, 161 Ga. App. 373, 288 S.E.2d 266 (1982); Southern Bell Tel. & Tel. Co. v. Hodges, 164 Ga. App. 757, 298 S.E.2d 570 (1982); Georgia Inst. of Technology v. Gore, 167 Ga. App. 359, 306 S.E.2d 338 (1983); Georgia-Pacific Corp. v. Sanders, 171 Ga. App. 799, 320 S.E.2d 850 (1984); ITT-Thompson Indus., Inc. v. Wheeler, 179 Ga. App. 92, 345 S.E.2d 614 (1986); Paideia Sch. v. Geiger, 192 Ga. App. 723, 386 S.E.2d 381 (1989); Robinson v. J. Smith Lanier & Co., 220 Ga. App. 737, 470 S.E.2d 272 (1996); Baugh-Carroll v. Hospital Authority of Randolph County, 248 Ga. App. 591, 545 S.E.2d 690 (2001); D.W. Adcock, M.D., P.C. v. Adcock, 257 Ga. App. 700, 572 S.E.2d 45 (2002).

Limitation Period

1. Application of Limitation

Bar only applies to valid claims. — It cannot be said that a case is barred by the

statute of limitations unless it appears that there was a valid claim to be so barred. *Free v. Associated Indem. Corp.*, 78 Ga. App. 839, 52 S.E.2d 325 (1949).

Applies to original claims by those entitled to compensation in first instance. — The one-year statutory limitation of this section applied to original claims, whether filed by the employee or, if the employee had not filed a claim at the time of death, by the employee's dependents, who would be entitled to compensation in the first instance. *Gordy v. Callaway Mills Co.*, 111 Ga. App. 798, 143 S.E.2d 401 (1965) (see O.C.G.A. § 34-9-82).

Where the claimants were partial dependents of the deceased employee, and, if entitled to compensation, they would be so entitled in the first instance as their son, the deceased employee, was killed instantly in the accident, and no compensation had been paid to anyone, the one-year limitation for filing a claim as provided by this section applied to a partial dependent where the partial dependent would be entitled to compensation in the first instance, but it did not apply to a dependent secondarily entitled to remaining compensation. *Great Am. Indem. Co. v. Usry*, 87 Ga. App. 821, 75 S.E.2d 270 (1953) (see O.C.G.A. § 34-9-82).

This section did not apply to a claim filed by a partial dependent contingently entitled to the remaining part of an award made in the first instance to one primarily entitled thereto. *Bituminous Cas. Corp. v. Johnson*, 79 Ga. App. 105, 53 S.E.2d 119 (1949) (see O.C.G.A. § 34-9-82).

Unless a statute of limitations expressly or by necessary implication is made applicable to causes of action already barred when it is passed, it will not be held to apply thereto. *Bussey v. Bishop*, 169 Ga. 251, 150 S.E. 78 (1929).

Effect of withdrawal. — Written notice of claimant by claimant's authorized attorneys withdrawing the case and the acknowledgment by the department construing the request "that the application for a hearing in the above case be withdrawn," and stating that, "in accordance therewith, this case is being withdrawn from our calendar," amounted to a full and complete relinquishment and withdrawal of the notice prescribed by this section with the result that a belated claim filed more than four years

Limitation Period (Cont'd)**1. Application of Limitation (Cont'd)**

thereafter came too late. *Maryland Cas. Co. v. Gill*, 46 Ga. App. 746, 169 S.E. 245 (1933) (see O.C.G.A. § 34-9-82).

Provisions of former Code 1933, § 102-102 (see O.C.G.A. § 1-3-1(d)(3)) to the effect that when a number of days is prescribed for the exercise of any privilege and the last day shall fall on a Saturday or Sunday, the party having such privilege shall have through the following Monday to exercise such privilege, do not apply to limitations expressed in months or years and to the limitation fixed by former Code 1933, § 114-305 (see O.C.G.A. § 34-9-82) so as to extend the time for filing a claim under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Chevrolet Parts Div., GMC v. Harrell*, 100 Ga. App. 280, 111 S.E.2d 104 (1959).

Where a claimant was injured in an accident which occurred on October 26, 1957, and the claim and request for a hearing thereon was mailed to the board on October 25, 1958, which date happened to have fallen on a Saturday, and the claim and request for hearing were not received by the board until Monday, October 27, 1958, it was filed too late, and the deputy director properly dismissed it when those facts were made to appear. *Chevrolet Parts Div., GMC v. Harrell*, 100 Ga. App. 280, 111 S.E.2d 104 (1959).

There is no limitation upon the time within which a claim must be heard and adjudicated. *State Hwy. Dep't v. Cooper*, 104 Ga. App. 130, 121 S.E.2d 258 (1961).

Limitation not applicable to additional compensation claims. — A claim for additional compensation, filed under former Code 1933, § 114-709 (see O.C.G.A. § 34-9-104), was not subject to the limitation set forth in former Code 1933, § 114-305 (see O.C.G.A. § 34-9-82). *Campbell Coal Co. v. Render*, 48 Ga. App. 547, 173 S.E. 245 (1934); *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952); *Old Colony Ins. Co. v. Bennett*, 108 Ga. App. 499, 133 S.E.2d 415 (1963).

Limitation not applicable to continued cases. — Where the "case" or "claim" of the employer and the appearance and answer of the employee were all filed within 12 months

and none of them had ever been withdrawn with the approval or consent of the court or the department (now board), and the case was continued, it was still pending, and while so pending, could be reset and tried, consequently the statute of limitations did not apply. *Metropolitan Cas. Ins. Co. v. Maloney*, 56 Ga. App. 74, 192 S.E. 320 (1937).

Where original injury becomes disabling.

— If the employer is given notice of the employee's original accident and the employee's condition gradually worsens to the point of disability and a claim is filed for this subsequently occurring disability within one year of the original accident itself, the requirements of both O.C.G.A. §§ 34-9-80 and 34-9-82 are met. *Mason, Inc. v. Gregory*, 161 Ga. App. 125, 291 S.E.2d 30 (1982).

Subsequent, aggravating accident.

— Award arising from "new accident" must be predicated upon filing claim within one year from either the date the claimant was forced to cease work because of the gradual worsening of claimant's condition (which was at least partly attributable to claimant's physical activity in continuing to work subsequent to this original job-related incident) or the date of the occurrence of a subsequent specific job-related incident which aggravates the claimant's pre-existing, and therefore, uncompensated condition. *Slattery Assocs. v. Hufstetler*, 161 Ga. App. 389, 288 S.E.2d 654 (1982).

New injury resulting from employment related prior injury. — Where the employee continued working following the employee's initial injury and, more than one year later, sought medical benefits for an aggravation to the employee's pre-existing injury, evidence was sufficient to establish that the employee suffered a "new injury by accident" and the employee's claim was not barred by the statute of limitations. *UPS v. Culpepper*, 219 Ga. App. 534, 465 S.E.2d 709 (1995).

Remedial treatment. — Medical treatment which is deemed, for statute of limitation purposes, to be remedial treatment furnished by the employer must be commenced within the original period of limitation, i.e., within one year of the job-related injury or of previous employer-furnished treatment. *Poissonnier v. Better Bus. Bureau of W. Georgia-East Ala., Inc.*, 180 Ga. App. 588, 349 S.E.2d 813 (1986).

Medical treatment which is deemed, for statute of limitation purposes, to be remedial treatment furnished by the employer must be commenced within the original period of limitation, i.e., within one year of the job-related injury or of previous employer-furnished treatment. *Wier v. Skyline Messenger Serv.*, 203 Ga. App. 673, 417 S.E.2d 693, cert. denied, 203 Ga. App. 908, 417 S.E.2d 693 (1992).

Since the claimant continued the exercises prescribed by claimant's doctor but there was no medical oversight of the exercise program and claimant failed to keep claimant's six-week check up appointment, this did not constitute "remedial treatment" so as to extend the time for filing a claim. *Wier v. Skyline Messenger Serv.*, 203 Ga. App. 673, 417 S.E.2d 693, cert. denied, 203 Ga. App. 908, 417 S.E.2d 693 (1992).

The date of the last remedial treatment is the point from which the timeliness of a claim is measured; thus, a claim that was not filed within one year of the last remedial treatment furnished by the employer was barred. *Queen Carpet, Inc. v. Moynihan*, 221 Ga. App. 797, 472 S.E.2d 489 (1996).

Claim for change in condition. — Where claimant had received weekly income benefits for the period of claimant's disability, a claim filed by claimant for the same injury which had caused claimant's disability was a claim for a change in condition, and not an initial claim, and the claim was therefore governed by the two-year limitations period of O.C.G.A. § 34-9-104(b). *Clarke v. Samson Mfg. Co.*, 177 Ga. App. 149, 338 S.E.2d 738 (1985).

Inability to fix date of accident. — Right of claimant to compensation is not necessarily barred because claimant cannot definitely fix date of the accident resulting in disability, either because claimant cannot remember the precise time when the accident occurred or because the accident was of such a nature that there is difficulty in ascertaining with complete accuracy when it happened. *Skinner Poultry Co. v. Mapp*, 98 Ga. App. 772, 106 S.E.2d 825 (1958).

Application to review of award. — The provisions of Ga. L. 1920, p. 167, § 25 to the effect that the right to compensation should be forever barred unless a claim be filed with the commission within one year after the accident have no application where the em-

ployee is seeking a review of an award of settlement. *U.S. Cas. Co. v. Smith*, 34 Ga. App. 363, 129 S.E. 880 (1925), *aff'd*, 162 Ga. 130, 133 S.E. 851 (1926) (see O.C.G.A. § 34-9-82).

Employer was not estopped to raise O.C.G.A. § 34-9-82 as a defense due to the fact that the claimant received "medical and rehabilitation benefits" prior to the expiration of the limitation period. *Owens-Illinois, Inc. v. Childers*, 160 Ga. App. 566, 288 S.E.2d 11 (1981).

Claims held properly barred. — See *White v. U.S. Fid. & Guar. Co.*, 41 Ga. App. 514, 153 S.E. 574 (1930); *Williams v. Campbell Constr. Co.*, 63 Ga. App. 381, 11 S.E.2d 233 (1940); *Kell v. Bridges*, 80 Ga. App. 55, 55 S.E.2d 309 (1949); *Anderson v. Lockheed Aircraft Corp.*, 98 Ga. App. 814, 107 S.E.2d 295 (1959).

2. Date of Injury

Date of accident is the date on which disability manifests itself. *Pacific Employers Ins. Co. v. Ivey*, 118 Ga. App. 299, 163 S.E.2d 435 (1968).

Where an employee filed a claim with the board approximately 11 months after the employee's last work day, on which date the employee was for the third time hospitalized for treatment of the employee's condition, the cut-off date set by the board for medical expenses associated with the condition which gave rise to the claim was reasonable. *Harden v. Southeastern Meat Co.*, 196 Ga. App. 22, 395 S.E.2d 273 (1990).

Aggravation by continued work of a previous injury is a new accident. *Blackwell v. Liberty Mut. Ins. Co.*, 230 Ga. 174, 196 S.E.2d 129 (1973); *Twin City Fire Ins. Co. v. Lowe*, 140 Ga. App. 349, 231 S.E.2d 125 (1976); *Georgia Cas. & Sur. Co. v. Moore*, 142 Ga. App. 191, 235 S.E.2d 591 (1977); *Zurich Ins. Co. v. Cheshire*, 178 Ga. App. 539, 343 S.E.2d 753 (1986).

Period runs when forced to cease work. — If claimant after becoming injured at work continued to work until claimant was forced to cease work because of aggravation of the original injury, the statute of limitations runs from the date the employee was forced to cease work if the aggravation of the original injury was attributable to the continued employment. *Noles v. Mills*, 114 Ga. App. 130, 150 S.E.2d 305 (1966); *Blackwell v. Liberty*

Limitation Period (Cont'd)**2. Date of Injury (Cont'd)**

Mut. Ins. Co., 230 Ga. 174, 196 S.E.2d 129 (1973); Commercial Union Cos. v. Byrd, 133 Ga. App. 878, 212 S.E.2d 446 (1975); Jarrell v. American Home Assurance, 149 Ga. App. 761, 256 S.E.2d 123 (1979); Home Ins. Co. v. McEachin, 151 Ga. App. 567, 260 S.E.2d 560 (1979).

Extension of period because of aggravation of injury. — Aggravation of preexisting injury, followed by disability requiring employee to cease work, will extend the time for filing a claim for 12 months following the onset of disability. Pacific Employers Ins. Co. v. Ivey, 118 Ga. App. 299, 163 S.E.2d 435 (1968).

It is not necessary that there be a specific job-connected incident which aggravates the previous injury where employment contributes to the aggravation of a preexisting injury. Home Ins. Co. v. McEachin, 151 Ga. App. 567, 260 S.E.2d 560 (1979).

Claim not barred. — A claim based on a subsequent disabling aggravation of a previously incurred on-the-job injury was not barred by this section because more than one year elapsed from the initial injury. Aetna Cas. & Sur. Co. v. Cagle, 106 Ga. App. 440, 126 S.E.2d 907 (1962) (see O.C.G.A. § 34-9-82).

Gradual injury. — If a claim is based on a gradual injury, the date of the accident may be found to be the date the employee is required to cease work where the evidence authorizes it. Carey v. Travelers Ins. Co., 133 Ga. App. 657, 212 S.E.2d 13 (1975); Mason, Inc. v. Gregory, 161 Ga. App. 125, 291 S.E.2d 30 (1982).

3. Waiver

Failure to file a claim within the period of limitations may be waived. St. Paul Mercury Indem. Co. v. Oakley, 73 Ga. App. 97, 35 S.E.2d 562 (1945); Maryland Cas. Co. v. Smith, 122 Ga. App. 262, 176 S.E.2d 666 (1970).

Participation in hearing is waiver. — The principle of waiver may be applied to the portion of this section which required the filing of a claim against the employer where the employer appeared and participated in the hearing as fully as if the claim had in fact been filed. Maryland Cas. Co. v. Smith, 122

Ga. App. 262, 176 S.E.2d 666 (1970) (see O.C.G.A. § 34-9-82).

Failure to object is waiver. — The failure to raise the question of the time of the filing of a claim at the hearing of the case is a waiver of the time of such filing. St. Paul Mercury Indem. Co. v. Oakley, 73 Ga. App. 97, 35 S.E.2d 562 (1945).

Where no question of statute of limitations as to time of, or method of service of, notice of claim for compensation within one year of accident is raised at hearing by board, both parties being represented by counsel, the same is waived and cannot be raised for the first time in the appellate court. Sanford v. University of Ga. Bd. of Regents, 131 Ga. App. 858, 207 S.E.2d 255 (1974).

Payment for medical services may be waived. — Where an employer or the employer's insurance carrier has furnished or paid for medical and hospital services to an injured employee, it is generally held that this constitutes a payment of compensation, or a waiver which suspends the running of the time for filing a claim for compensation. Chevrolet Div., GMC v. Dempsey, 212 Ga. 560, 93 S.E.2d 703 (1956).

Representations and assurances of payment constituting waiver. — Representations of payment made by the carrier's agent which the claimant relied on are sufficient to act as a waiver of the carrier's rights under the one-year limitation period. Cotton States Ins. Co. v. Studdard, 126 Ga. App. 217, 190 S.E.2d 549 (1972).

Representations and assurances that an injured employee will be taken care of by the company or its insurance carrier create an estoppel barring the company or carrier from asserting the one-year statute of limitations for filing a claim under this section. Brown Transp. Co. v. James, 243 Ga. 701, 257 S.E.2d 242 (1979) (see O.C.G.A. § 34-9-82).

Benefits paid under federal law. — Employee's receipt of benefits under the Longshoremen's & Harborworker's Compensation Act, 33 U.S.C. § 901 et seq., served to toll the running of the state statute of limitation. Atlantic Container Servs. v. Godbee, 218 Ga. App. 594, 462 S.E.2d 465 (1995).

Conduct of defendant and its insurance carrier may be such as to estop them from presenting the statutory limitation as a defense in bar of the claim for compensation, if

the effect of such conduct was to mislead or deceive claimant, whether intentional or not, and induce claimant to withhold or postpone filing a claim petition until more than a year elapsed from the occurrence of the accident. *Brown Transp. Corp. v. James*, 243 Ga. 701, 257 S.E.2d 242 (1979).

Tolling of Limitation

1. Fraud

Nature of fraud. — Fraud which will relieve the bar of the statute of limitations must be such as debars or deters the plaintiff from plaintiff's action. *Fidelity & Cas. Co. v. Bishop*, 108 Ga. App. 422, 133 S.E.2d 51 (1963); *U.S. Cas. Co. v. Owens*, 109 Ga. App. 834, 137 S.E.2d 543 (1964), overruled on other grounds, *Brown Transp. Co. v. James*, 243 Ga. 701, 257 S.E.2d 242 (1979); *Mallory v. American Cas. Co.*, 114 Ga. App. 641, 152 S.E.2d 592 (1966); *Perkins v. Aetna Cas. & Sur. Co.*, 147 Ga. App. 662, 249 S.E.2d 661 (1978), appeal dismissed, 243 Ga. 701, 256 S.E.2d 792 (1979).

Fraud which will toll the statute of limitations in this section was an intentional act of concealment or misrepresentation which would operate as a deterrent to claimant to file a claim with the board, or an affirmative act, or concealment, or misrepresentation preventing an inquiry. *Perkins v. Aetna Cas. & Sur. Co.*, 147 Ga. App. 662, 249 S.E.2d 661 (1978), appeal dismissed, 243 Ga. 701, 256 S.E.2d 792 (1979) (see O.C.G.A. § 34-9-82).

Affirmative act is required. — An affirmative act or concealment or misrepresentation preventing an inquiry must exist to prevent the statute from so operating. *Welchel v. American Mut. Liab. Ins. Co.*, 54 Ga. App. 511, 188 S.E. 357 (1936), overruled on other grounds, *Brown Transp. Co. v. James*, 243 Ga. 701, 257 S.E.2d 242 (1979).

Affirmative act must be intentional. — No fraud is practiced absent an intentional act of concealment or misrepresentation which operates as a deterrent to claimant to file a claim with the board. *Day v. Bituminous Cas. Corp.*, 141 Ga. App. 555, 234 S.E.2d 142 (1977), overruled on other grounds, *Brown Transp. Corp. v. James*, 243 Ga. 701, 257 S.E.2d 242 (1979).

Question of fact. — The determination of whether the conduct or representations of the employer were such as to prevent the

filing of a timely claim by the employee with the board, and thus amount to the practice of a fraud upon the employee, is a factual one. *Indemnity Ins. Co. v. O'Neal*, 104 Ga. App. 305, 121 S.E.2d 689 (1961), overruled on other grounds, *Brown Transp. Co. v. James*, 243 Ga. 701, 257 S.E.2d 242 (1979).

That a plaintiff fails to sue on account of a mere uncertain and indefinite understanding, based on no consideration, would not be such fraud as would relieve the bar of the statute. *Fidelity & Cas. Co. v. Bishop*, 108 Ga. App. 422, 133 S.E.2d 51 (1963); *United States Cas. Co. v. Owens*, 109 Ga. App. 834, 137 S.E.2d 543 (1964); *Mallory v. American Cas. Co.*, 114 Ga. App. 641, 152 S.E.2d 592 (1966).

Fact that the employer fails to file a report of the accident as required by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) does not constitute such a fraud on the employee as will toll the statute. *Welchel v. American Mut. Liab. Ins. Co.*, 54 Ga. App. 511, 188 S.E. 357 (1936), overruled on other grounds, *Brown Transp. Co. v. James*, 243 Ga. 701, 257 S.E.2d 242 (1979).

2. Persons Under Disability

Effect of this section, that the right to compensation was dependent upon a claim being filed within one year from the date of the accident, was not to abrogate or repeal the general provisions of the Code which fix different periods of limitations for causes of action of varying natures, and which also provide that such statutes shall not run during the period of disability of a minor or other person laboring under disability to sue. *Porter v. Liberty Mut. Ins. Co.*, 46 Ga. App. 86, 166 S.E. 675 (1932) (see O.C.G.A. § 34-9-82).

Mental incapacity. — If there be such a degree of unsoundness of mind or imbecility as to incapacitate one from managing the ordinary business of life, it will authorize a finding that the claimant is "mentally incompetent", and the statute of limitations is tolled during the period of time the claimant is "mentally incompetent" and until the disability has been removed. *Royal Indem. Co. v. Agnew*, 66 Ga. App. 377, 18 S.E.2d 57 (1941); *Lowe v. Pue*, 150 Ga. App. 234, 257 S.E.2d 209 (1979).

Minors. — Since there is no exception in the workers' compensation law (see

Tolling of Limitation (Cont'd)

2. Persons Under Disability (Cont'd)

O.C.G.A. § 34-9-1 et seq.) in favor of infants, except those under 18 years of age or those laboring under some other disability, it must be held that they stand upon the same footing as adults with reference to the period of limitation fixed by the statute. *Porter v. Liberty Mut. Ins. Co.*, 46 Ga. App. 86, 166 S.E. 675 (1932).

Where it is conclusive, under both the law and the evidence that the claimant was a minor dependent at the time of the accident which resulted in the death of claimant's spouse, and, having no guardian or trustee, the statute did not begin to run against claimant until claimant reached the age of majority. *Durham v. Durham*, 59 Ga. App. 430, 1 S.E.2d 207 (1939).

3. Actions Not Tolling Statute

Payments made without an agreement or approved award do not toll the running of the one-year statutory period within which a claim must be filed in this state. *Sprayberry v. Commercial Union Ins. Co.*, 140 Ga. App. 758, 232 S.E.2d 111 (1976).

Procedure for Filing Claim

1. Jurisdiction of Board

Limitation imposed by this section operated as a limitation of the liability itself as created, and not of the remedy alone. *Porter v. Liberty Mut. Ins. Co.*, 46 Ga. App. 86, 166 S.E. 675 (1932); *New York Indem. Co. v. Allen*, 47 Ga. App. 657, 171 S.E. 191 (1933); *Attaway v. First Nat'l Bank*, 49 Ga. App. 270, 175 S.E. 258 (1934), overruled on other grounds sub nom. *Sprayberry v. Commercial Union Ins. Co.*, 140 Ga. App. 758, 232 S.E.2d 111 (1976) (see O.C.G.A. § 34-9-82).

An essential element of a claim under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is the filing thereof with the board within 12 months from the date of the accident. *Bussey v. Bishop*, 169 Ga. 251, 150 S.E. 78 (1929), overruled on other grounds, *Canton Textile Mills, Inc. v. Lathem*, 253 Ga. 102, 317 S.E.2d 189 (1984); *Porter v. Liberty Mut. Ins. Co.*, 46 Ga. App. 86, 166 S.E. 675 (1932); *Southern Cotton Oil Co. v. McLain*, 49 Ga. App. 177, 174 S.E. 726 (1934);

Patterson v. Employer's Mut. Liab. Ins. Co., 99 Ga. App. 325, 108 S.E.2d 146 (1959).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) brings in a new and independent, but conditional, right to compensation, the condition being that a claim therefor must be filed within a year after the accident. *Porter v. Liberty Mut. Ins. Co.*, 46 Ga. App. 86, 166 S.E. 675 (1932).

Filing of the claim for compensation within the time prescribed is jurisdictional.

Porter v. Liberty Mut. Ins. Co., 46 Ga. App. 86, 166 S.E. 675 (1932); *New York Indem. Co. v. Allen*, 47 Ga. App. 657, 171 S.E. 191 (1933); *Southern Cotton Oil Co. v. McLain*, 49 Ga. App. 177, 174 S.E. 726 (1934); *Attaway v. First Nat'l Bank*, 49 Ga. App. 270, 175 S.E. 258 (1934), overruled on other grounds sub nom. *Sprayberry v. Commercial Union Ins. Co.*, 140 Ga. App. 758, 232 S.E.2d 111 (1976); *Welchel v. American Mut. Liab. Ins. Co.*, 54 Ga. App. 511, 188 S.E. 357 (1936); *Williams v. Campbell Constr. Co.*, 63 Ga. App. 381, 11 S.E.2d 233 (1940); *Zachery v. Royal Indem. Co.*, 80 Ga. App. 659, 56 S.E.2d 812 (1949); *Employers Mut. Liab. Ins. Co. v. Anderson*, 96 Ga. App. 509, 100 S.E.2d 611 (1957); *State Hwy. Dep't v. Cooper*, 104 Ga. App. 130, 121 S.E.2d 258 (1961); *Indemnity Ins. Co. v. O'Neal*, 104 Ga. App. 305, 121 S.E.2d 689 (1961); *Fidelity & Cas. Co. v. Bishop*, 108 Ga. App. 422, 133 S.E.2d 51 (1963); *U.S. Cas. Co. v. Owens*, 109 Ga. App. 834, 137 S.E.2d 543 (1964); *Mallory v. American Cas. Co.*, 114 Ga. App. 641, 152 S.E.2d 592 (1966); *Hartford Accident & Indem. Co. v. Snyder*, 126 Ga. App. 31, 189 S.E.2d 919 (1972); *Travelers Ins. Co. v. Hall*, 128 Ga. App. 71, 195 S.E.2d 679 (1973); *Perkins v. Aetna Cas. & Sur. Co.*, 147 Ga. App. 662, 249 S.E.2d 661 (1978), appeal dismissed, 243 Ga. 701, 256 S.E.2d 792 (1979).

Unless jurisdictional requirements are complied with, the board is without authority to grant the injured employee compensation. *Porter v. Liberty Mut. Ins. Co.*, 46 Ga. App. 86, 166 S.E. 675 (1932); *New York Indem. Co. v. Allen*, 47 Ga. App. 657, 171 S.E. 191 (1933); *Attaway v. First Nat'l Bank*, 49 Ga. App. 270, 175 S.E. 258 (1934), overruled on other grounds sub nom. *Sprayberry v. Commercial Union Ins. Co.*, 140 Ga. App. 758, 232 S.E.2d 111 (1976); *Welchel v. American Mut. Liab. Ins. Co.*, 54 Ga. App. 511, 188 S.E. 357 (1936); *Zachery v.*

Royal Indem. Co., 80 Ga. App. 659, 56 S.E.2d 812 (1949); Employers Mut. Liab. Ins. Co. v. Anderson, 96 Ga. App. 509, 100 S.E.2d 611 (1957); Chevrolet Parts Div., GMC v. Harrell, 100 Ga. App. 280, 111 S.E.2d 104 (1959); State Hwy. Dep't v. Cooper, 104 Ga. App. 130, 121 S.E.2d 258 (1961); Hartford Accident & Indem. Co. v. Snyder, 126 Ga. App. 31, 189 S.E.2d 919 (1972); Travelers Ins. Co. v. Hall, 128 Ga. App. 71, 195 S.E.2d 679 (1973).

If the employee, personally or by counsel, files a claim within this limitation, the jurisdiction of the board attaches as to this claim. State Hwy. Dep't v. Cooper, 104 Ga. App. 130, 121 S.E.2d 258 (1961).

If the employer requested a hearing under former Code 1933, § 114-706 (see O.C.G.A. § 34-9-100) and the employee has binding "notice" of this fact and affirmatively responded so as to convert the application for hearing into a claim within the one-year limitation, the board thereby acquired jurisdiction of the claim under former Code 1933, § 114-305 (see O.C.G.A. § 34-9-82). State Hwy. Dep't v. Cooper, 104 Ga. App. 130, 121 S.E.2d 258 (1961).

If a claim filed was withdrawn by the party filing it before a hearing is held, it is as though no claim had been filed, and the board would be without jurisdiction to entertain a second claim filed after the expiration of the statutory limitation of this section. Ogden v. Clark Thread Co., 93 Ga. App. 227, 91 S.E.2d 191 (1956); Gordy v. Callaway Mills Co., 111 Ga. App. 798, 143 S.E.2d 401 (1965) (see O.C.G.A. § 34-9-82).

Party loses standing after failure to comply. — Where plaintiff failed to comply with the one-year time limit on claims provided in Ga. L. 1925, p. 282, § 2, plaintiff had no standing to challenge the constitutionality of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) because plaintiff was thereby not affected by its provisions. Threatt v. American Mut. Liab. Ins. Co., 173 Ga. 350, 160 S.E. 379 (1931), cert. denied, 284 U.S. 670, 52 S. Ct. 127, 76 L. Ed. 567 (1932) (see O.C.G.A. § 34-9-82).

Jurisdiction ends upon compliance with award. — The jurisdiction of the department (now board) of a case attached with the filing of the claim as required by this section, and was lost when there is a full compliance with the award, unless there is a

provision in the act or in the award conferring jurisdiction of the case. London Guarantee & Accident Co. v. Boynton, 54 Ga. App. 419, 188 S.E. 265 (1936) (see O.C.G.A. § 34-9-82).

2. Claimant

Good faith claim of entitlement. — This section referred to a claim by one who in good faith contended that one was entitled to the immediate and unconditional award of compensation. Bituminous Cas. Corp. v. Johnson, 79 Ga. App. 105, 53 S.E.2d 119 (1949) (see O.C.G.A. § 34-9-82).

Duty to pass on claimant's competency. — It is not only within the power, but is the duty of the board to pass on the competency of a claimant to file a claim. McIntyre v. Employers Mut. Liab. Ins. Co., 122 Ga. App. 424, 177 S.E.2d 191 (1970).

It is the claimant's duty to file a claim against one whom claimant contends is claimant's employer. It is not the duty of the board to make a special investigation, before a hearing, to ascertain who the proper parties are. The burden of showing the employment is on the claimant. McCormick v. Kitchens, 59 Ga. App. 376, 1 S.E.2d 57 (1939).

Claimant under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is presumed to know the law which required claimant to file a claim with the board within one year after the accident. New York Indem. Co. v. Allen, 47 Ga. App. 657, 171 S.E. 191 (1933).

Employee must affirmatively take some action within the one-year limitation, which the employee may do either by filing a claim, or by responding to the employer's request for a hearing and thus convert the hearing into a claim. State Hwy. Dep't v. Cooper, 104 Ga. App. 130, 121 S.E.2d 258 (1961); U.S. Cas. Co. v. Owens, 109 Ga. App. 834, 137 S.E.2d 543 (1964).

Hearing requested by the employer, standing alone, is not a claim until the employee affirmatively responds to it by becoming a party within the one-year limitation. State Hwy. Dep't v. Cooper, 104 Ga. App. 130, 121 S.E.2d 258 (1961).

Applications under § 34-9-100. — Any application by the employer for a hearing under former Code 1933, § 114-706 (see O.C.G.A. § 34-9-100) to have determined

Procedure for Filing Claim (Cont'd)**2. Claimant (Cont'd)**

the amount of compensation, if any, to which the employee may be entitled, in no way relieved the employee from taking some affirmative action before the board within the one-year limitation. *State Hwy. Dep't v. Cooper*, 104 Ga. App. 130, 121 S.E.2d 258 (1961).

3. Form of Claim

Claims to be filed against a party. — It was evidently the legislative intention that claims should be filed against some party, and that simply to set out that one has been injured and that somebody owes compensation is not sufficient. *McCormick v. Kitchens*, 59 Ga. App. 376, 1 S.E.2d 57 (1939).

Workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) does not require any technical or formal filing of a claim. *Bituminous Cas. Corp. v. Mallory*, 63 Ga. App. 714, 12 S.E.2d 112 (1940); *Roddy v. Hartford Accident & Indem. Co.*, 65 Ga. App. 632, 16 S.E.2d 81 (1941); *Ayers v. Aetna Cas. & Sur. Co.*, 71 Ga. App. 327, 30 S.E.2d 811 (1944); *State Hwy. Dep't v. Cooper*, 104 Ga. App. 130, 121 S.E.2d 258 (1961); *Maryland Cas. Co. v. Smith*, 122 Ga. App. 262, 176 S.E.2d 666 (1970).

Letter to board may be sufficient. — The mere writing of a letter to the board by a claimant setting forth claimant's employment, the name of claimant's employer, and the cause of claimant's injuries, may amount to a filing of claimant's claim. *Bituminous Cas. Corp. v. Mallory*, 63 Ga. App. 714, 12 S.E.2d 112 (1940); *Ayers v. Aetna Cas. & Sur. Co.*, 71 Ga. App. 327, 30 S.E.2d 811 (1944); *State Hwy. Dep't v. Cooper*, 104 Ga. App. 130, 121 S.E.2d 258 (1961).

Letter must ask for relief. — Where the letter did not ask for relief or a hearing or action of any nature beyond the giving of information, it did not amount to the filing of a claim under this section. *State Hwy. Dep't v. Cooper*, 104 Ga. App. 130, 121 S.E.2d 258 (1961) (see O.C.G.A. § 34-9-82).

Submission of a compensation agreement to the board is equivalent to the filing of a formal claim, as a matter of law, on the part

of the employee, and the board in returning an agreement to the insurer, for purposes of correction and resubmission, does not judicially determine the rights of the claimant by an approval or rejection of the agreement but retains jurisdiction of the matter waiting further action by the parties. *Hartford Accident & Indem. Co. v. Dutton*, 110 Ga. App. 398, 138 S.E.2d 733 (1964).

Effect of requesting delay. — A claim for compensation must ordinarily be filed within one year in order to comply with this section. Where the claimant personally filed an "application for hearing" within the statutory period and notice of pendency of the claim is given to the employer, the fact that claimant placed on claimant's claim the notation, "do not assign my case for a hearing until specifically requested," will not amount to a failure to file in compliance with this section, even though a hearing was not requested or held within the statutory period. *Complete Auto Transit, Inc. v. Reavis*, 105 Ga. App. 364, 124 S.E.2d 491 (1962) (see O.C.G.A. § 34-9-82).

4. Delivery

Claim is filed with the board when it is actually delivered to the board or to some proper officer thereof and received by the officer to be kept on file. *Chevrolet Parts Div., GMC v. Harrell*, 100 Ga. App. 280, 111 S.E.2d 104 (1959).

Delivery of a letter containing written notice of a claimant's claim for compensation to the United States mail for delivery to the board does not constitute the filing of such claim with the board. The claim cannot be considered as filed with the board until it is actually received by the board or by some proper officer thereof to be kept on file. *Travelers Ins. Co. v. Hall*, 128 Ga. App. 71, 195 S.E.2d 679 (1973).

Where evidence was uncontradicted that attorney for claimant mailed letter, ample as the basis for a claim, properly addressed and stamped, to the board within one year after the claimant was injured, and no one testified that the letter had not been received by the board, the evidence authorized an award of the board in claimant's favor. *Ayers v. Aetna Cas. & Sur. Co.*, 71 Ga. App. 327, 30 S.E.2d 811 (1944).

OPINIONS OF THE ATTORNEY GENERAL

Filing of workers' compensation claims can only be done by the claimant or the claimant's legal representative. 1960-61 Op. Att'y Gen. p. 590.

Period of time a person has been retired from or has not been employed by a school system would not be of any particular significance as to the former employer's workers'

compensation coverage; this is not to say that there are not notice of accident filing requirements and filing of claim requirements which must be complied with in order for an employee or former employee to make a proper claim for compensation. 1977 Op. Att'y Gen. No. 77-38.

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 527 et seq.

C.J.S. — 100 C.J.S., Workers' Compensation, § 868 et seq.

ALR. — Applicability of general statute of limitations to action, or proceeding under workmen's compensation acts, 16 ALR 462; 40 ALR 495.

Limitation of time for filing claim under workmen's compensation as jurisdictional, 78 ALR 1294.

Construction and application of provisions of workmen's compensation acts regarding allowance for aggravation of injury from same accident after time limited for filing claim, 105 ALR 971.

Workmen's compensation: date of accident or date when injury becomes manifest as time from which period for filing claim commences to run, 108 ALR 316.

Computation of period for filing death claim under workmen's compensation statutes, 119 ALR 1158.

Payments, furnishing medical or hospital services, or burial, by employer or his insurer, to employee after injury, as affecting time for filing claim under Workmen's Compensation Act, 144 ALR 606.

Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 ALR2d 500.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period, 79 ALR2d 1080.

Statute of limitations: effect of delay in appointing administrator or other representative on cause of action accruing at or after death of person in whose favor it would have accrued, 28 ALR3d 1141.

Effect of injured employee's proceeding for workmen's compensation benefits on running of statute of limitations governing action for personal injury arising from same incident, 71 ALR3d 849.

Fraud as extending statutory limitations period for contesting will or its probate, 48 ALR4th 1094.

When limitations period begins to run as to claim for disability benefits for contracting of disease under Workers' Compensation or Occupational Diseases Act, 86 ALR5th 295.

When time period commences as to claim under workers' compensation or occupational diseases act for death of worker due to contraction of disease, 100 ALR5th 567.

34-9-83. Priority of claims.

All rights of compensation under this chapter shall have the same preference or priority for the whole thereof against the assets of the employer as is allowed by law for claims for unpaid wages for labor. (Ga. L. 1920, p. 167, § 21; Code 1933, § 114-301.)

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 166.

C.J.S. — 99 C.J.S., Workers' Compensation, § 281.

34-9-84. Assignability of claims.

No claim for compensation under this chapter shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors. (Ga. L. 1920, p. 167, § 22; Code 1933, § 114-302.)

JUDICIAL DECISIONS

Purpose. — All laws exempting any portion of one's earnings from the process of garnishment are primarily based upon the necessity of exempting in behalf of a debtor, even against the debtor's just debts, something with which to care for the debtor's family or dependents as well as oneself; this is the only principle upon which a debtor should be permitted to withhold money within the power of the court from a creditor, the justness of whose claim is undisputed. *American Mut. Liab. Ins. Co. v. Hicks*, 159 Ga. App. 214, 283 S.E.2d 18 (1981).

Jurisdiction when constitutionality in question. — If constitutionality of this section was drawn in question, the Supreme Court of Georgia, and not the Court of Appeals, had jurisdiction of the case. *Smith v. Georgia Granite Corp.*, 57 Ga. App. 245, 194 S.E. 908, rev'd on other grounds, 186 Ga. 634, 198 S.E. 772 (1938) (see O.C.G.A. § 34-9-84).

Exemption only for benefit of residents. — The exemption from the claims of creditors, as declared in this section was a mere privilege and not an absolute right. It was provided only as a matter of state policy for the benefit of residents of this state, and cannot be claimed either by or for a debtor who was removed to another state and is no longer either a permanent or a temporary resident of Georgia. *Smith v. Georgia Granite Corp.*, 186 Ga. 634, 198 S.E. 772 (1938) (see O.C.G.A. § 34-9-84).

Garnishment. — While ancillary to the main action, a garnishment was a distinct cause of action between different parties, requiring a separate and independent judgment. Accordingly, where the garnishee in

an attachment case answered that it was indebted to the defendant in a stated amount, but that such indebtedness arose under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) and was exempt from garnishment under this section, and the plaintiff filed a traverse of the answer attacking the exemption provision as unconstitutional, and alleging that the indebtedness referred to in the answer was not exempt, for the reason that the defendant removed from Georgia and then resided in another state, the questions for determination upon such answer and traverse related only to the claimed exemption from garnishment, and did not include any question as to the liability of the defendant to the plaintiff in attachment, or as to the assignability of the claim for compensation. *Smith v. Georgia Granite Corp.*, 186 Ga. 634, 198 S.E. 772 (1938) (see O.C.G.A. § 34-9-84).

A garnishment to collect a judgment for child support is not precluded by O.C.G.A. § 34-9-84. *American Mut. Liab. Ins. Co. v. Hicks*, 159 Ga. App. 214, 283 S.E.2d 18 (1981); *Travelers Ins. Co. v. Moxley*, 160 Ga. App. 391, 287 S.E.2d 340 (1981).

Workers' compensation benefits. — Debtor's workers' compensation benefits did not constitute property of that debtors' bankruptcy estate and were beyond the jurisdiction of the court pursuant to O.C.G.A. § 34-9-84. *In re Harvey*, 356 B.R. 557 (Bankr. S.D. Ga. 2006).

Cited in *West v. Standard Accident Ins. Co.*, 176 Ga. 54, 166 S.E. 761 (1932); *West v. Standard Accident Ins. Co.*, 176 Ga. 755, 168 S.E. 766 (1933).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, §§ 460, 667 et seq.

C.J.S. — 100 C.J.S., Workers' Compensation, §§ 730, 731.

ALR. — Constitutionality of prohibition of assignment or release of claim under Workmen's Compensation Acts, 47 ALR 799. Claim for compensation or for assess-

ments or premiums under Workmen's Compensation Act as provable in bankruptcy, 86 ALR 770.

Debtor's exemption (other than homestead) as applicable in favor of nonresidents or of residents absent or about to remove from the state, 119 ALR 554.

Survivability or assignability of claim for accrued and unpaid installments of public relief or pension benefits, 153 ALR 810.

Validity, construction, and effect of statutory exemptions of proceeds of workers' compensation awards, 48 ALR5th 473.

34-9-85. Claim by guardian or trustee of mental incompetent or minor.

If an injured employee is mentally incompetent or is under 18 years of age at the time any right or privilege accrues to him under this chapter, his guardian or trustee may claim and exercise such right or privilege in his behalf. (Ga. L. 1920, p. 167, § 47; Code 1933, § 114-307.)

Law reviews. — For annual survey of law of workers' compensation, see 56 Mercer L. Rev. 479 (2004).

JUDICIAL DECISIONS

Representation by attorney. — An award made under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) involving a claimant under 18 years of age, who was represented by an attorney engaged by the claimant's father as the claimant's natural guardian, the father being present and testifying on the first hearing, before a single director, will not be set aside as improperly made on the ground that no guardian or trustee appeared for the claimant as provided by this section. *Webb v. General Accident, Fire & Life Ins. Co.*, 72 Ga. App. 127,

33 S.E.2d 273 (1945) (see O.C.G.A. § 34-9-85).

Plain intimation of Ga. L. 1920, p. 167 § 47 (see O.C.G.A. § 34-9-85) is that a guardian or trustee, in the guardian's power to act, is limited to cases where the minor employee has not attained the age of 18 years. *Porter v. Liberty Mut. Ins. Co.*, 46 Ga. App. 86, 166 S.E. 675 (1932).

Cited in *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939); *Royal Indem. Co. v. Agnew*, 66 Ga. App. 377, 18 S.E.2d 57 (1941).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, §§ 540 et seq., 626.

C.J.S. — 100 C.J.S., Workers' Compensation, § 814 et seq. 101 C.J.S., Workers' Compensation, § 1527 et seq.

ALR. — Right of parent who consents to or acquiesces in employment of child under statutory age to recover for latter's injury or death while in such employment, 23 ALR 635; 40 ALR 1206.

Applicability and effect of Workmen's Compensation Act in cases of injury to minors, 83 ALR 416; 142 ALR 1018.

Protection of interest or rights of minors in proceedings for, or award of, compensation under provisions of Workmen's Compensation Act, 120 ALR 395.

34-9-86. Applicability of time limits to mental incompetents, minors, and persons proceeding against defunct corporations.

No limitation of time provided in this chapter for the giving of notice or making claim shall apply to any person who is mentally incompetent or a minor dependent, as long as he has no guardian or trustee, or to a person who proceeds in good faith against a corporation supposed to have a legal entity but which is proved to be defunct by reason of the expiration of its charter. (Ga. L. 1920, p. 167, § 48; Ga. L. 1925, p. 282, § 3; Code 1933, § 114-306.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

MENTALLY INCOMPETENT PERSONS

MINOR DEPENDENTS

General Consideration

Filing of claim within time prescribed is essential to enforce right to compensation fixed by the statute and is jurisdictional. *Williams v. Campbell Constr. Co.*, 63 Ga. App. 381, 11 S.E.2d 233 (1940).

Cited in *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939); *McDonald v. Travelers Ins. Co.*, 81 Ga. App. 614, 59 S.E.2d 537 (1950); *Georgia Forestry Comm'n v. Harrell*, 98 Ga. App. 238, 105 S.E.2d 461 (1958).

Mentally Incompetent Persons

"Mentally incompetent" construed. — In the absence of anything in the workers' compensation law to indicate that anything different was intended, the term "mentally incompetent" as used in former Code 1933, § 114-306 (see O.C.G.A. § 34-9-86), which exempted a person from the application of the limitation provision in former Code 1933, § 114-305 (see O.C.G.A. § 34-9-82), must be given the same scope and meaning as that which is accorded to it, or words of similar import, in other statutes which deal with the status of persons generally. *Royal Indem. Co. v. Agnew*, 66 Ga. App. 377, 18 S.E.2d 57 (1941).

Test for tolling statute of limitations. — The test as to whether a claimant was so "mentally incompetent" under this section as to toll the running of the statute of

limitations was this: is the claimant's mind so unsound or is the claimant so weak in the claimant's mind, or so imbecile, no matter from what cause, that the claimant cannot manage the ordinary affairs of life? *Royal Indem. Co. v. Agnew*, 66 Ga. App. 377, 18 S.E.2d 57 (1941); *Kell v. Bridges*, 77 Ga. App. 424, 48 S.E.2d 780 (1948); *Petteway v. Continental Cas. Co.*, 112 Ga. App. 496, 145 S.E.2d 635 (1965); *Mayor of Athens v. Schaeffer*, 122 Ga. App. 729, 178 S.E.2d 764 (1970) (see O.C.G.A. § 34-9-86).

If there is such a degree of unsoundness of mind or imbecility as to incapacitate one from managing the ordinary business of life, it will authorize a holding that a claimant is "mentally incompetent" and that the statute is tolled during the period of time the claimant is "mentally incompetent" and until the disability is removed. *Royal Indem. Co. v. Agnew*, 66 Ga. App. 377, 18 S.E.2d 57 (1941); *Lowe v. Pue*, 150 Ga. App. 234, 257 S.E.2d 209 (1979).

Duty of board. — When the claimant in a workers' compensation case files a claim more than one year after the accident, and upon the hearing there is evidence adduced that would authorize the finding of fact that the claimant was mentally incompetent, it is not only within the power but it is the duty of the board to pass on this issue in order to determine whether the claim is barred. *Kell v. Bridges*, 77 Ga. App. 424, 48 S.E.2d 780 (1948).

Minor Dependents

Term "minor dependent", as used in Ga. L. 1925, p. 282, § 3 refers to a minor under the age of 18, who is conclusively presumed to be dependent upon a parent for support, and to claims arising in favor of the dependents of an injured or deceased employee, and not to a claim accruing in favor of one who is an employee personally. *Porter v. Liberty Mut. Ins. Co.*, 46 Ga. App. 86, 166

S.E. 675 (1932) (see O.C.G.A. § 34-9-86).

When limitation period begins to run. —

Since it is conclusive, under both the law and the evidence, that the claimant was a minor dependent at the time of the accident which resulted in the death of the claimant's spouse, and having no guardian or trustee, the statute did not begin to run against the claimant until the claimant reached the age of majority. *Durham v. Durham*, 59 Ga. App. 430, 1 S.E.2d 207 (1939).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, §§ 540 et seq., 593.

C.J.S. — 100 C.J.S., Workers' Compensation, § 831.

ALR. — Applicability of general statute of limitations to action, or proceeding under workmen's compensation acts, 16 ALR 462; 40 ALR 495.

May notice of injury or claim contemplated by Workmen's Compensation Act be waived, 78 ALR 1306.

Mental incompetency as obviating effect of failure to comply with provisions of Workmen's Compensation Acts as to giving notice or other procedural matters, 91 ALR 1400.

Protection of interest or rights of minors

in proceedings for, or award of, compensation under provisions of Workmen's Compensation Act, 120 ALR 395.

Applicability and effect of Workmen's Compensation Act in cases of injury to minors, 142 ALR 1018.

Workmen's compensation: provision limiting time for giving notice of injury or presenting claim as applied to infants, 142 ALR 1035.

Effect of injured employee's proceeding for workmen's compensation benefits on running of statute of limitations governing action for personal injury arising from same incident, 71 ALR3d 849.

PART 2**HEARING AND APPEALS**

Law reviews. — For note on the 1994 amendments of Code Sections 34-9-100, 34-9-102, and 34-9-103 of this part, see 11 Ga. St. U.L. Rev. 204 (1994).

34-9-100. Filing of claims with board; investigation or mediation; hearing; dismissal of stale claims.

(a) Subject to Code Section 34-9-82, a claim for compensation may be filed with the board at any time following an injury or death. The board and its administrative law judges shall have full authority to hear and determine all questions with respect to such claims.

(b) The board shall make or cause to be made any investigation or mediation it considers necessary and, upon its own motion or application of any interested party, order a hearing thereon and assign the claim to an administrative law judge for review. Furthermore, the board may direct the parties to participate in mediation conducted under the supervision and guidance of the board.

(c) Any application for hearing filed with the board pursuant to this Code section, on or after July 1, 1985, but prior to July 1, 2007, for which no hearing is conducted for a period of five years shall automatically stand dismissed.

(d)(1) For injuries occurring on or after July 1, 2007, any claim filed with the board for which neither medical nor income benefits have been paid shall stand dismissed with prejudice by operation of law if no hearing has been held within five years of the alleged date of injury.

(2) This subsection shall not apply to a claim for an occupational disease as defined in Code Section 34-9-280.

(3) The form provided by the board for use in filing a workers' compensation claim shall include notice of the provisions of this subsection.

(e) Any claim, notice, or appeal required by this chapter to be filed with the board shall be deemed filed on the earlier of:

(1) The date such claim or notice is actually received by the board; or

(2) The official postmark date such claim or notice was mailed to the board, properly addressed with postage prepaid, by registered or certified mail or statutory overnight delivery. (Ga. L. 1920, p. 167, § 56; Code 1933, § 114-706; Ga. L. 1945, p. 462, § 1; Ga. L. 1956, p. 725, § 1; Ga. L. 1969, p. 205, § 1; Ga. L. 1973, p. 232, § 8; Ga. L. 1974, p. 1143, § 10; Ga. L. 1978, p. 2220, § 11; Ga. L. 1985, p. 727, § 2; Ga. L. 1991, p. 359, § 1; Ga. L. 1994, p. 887, § 6; Ga. L. 1995, p. 642, § 7; Ga. L. 2000, p. 1589, § 3; Ga. L. 2007, p. 616, § 2/HB 424.)

The 2007 amendment, effective July 1, 2007, in subsection (c), substituted "Any" for "On or after July 1, 1985, a" and inserted " , on or after July 1, 1985, but prior to July 1, 2007, "; added present paragraphs (d)(1) through (d)(3); redesignated former subsection (d) as present subsection (e); and substituted "The" for "the" at the beginning of paragraphs (e)(1) and (e)(2).

Editor's notes. — Ga. L. 1995, p. 642, § 13, not codified by the General Assembly, provides for severability.

Law reviews. — For article, "Workers' Compensation," see 53 Mercer L. Rev. 521 (2001).

JUDICIAL DECISIONS

Former Code 1933, § 114-706 (see O.C.G.A. § 34-9-100) must be construed in *pari materia* with other sections of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) and with former Code 1933, § 114-307 (see O.C.G.A. § 34-9-104) in particular. *Arnold v. Indemnity Ins. Co.*, 94 Ga. App. 493, 95 S.E.2d 29 (1956); *St. Paul Fire & Marine Ins. Co. v. White*, 103 Ga. App. 607, 120 S.E.2d 144 (1961).

Expeditious determination of claims intended. — It was clear from this section that the General Assembly contemplated an expeditious determination of claims filed under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Ogden v. Clark Thread Co.*, 93 Ga. App. 227, 91 S.E.2d 191 (1956) (see O.C.G.A. § 34-9-100).

An administrative law judge can summarily dispose of a claim for benefits when the

underlying issues between the same parties have already been heard and determined. *Continental Baking Co. v. Brock*, 198 Ga. App. 578, 402 S.E.2d 331 (1991).

Force and effect of board's decision. — A decision of the Workers' Compensation Board has the same force and effect as the decision or judgment of any other tribunal. *Hartford Accident & Indem. Co. v. Webb*, 109 Ga. App. 667, 137 S.E.2d 362 (1964).

"Claim" construed. — The word "claim," as used in former Code 1933, § 114-305 (see O.C.G.A. § 34-9-82), was coextensive with "case", and embraced the counterclaim of an employee as well as the claim of the employer. *Metropolitan Cas. Ins. Co. v. Maloney*, 56 Ga. App. 74, 192 S.E. 320 (1937).

Workers' compensation law (see O.C.G.A. § 34-9-1 et seq) does not require any special kind of claim to be filed. *Lumbermen's Mut. Cas. Co. v. Layfield*, 61 Ga. App. 1, 5 S.E.2d 610 (1939).

Application by either party authorized. — Where the employee and the employer or insurance carrier fail to agree as to payment of compensation, either party may make application to the board for a hearing in regard to any matter at issue and for a ruling thereon. *Bailey-Lewis-Williams of Ga., Inc. v. Thomas*, 103 Ga. App. 279, 119 S.E.2d 141 (1961).

Power to add parties. — An administrative law judge had the power to add a party to a claim, and also had the jurisdiction and power to determine the legal question of whether the added party was the alter ego of the employer. *Morgan v. Palace Indus., Inc.*, 195 Ga. App. 80, 392 S.E.2d 315 (1990).

Claimant not required to file claim in addition to answer. — Where employer instituted or filed a case seeking a hearing in regard to the matter at issue and employee responded, it was unnecessary for employee to file a claim other than the one set up in the employee's answer, so long as the case was pending. *Metropolitan Cas. Ins. Co. v. Maloney*, 56 Ga. App. 74, 192 S.E. 320 (1937).

Injunctions. — If the employer has initiated a hearing under this section, the employee cannot enjoin proceedings in a court of equity for the reason that the employee has an adequate remedy at law to object before the board to the jurisdiction of that

body. *State Hwy. Dep't v. Cooper*, 104 Ga. App. 130, 121 S.E.2d 258 (1961) (see O.C.G.A. § 34-9-100).

Withdrawal of claim before hearing. — If a claim was withdrawn by the party filing it before a hearing was had, it was as though no claim was filed, and the board would be without jurisdiction to entertain a second claim filed after the expiration of the statutory limitation for which provision was made in former Code 1933, § 114-305 (see O.C.G.A. § 34-9-82); however, where a claim was filed within the statutory period and never withdrawn, the board may entertain the claim at any time thereafter. *Ogden v. Clark Thread Co.*, 93 Ga. App. 227, 91 S.E.2d 191 (1956) (decided prior to 1985 amendment which added subsection (d) (now (e))).

Statute of limitations not applicable where case pending. — Where "case" or "claim" of employer and appearance and answer of employee were all filed within 12 months, and none of them had ever been withdrawn with the approval or consent of the court or department (now board), and the case was continued, it was still pending, and while so pending could be reset and tried; consequently, the statute of limitations did not apply. *Metropolitan Cas. Ins. Co. v. Maloney*, 56 Ga. App. 74, 192 S.E. 320 (1937).

Objection to board's jurisdiction. — When a hearing is requested and notice is given, a person so notified may object to the jurisdiction of the industrial commission (now board of workers' compensation) on any ground that will show an absence of authority of the commission (board) to inquire into the matter. *Milledgeville State Hosp. v. Clodfelter*, 99 Ga. App. 49, 107 S.E.2d 289 (1959).

Stipulations. — There is nothing which prohibits the board from entering awards based on stipulations, even though the effect of the award is to deny compensation in any amount to claimant. *Lavender v. Zurich Ins. Co.*, 110 Ga. App. 196, 138 S.E.2d 118 (1964).

Burden of proof. — A person attacking a workers' compensation agreement on the ground that it is void has the burden of proving such invalidity. *Manus v. Liberty Mut. Ins. Co.*, 100 Ga. App. 289, 111 S.E.2d 103 (1959).

Authority to reopen or rehear case. — State board of workers' compensation has

no power to reopen or rehear a case, after a prior award, on its merits or for purposes of modification, except upon application for a hearing on a change of condition under former Code 1933, § 114-709 (see O.C.G.A. § 34-9-104), or where an application for review has been made under former Code 1933, § 114-708 (see O.C.G.A. § 34-9-103). *Dempsey v. Chevrolet Div., Gen. Motors*, 102 Ga. App. 408, 116 S.E.2d 509 (1960).

Where claimant appellant had the opportunity at claimant's 1985 hearing to proffer evidence on all the issues about which claimant complained on appeal, and appellant did not contend that any error was committed by the administrative law judge which prevented claimant from presenting material evidence to prove claimant's entitlement to income benefits, or that there was newly discovered evidence authorizing a new trial pursuant to O.C.G.A. § 5-5-23 and Rule 103(d) of the Rules and Regulations of the State board of workers' compensation, claimant attempted in claimant's appeal to gain another chance to reargue facts and circumstances preexisting the 1985 hearing; the evidence in the record was sufficient to support the board's conclusion, either at the time of the first award or on reappraisal. *Sanders v. Georgia-Pacific Corp.*, 192 Ga. App. 439, 385 S.E.2d 101, cert. denied, 192 Ga. App. 903, 385 S.E.2d 101 (1989).

Agreement to discontinue payments. — The legislature intended that parties to an agreement for compensation might agree as to the discontinuance of weekly payments under such agreement and formalize the agreement by reducing it to writing, signing it, and submitting it to the board for the board's approval. *Atlanta Coca Cola Bottling Co. v. Gates*, 225 Ga. 824, 171 S.E.2d 723 (1969).

Relitigation of claims. — In a bankruptcy proceeding seeking a determination that a debt arising from a workers' compensation award was dischargeable, findings of the administrative law judge that the employer failed to provide workers' compensation insurance as required by state law, and that claimant's injuries were compensable and should have been timely paid by the employer would not be relitigated; however, no specific findings were made as to the employer's intent in failing to provide insurance and, thus, there was a genuine issue of

material fact and collateral estoppel was not applicable to such issue. *Walters v. Betts*, 174 Bankr. 636 (Bankr. N.D. Ga. 1994).

Waiver. — Compliance by a permanent partial disability claimant with an administrative law judge's directive requiring claimant to submit claimant's medical evidence to the judge outside of the context of a hearing does not constitute a waiver of the claimant's right to a hearing on the claim. *Miller v. Brunswick Pulp & Paper Co.*, 184 Ga. App. 172, 360 S.E.2d 754 (1987).

Cited in *Wilkins v. Travelers Ins. Co.*, 52 Ga. App. 142, 182 S.E. 628 (1935); *United States Fid. & Guar. Co. v. Lawson*, 15 F. Supp. 116 (S.D. Ga. 1936); *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939); *Lumbermen's Mut. Cas. Co. v. Cook*, 195 Ga. 397, 24 S.E.2d 309 (1943); *Hartford Accident & Indem. Co. v. Camp*, 69 Ga. App. 758, 26 S.E.2d 679 (1943); *State Hwy. Dep't v. Turner*, 198 Ga. 795, 32 S.E.2d 805 (1945); *Howard v. Murdock*, 83 Ga. App. 536, 64 S.E.2d 221 (1951); *Heath v. Standard Accident Ins. Co.*, 94 Ga. App. 548, 95 S.E.2d 726 (1956); *Rittenhouse v. U.S. Fid. & Guar. Co.*, 96 Ga. App. 407, 100 S.E.2d 145 (1957); *National Sur. Corp. v. Nelson*, 99 Ga. App. 95, 107 S.E.2d 718 (1959); *General Accident Fire & Life Assurance Corp. v. Teal*, 100 Ga. App. 314, 111 S.E.2d 113 (1959); *American Cas. Co. v. Herron*, 100 Ga. App. 661, 112 S.E.2d 160 (1959); *Sears, Roebuck & Co. v. Wilson*, 215 Ga. 746, 113 S.E.2d 611 (1960); *Complete Auto Transit, Inc. v. Davis*, 101 Ga. App. 849, 115 S.E.2d 482 (1960); *Clay v. Aetna Cas. & Sur. Co.*, 102 Ga. App. 498, 116 S.E.2d 686 (1960); *Indemnity Ins. Co. of N. Am. v. Loftis*, 103 Ga. App. 749, 120 S.E.2d 655 (1961); *Employers Mut. Liab. Ins. Co. v. Derwael*, 105 Ga. App. 54, 123 S.E.2d 345 (1961); *Amerson v. Employers Ins. Co.*, 105 Ga. App. 336, 124 S.E.2d 496 (1962); *Pacific Employers Ins. Co. v. Shoemaker*, 105 Ga. App. 432, 124 S.E.2d 653 (1962); *Complete Auto Transit, Inc. v. Davis*, 106 Ga. App. 369, 126 S.E.2d 909 (1962); *Anglin v. St. Paul-Mercury Indem. Co.*, 106 Ga. App. 395, 126 S.E.2d 913 (1962); *Firth v. Liberty Mut. Ins. Co.*, 107 Ga. App. 285, 129 S.E.2d 812 (1963); *Guess v. Liberty Mut. Ins. Co.*, 219 Ga. 581, 134 S.E.2d 783 (1964); *American Mut. Liab. Ins. Co. v. Chandler*, 112 Ga. App. 574, 145 S.E.2d 816 (1965); *Hartford Accident & Indem. Co. v. Tribble*, 119 Ga. App.

120, 166 S.E.2d 410 (1969); *NABISCO v. Martin*, 225 Ga. 198, 167 S.E.2d 140 (1969); *Noles v. National Engine Rebuilding Co.*, 119 Ga. App. 833, 169 S.E.2d 185 (1969); *Royal Globe Indem. Co. v. Thompson*, 123 Ga. App. 268, 180 S.E.2d 576 (1971); *Handley v. Travelers Ins. Co.*, 131 Ga. App. 797, 207 S.E.2d 218 (1974); *Commercial Union Ins. Co. v. Crews*, 139 Ga. App. 521,

229 S.E.2d 14 (1976); *West Point Pepperell, Inc. v. Springfield*, 140 Ga. App. 530, 231 S.E.2d 811 (1976); *Terry v. Insurance Co. of N. Am.*, 146 Ga. App. 206, 246 S.E.2d 7 (1978); *Southern Bell Tel. & Tel. Co. v. Hodges*, 164 Ga. App. 757, 298 S.E.2d 570 (1982); *McFadden Bus. Publications, Inc. v. Guidry*, 177 Ga. App. 885, 341 S.E.2d 294 (1986).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, *Workers' Compensation*, §§ 526 et seq., 643.

C.J.S. — 100 C.J.S., *Workers' Compensation*, §§ 718, 719.

ALR. — *Workmen's compensation: char-*

acter or status of right or claim within provision of act requiring or authorizing approval by the court or commission of settlement or compromise, 153 ALR 285.

34-9-101. Appointment of physician to examine injured employee; payment of fee and expenses of examining physician.

The members of the board or any one of them or an administrative law judge may, upon the application of either party or upon their own motion, appoint one or more disinterested and duly qualified physicians or surgeons to make any necessary medical examination of the employee and to report or testify with respect thereto. The physicians or surgeons shall be allowed travel expenses and a reasonable fee, to be paid by either or both parties or by the state, as directed by the board, any member thereof, or an administrative law judge. (Ga. L. 1920, p. 167, § 62; Code 1933, § 114-713; Ga. L. 1975, p. 198, § 11; Ga. L. 1988, p. 1679, § 17.)

Cross references. — Examination of employee upon request by employer, and effect of refusal of examination, § 34-9-202.

JUDICIAL DECISIONS

Discretion in appointing physician. — This section invested discretion in the making or refusing of appointment of a physician to examine an employee. *Ingram v. Liberty Mut. Ins. Co.*, 62 Ga. App. 789, 10 S.E.2d 99 (1940) (see O.C.G.A. § 34-9-101).

Disqualification. — A disinterested physician would not be disqualified as a matter of law if the physician were the family physician of the employer, was hired and paid to treat certain persons at the instance of the carrier, and was also the family physician of the employee; it would not disqualify the physician, as a matter of law, if the physician

occupied such position toward only one or two of the interested parties, but if the physician were regularly retained by any one of the three the physician would be disqualified. *Wiley v. Bituminous Cas. Co.*, 76 Ga. App. 862, 47 S.E.2d 652 (1948).

A physician appointed under this section was not disqualified to serve in this capacity merely because on some occasions the physician examined and treated patients at the instance of the employer's insurance carrier, where the physician was paid for such services as they were rendered, and was not regularly retained by such carrier. *Wiley v.*

Bituminous Cas. Co., 76 Ga. App. 862, 47 S.E.2d 652 (1948) (see O.C.G.A. § 34-9-101).

Opportunity to cross-examine physician.

— Where, on the hearing of a claim for compensation, it was ordered on motion of counsel for claimant that claimant be examined by a physician who was not present, but where counsel for employer and insurance carrier did not waive the right to subject such physician to cross-examination, excep-

tion to award in claimant's favor, on grounds that such physician's report was considered in making such award and that counsel for employer and insurance carrier had no opportunity to subject the physician to cross-examination, was meritorious. *Caldwell v. American Mut. Liab. Ins. Co.*, 45 Ga. App. 82, 163 S.E. 247 (1932).

Cited in *Roberson v. Lumbermen's Mut. Cas. Co.*, 92 Ga. App. 572, 89 S.E.2d 270 (1955).

RESEARCH REFERENCES

C.J.S. — 101 C.J.S., Workmen's Compensation, § 1378 et seq.

34-9-102. Hearing before administrative law judge.

(a) *Notice of hearing.* The hearing shall be held as soon as practicable; provided, however, no hearing shall be scheduled less than 30 days nor more than 90 days from the date of the hearing notice. With regard to any request for a determination of noncatastrophic status in accordance with subparagraph (g)(6)(B) of Code Section 34-9-200.1, no hearing shall be scheduled less than 90 days after the hearing is requested.

(b) *Place of hearing.* If the injury or death occurred within this state, the hearing shall be held in the county where the injury or death occurred or in any contiguous county or in any county within 50 miles of the county of injury or death, unless otherwise agreed by the parties and authorized by the administrative law judge. If the injury or death occurred outside the state, the hearing may be held in the county of the employer's residence or place of business or in any other county of the state, as determined in the discretion of the administrative law judge.

(c) *Authority of administrative law judge.* The administrative law judge conducting the hearing shall have, in addition to all powers necessary to implement this chapter, the following powers: to administer oaths and affirmations, to issue subpoenas, to rule upon offers of proof, to regulate the course of the hearing, to set the time and place for continued hearings, to fix the time for filing briefs, to dispose of motions to dismiss for lack of board jurisdiction, to rule on requests for continuance, to add or delete parties with or without motion, to issue interlocutory orders, to rule upon or dispose of all other motions, to appoint guardians under Code Section 34-9-226, to reprimand or exclude from the hearing any person for any indecorous or improper conduct committed in the presence of the administrative law judge, and to require any party to provide the board with the name of its legal representative, if any, within 21 days from the date of the hearing notice.

(d) *Discovery procedures.*

(1) Discovery procedures shall be governed and controlled by Chapter 11 of Title 9, the "Georgia Civil Practice Act."

(2) The term "administrative law judge" shall be substituted for the word "court" when construing any procedural rule, provided that any administrative law judge shall seek enforcement of orders as stated in subsection (h) of this Code section.

(3) The administrative law judge may admit as evidence at the hearing and at all future hearings evidence obtained by depositions, interrogatories, or admissions of fact, whether or not the deponent is available to testify in person at the hearing and whether or not the evidence was taken originally for the purpose of discovery or evidence, or both.

(e) *Conduct of hearing.*

(1) The administrative law judge shall conduct the hearing in an informal manner consistent with the requirements of due process of law. Irrelevant, immaterial, and unduly repetitious evidence shall be excluded. The rules of evidence pertaining to the trial of civil nonjury cases in the superior courts of Georgia shall be followed unless otherwise provided in this chapter. A party may conduct such cross-examination as required for a full and true disclosure of the facts. Official notice may be taken of judicially cognizable facts, provided the parties are provided an opportunity to contest the material noticed.

(2) Any medical report or document signed and dated by an examining or treating physician or other duly qualified medical practitioner shall be admissible in evidence insofar as it purports to represent the history, examination, diagnosis, treatment, prognosis, or opinion relevant to any medical issue by the person signing the report, as if that person were present at the hearing and testifying as a witness, subject to the right of any party to object to the admissibility of any portion of the report and subject to the right of an adverse party to cross-examine the person signing the report and provide rebuttal testimony within the time allowed by the administrative law judge. The party tendering the medical report may, within the time allowed by the administrative law judge, also introduce the testimony of the person who has signed the medical report for the purpose of supplementing the report. It is the express intent of the General Assembly that the provisions of this paragraph be applied retroactively as well as prospectively.

(3) For the purposes of Code Section 34-9-104, a report on a form prescribed by the board or in a narrative form which substantially complies with the form prescribed by the board and which is signed and dated by a prospective employer shall be admissible in evidence in lieu of the oral testimony of such prospective employer insofar as it documents that the employee has applied for a position or positions suitable to the employee's limitations or restrictions resulting from the work related

injury and was not hired. Any party shall have the right to object to the admissibility of any portion of the report and an adverse party shall have the right to cross-examine the person signing the report and provide rebuttal testimony within the time allowed by the administrative law judge. The party tendering the report may, with the time allowed by the administrative law judge, also introduce the oral testimony of the person who has signed the report for the purpose of supplementing the report.

(4) A written laboratory test result report under Code Section 34-9-415 shall be admissible in evidence if accompanied by an affidavit from the laboratory confirming authenticity.

(5) Code Section 24-3-18 shall not apply to workers' compensation claims filed under this chapter.

(f) *Decision of the administrative law judge.* Within 30 days following the completion of evidence, unless the time for filing the decision is extended by the board, the administrative law judge shall determine the questions and issues and file the decision with the record of the hearing. At the time of the filing a copy of the decision shall be mailed to all parties at their last known addresses. The decision of the administrative law judge shall be made in the form of a compensation award, appropriately titled to show its purpose and containing a concise report of the case, with findings of fact and conclusions of law and any other necessary explanation of the action taken. The administrative law judge may reconsider the official decision prior to its becoming final to correct apparent errors or omissions. The compensation award shall be final unless an appeal is filed in accordance with Code Section 34-9-103.

(g) *Record of hearing.* The hearing shall be reported by a designated reporter for the board, but the record of the hearing need not be transcribed unless timely application has been made to the board for an appeal from the decision of the administrative law judge. At any time, however, a party shall have a right to obtain a transcript of the record, upon payment to the reporter of the expense of transcription.

(h) *Enforcement of orders of administrative law judge.* In proceedings before the administrative law judge or the board, if any party or an agent or employee of a party disobeys or resists any lawful order or process; or neglects to produce, after having been ordered to do so, any pertinent book, paper, or document; or refuses to appear after having been subpoenaed; or, upon appearing, refuses to take the oath or affirmation as a witness; or, after taking the oath or affirmation, refuses to testify, the administrative law judge or the board shall have the same rights and powers given the court under Chapter 11 of Title 9, the "Georgia Civil Practice Act." If any person not a party refuses as aforesaid, the administrative law judge or the board may certify the facts to the superior court of the county where the offense is committed for appropriate action or may impose the sanctions provided in Code Section 34-9-60.

(i) *Address of record.* Each employer and claimant shall maintain an up-to-date address with the board. Any notice required by this chapter shall be satisfied by the mailing of the notice to the address of record; provided, however, that mailing to an obsolete address, if not properly forwarded, shall not prejudice a claimant if it is established to the satisfaction of the administrative law judge or the board that at the time of the mailing the employer knew or should have known of a subsequent and proper address for the claimant.

(j) *Notice to nonresident party.*

(1) Any party subject to this chapter who is or who becomes a nonresident of this state at the time of or after the injury or death of an employee shall be deemed to have appointed irrevocably the executive director of the board as that party's agent for service of notice or any other process in any proceeding under this chapter.

(2) Any notice or process served on the executive director shall have the same legal effect as if served upon the nonresident party personally within the state.

(3) The executive director or his or her designated agent shall immediately mail a copy of the notice or process to the last known address of the nonresident party. (Ga. L. 1920, p. 167, § 57; Code 1933, § 114-707; Ga. L. 1975, p. 198, § 9; Ga. L. 1978, p. 2220, § 12; Ga. L. 1988, p. 1679, § 18; Ga. L. 1992, p. 6, § 34; Ga. L. 1992, p. 1942, § 10; Ga. L. 1994, p. 887, § 7; Ga. L. 1995, p. 642, § 8; Ga. L. 1997, p. 1367, § 3; Ga. L. 1998, p. 1508, § 2; Ga. L. 2000, p. 1589, § 3; Ga. L. 2003, p. 364, § 1; Ga. L. 2005, p. 1210, § 4/HB 327.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1998, "this chapter" was substituted for "Chapter 9 of this title" at the end of paragraph (e)(5).

Editor's notes. — Ga. L. 1995, p. 642, § 13, not codified by the General Assembly, provides for severability.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to paragraph (j)(3) shall be applicable with respect to notices delivered on or after July 1, 2000.

Law reviews. — For annual survey of workers' compensation, see 38 Mercer L. Rev. 431 (1986). For article, "State Adminis-

trative Agency Contested Case Hearings," see 24 Ga. St. B.J. 193 (1988). For review of 1998 legislation relating to labor and industrial relations, see 15 Ga. St. U. L. Rev. 185 (1998). For survey article on workers' compensation law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For annual survey of law of workers' compensation, see 56 Mercer L. Rev. 479 (2004). For annual survey of workers' compensation law, see 57 Mercer L. Rev. 419 (2005).

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
RIGHTS OF PARTIES
NOTICE

EVIDENCE
MEDICAL EVIDENCE
FINDINGS OF FACT

General Consideration

There need not be positive unequivocal expert testimony to support a claim. *Fox v. Liberty Mut. Ins. Co.*, 125 Ga. App. 285, 187 S.E.2d 305 (1972).

Employee does not abandon compensation claim by failing to personally appear in court, as the right of cross-examination of the opposite party does not include the right to require that party's presence in court, and such party may not be compelled to attend court except in such manner as other witnesses are required to attend court, by subpoena. *DeKalb County Merit Sys. v. Johnson*, 151 Ga. App. 405, 260 S.E.2d 506 (1979).

Absence of employee from hearing. — There is nothing in the workers' compensation laws (see O.C.G.A. § 34-9-1 et seq.) that would debar claimant from having the merits of claimant's case passed upon simply because claimant was providentially hindered from being present at a certain time set for hearing. *Howard v. Murdock*, 83 Ga. App. 536, 64 S.E.2d 221 (1951).

Determination of preliminary questions prerequisite to award. — To make an award either allowing or disallowing compensation, aside from medical aid as provided in former Code 1933, § 114-501 (see O.C.G.A. § 34-9-200), the board must determine preliminary questions whether there was an accidental injury resulting in disability for more than seven days and whether or not it arose out of and in the course of employment; if these preliminary questions are decided in the affirmative, then the employee is entitled to compensation in some amount, but a negative decision on any one of these facts requires an award denying compensation. *Milledgeville State Hosp. v. Clodfelter*, 99 Ga. App. 49, 107 S.E.2d 289 (1959).

Power to add parties. — An administrative law judge had the power to add a party to a claim, and also had the jurisdiction and power to determine the legal question of whether the added party was the alter ego of the employer. *Morgan v. Palace Indus., Inc.*, 195 Ga. App. 80, 392 S.E.2d 315 (1990).

No authority to award "punitive attorney's fees." — O.C.G.A. § 34-9-102 provided no

legal support for order directing that one attorney pay "punitive attorney's fees" to another attorney as a result of the former's misconduct during the hearing of a case. *Sadie G. Mays Mem. Nursing Home v. Freeman*, 163 Ga. App. 557, 295 S.E.2d 340 (1982).

No power to make temporary orders. — Industrial Commission (now Board of Workers' Compensation) is an administrative body, and there is no provision in the workers' compensation law (see § 34-9-1 et seq.) for it to make temporary orders. *Gravitt v. Georgia Cas. Co.*, 158 Ga. 613, 123 S.E. 897 (1924).

Summary disposition of claim. — An administrative law judge can summarily dispose of a claim for benefits when the underlying issues between the same parties have already been heard and determined. *Continental Baking Co. v. Brock*, 198 Ga. App. 578, 402 S.E.2d 331 (1991).

Award of board has same effect as judgment rendered by court of competent jurisdiction. *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939).

Doctrine of res judicata is applicable to awards of an administrative law judge of the State Board of Workers' Compensation on all questions of fact in matters in which the board has jurisdiction. *Georgia Cas. & Sur. Co. v. Randall*, 162 Ga. App. 532, 292 S.E.2d 118 (1982), overruled on other grounds, *Bahadori v. Sizzler #1543*, 230 Ga. App. 52, 505 S.E.2d 23 (1997), *Bahadori v. National Union Fire Ins. Co.*, 270 Ga. 203, 507 S.E.2d 467 (1998).

Doctrines of res judicata and estoppel by judgment are applicable to awards of the State Board of Workers' Compensation on all questions of fact in matters in which it has jurisdiction. *McFadden Bus. Publications, Inc. v. Guidry*, 177 Ga. App. 885, 341 S.E.2d 294 (1986).

No authority to preclude reopening of case. — The department (now board) has no power or jurisdiction to approve a settlement so as to preclude reopening of case upon a change of condition; and the superior court, on appeal, would be limited in like manner. *Department of Indus. Relations*

v. Travelers' Ins. Co., 177 Ga. 669, 170 S.E. 883, answer conformed to, 47 Ga. App. 553, 171 S.E. 169 (1933).

Finality of award absent appeal. — Failure to appeal within the time specified makes award of single commissioner (administrative law judge) final. *American Mut. Liab. Ins. Co. v. Lindsey*, 63 Ga. App. 658, 11 S.E.2d 512 (1940).

Equity proper forum for relief from erroneous award. — Relief from workers' compensation award in which employer was apparently erroneously found to be uninsured should properly have been sought in a court of equity pursuant to O.C.G.A. § 9-11-60. *Russell v. Fast Framers, Inc.*, 164 Ga. App. 771, 298 S.E.2d 303 (1982).

Finality of award absent fraud, accident, or mistake. — Where a hearing was had and an award was made in claimant's favor, if claimant was dissatisfied with the amount of the award the claimant's remedy was by way of appeal as provided in former Code 1933, § 114-712 (see O.C.G.A. § 34-9-108, et seq.); and where no appeal was taken, the award was conclusive and binding, and in the absence of fraud, accident, or mistake, claimant may not thereafter have the award increased, except upon a change in condition. *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939).

Appeal from award by either party authorized. — If there has been an award by a single commissioner (administrative law judge), either party may apply for review by the entire board within the time specified; fact that losing party made an appeal to the superior court as was provided in former Code 1933, § 114-710 (see O.C.G.A. § 34-9-105), before the expiration of such trial will not subject such appeal to dismissal. *American Mut. Liab. Ins. Co. v. Lindsey*, 63 Ga. App. 658, 11 S.E.2d 512 (1940).

Award should be directed against both employer and insurance carrier instead of against insurance carrier only. *Hartford Accident & Indem. Co. v. Hall*, 36 Ga. App. 574, 137 S.E. 415 (1927).

Award not against insurer alone. — Award directed both to employer and to insurance carrier, as well as to claimant, which orders insurance carrier, for the employer, to pay to claimant certain sums of money, is not an award against insurance carrier alone, but is an award against both employer and insur-

ance carrier. *U.S. Fid. & Guar. Co. v. Newton*, 37 Ga. App. 70, 139 S.E. 365 (1927).

Hearsay evidence inadmissible. — In a workers' compensation proceeding, medical records consisting of physicians' letters and unsigned medical reports were inadmissible hearsay and should not have been considered by the board in its decision on claimant's petition for resumption of total disability benefits. *Georgia Power Co. v. Leonard*, 215 Ga. App. 383, 451 S.E.2d 74 (1994).

Cited in *Fralish v. Royal Indem. Co.*, 53 Ga. App. 557, 186 S.E. 567 (1936); *Metropolitan Life Ins. Co. v. Saul*, 189 Ga. 1, 5 S.E.2d 214 (1939); *Lumbermen's Mut. Cas. Co. v. Cook*, 195 Ga. 397, 24 S.E.2d 309 (1943); *Wiley v. Bituminous Cas. Co.*, 76 Ga. App. 862, 47 S.E.2d 652 (1948); *Bituminous Cas. Corp. v. Chambers*, 84 Ga. App. 295, 66 S.E.2d 196 (1951); *Utica Mut. Ins. Co. v. Rolax*, 87 Ga. App. 733, 75 S.E.2d 205 (1953); *Ideal Mut. Ins. Co. v. Ray*, 94 Ga. App. 785, 96 S.E.2d 377 (1956); *Pacific Employers Ins. Co. v. West*, 213 Ga. App. 296, 99 S.E.2d 89 (1957); *Sears, Roebuck & Co. v. Wilson*, 215 Ga. 746, 113 S.E.2d 611 (1960); *Amerson v. Employers Ins. Co.*, 105 Ga. App. 336, 124 S.E.2d 496 (1962); *Guess v. Liberty Mut. Ins. Co.*, 219 Ga. 581, 134 S.E.2d 783 (1964); *Grier v. Travelers Ins. Co.*, 112 Ga. App. 159, 144 S.E.2d 196 (1965); *Travelers Ins. Co. v. Grier*, 115 Ga. App. 452, 154 S.E.2d 829 (1967); *Chattahoochee Camp Sch. v. Cole*, 117 Ga. App. 505, 161 S.E.2d 78 (1968); *LaFavor v. Aetna Cas. & Sur. Co.*, 117 Ga. App. 873, 162 S.E.2d 311 (1968); *GMC v. Martin*, 119 Ga. App. 279, 167 S.E.2d 211 (1969); *U.S. Fire Ins. Co. v. Phillips*, 120 Ga. App. 51, 169 S.E.2d 665 (1969); *Northern Assurance Co. of Am. v. Thompson*, 121 Ga. App. 666, 175 S.E.2d 67 (1970); *Knight v. Fulton Indus.*, 123 Ga. App. 538, 181 S.E.2d 691 (1971); *Maryland Cas. Co. v. Johnson*, 126 Ga. App. 468, 191 S.E.2d 90 (1972); *American Motorists Ins. Co. v. Brown*, 128 Ga. App. 813, 198 S.E.2d 348 (1973); *Merritt v. Royal Globe Indem. Co.*, 131 Ga. App. 246, 205 S.E.2d 530 (1974); *Greyhound Van Lines v. Collins*, 132 Ga. App. 806, 209 S.E.2d 250 (1974); *Hagin v. Powers*, 134 Ga. App. 609, 215 S.E.2d 346 (1975); *Cotton States Ins. Co. v. Bates*, 140 Ga. App. 428, 231 S.E.2d 445 (1976); *Rachel v. Simmons Co.*, 141 Ga. App. 236, 233 S.E.2d 56 (1977); *Commercial Union Ass'n Co. v. Couch*, 143

General Consideration (Cont'd)

Ga. App. 64, 237 S.E.2d 528 (1977); *Lee v. White Truck Lines*, 143 Ga. App. 94, 238 S.E.2d 120 (1977); *Home Indem. Co. v. Howard*, 143 Ga. App. 327, 238 S.E.2d 288 (1977); *Wills v. St. Paul Fire & Marine Ins. Co.*, 143 Ga. App. 562, 239 S.E.2d 219 (1977); *Walker v. Liberty Mut. Ins. Co.*, 147 Ga. App. 201, 248 S.E.2d 330 (1978); *Travelers Ins. Co. v. Gaither*, 148 Ga. App. 251, 251 S.E.2d 66 (1978); *Insurance Co. of N. Am. v. Forsyth*, 148 Ga. App. 201, 251 S.E.2d 76 (1978); *Denton v. U.S. Fid. & Guar. Co.*, 158 Ga. App. 849, 282 S.E.2d 350 (1981); *Johnson v. DeKalb County*, 159 Ga. App. 800, 285 S.E.2d 245 (1981); *Zamora v. Coffee Gen. Hosp.*, 162 Ga. App. 82, 290 S.E.2d 192 (1982); *K-Mart Corp. v. Anderson*, 163 Ga. App. 493, 295 S.E.2d 186 (1982); *Georgia Power Co. v. Brown*, 169 Ga. App. 45, 311 S.E.2d 236 (1983); *Dycol, Inc. v. Crump*, 169 Ga. App. 930, 315 S.E.2d 460 (1984); *Carrollton Coca-Cola Bottling Co. v. Brown*, 185 Ga. App. 588, 365 S.E.2d 143 (1988); *Johnson Controls, Inc. v. McNeil*, 211 Ga. App. 783, 440 S.E.2d 528 (1994); *Walters v. Betts*, 174 Bankr. 636 (Bankr. N.D. Ga. 1994); *Copeland v. Continental Kewitt*, 218 Ga. App. 305, 461 S.E.2d 277 (1995); *Cartwright v. Midtown Hosp.*, 243 Ga. App. 828, 534 S.E.2d 504 (2000).

Rights of Parties

Constitutional rights to due process and unfettered access to the courts of this state are applicable in workers' compensation proceedings. *Hart v. Owens-Illinois, Inc.*, 165 Ga. App. 681, 302 S.E.2d 701 (1983).

Rights of parties to hearing. — All interested parties must be notified of the time and place of hearing and have the right at such hearing to swear witnesses in their own behalf and to cross-examine the witnesses offered by the other side. *American Mut. Liab. Ins. Co. v. Williams*, 75 Ga. App. 129, 42 S.E.2d 578 (1947).

Failure to grant hearing unconstitutional.

— The failure to grant a hearing on a statutory employer's motion to dismiss it from the case was an obvious violation of the claimant's right of due process, where the claimant timely instituted a claim against the immediate employer, as required by O.C.G.A. § 34-9-8(c), and thus, also pre-

served claimant's right to recover compensation against a statutory employer. *Scott v. Tremco, Inc.*, 199 Ga. App. 606, 405 S.E.2d 347, cert. denied, 199 Ga. App. 907, 405 S.E.2d 347 (1991).

Right to jury trial not applicable. — Right to trial by jury, as guaranteed by the Georgia Constitution, is not applicable to the proceedings of the board of workers' compensation. *Woods v. Delta Air Lines*, 237 Ga. 332, 227 S.E.2d 376 (1976).

Expeditious determination of claims intended. — It was clear from this section that the General Assembly contemplated an expeditious determination of claims filed under the workers' compensation laws (see O.C.G.A. § 34-9-1 et seq.). *Ogden v. Clark Thread Co.*, 93 Ga. App. 227, 91 S.E.2d 191 (1956) (see O.C.G.A. § 34-9-102).

Plea in bar. — A party does not waive its right to cross-examination and to a full and fair hearing on the substantive merits of its defense by successfully asserting a plea in bar (such as a statute of limitation) at the trial and hearing level. If such a plea is later ruled ineffective on appeal, the proper procedure is to remand the case for a full presentation of evidence by all parties on the substantive merits thereof. *Hart v. Owens-Illinois, Inc.*, 165 Ga. App. 681, 302 S.E.2d 701 (1983).

Burden of proof on claimant. — In all claims for compensation, it is necessary for claimant to carry the burden of proof in order to establish a claim for compensation. *Shore v. Pacific Employers Ins. Co.*, 102 Ga. App. 431, 116 S.E.2d 526 (1960).

Construction of evidence in favor of claimant. — While claimant is at all times cast with the burden of proof, the evidence offered will, so far as it is genuinely susceptible of construction, be given that construction which is in claimant's favor in determining whether claimant has carried that burden by a preponderance of the evidence. *Cash v. American Sur. Co.*, 101 Ga. App. 379, 114 S.E.2d 57 (1960).

Notice**No jurisdiction absent notice of hearing.**

— Where the employee receives no notice of hearing, the board does not have jurisdiction to render any order upon the merits of the claim and the issue is not ripe for trial. *State Hwy. Dep't v. Cooper*, 104 Ga. App. 130, 121 S.E.2d 258 (1961).

Mailing satisfies notice requirement. — Any notice required by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) shall be satisfied by mailing the notice to the address of record. *Favors v. Travelers Ins. Co.*, 150 Ga. App. 741, 258 S.E.2d 554 (1979).

When an employer claimed it received no notice of a workers' compensation hearing at which compensation was awarded to an employee, the fact that notice was mailed by first class mail to the employer's address on file with the Workers' Compensation Board was sufficient, under O.C.G.A. § 34-9-102(i), to satisfy due process, which required notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action. The failure of the employer or insurer to actually receive notice was a non-amendable defect. *Am. Mobile Imaging, Inc. v. Miles*, 260 Ga. App. 877, 581 S.E.2d 396 (2003).

Sufficient to mail notice of award to parties. — Under O.C.G.A. § 34-9-102, there was no requirement that a notice of an administrative law judge's award be mailed to the parties' counsel, and notice mailed to the parties was sufficient to start the time period running for appealing an award. *Forsyth County Bd. of Educ. v. Trusty*, 187 Ga. App. 470, 370 S.E.2d 793 (1988).

Service of notice by mail judicially recognized. — The Court of Appeals will take judicial cognizance that it has been the custom of the Workers' Compensation Board, since its inception, to serve notice of hearing by posting it in the United States mail. *Bailey-Lewis-Williams of Ga., Inc. v. Thomas*, 103 Ga. App. 279, 119 S.E.2d 141 (1961).

Prima facie showing of notice. — Where there was no appearance for employer or insurance carrier, but record before the deputy director contained a copy of a "notice of hearing" and the deputy director stated that such notice "did not come back", a prima facie showing was made that such notice was mailed to the employer and that the employer had notice of the time and place of hearing. *Bailey-Lewis-Williams of Ga., Inc. v. Thomas*, 103 Ga. App. 279, 119 S.E.2d 141 (1961).

Notice to nonresident. — When an employer was a nonresident employer, providing it with notice of a hearing on a workers'

compensation claim by first class mail did not violate former O.C.G.A. § 34-9-102(j)(3), requiring service by certified mail or statutory overnight delivery, because its workers' compensation insurer was a Georgia resident, which was also provided with notice by first class mail and, under O.C.G.A. § 34-9-1(3), the definition of employer included the insurer, so notice to one of them was notice to the other. *Am. Mobile Imaging, Inc. v. Miles*, 260 Ga. App. 877, 581 S.E.2d 396 (2003).

Adequate notice found. — Employer received adequate notice of a workers' compensation hearing under O.C.G.A. § 34-9-102(a) where the employer's notice of the hearing was returned as undeliverable, the employer's president and part owner was subpoenaed to appear at the hearing, the mailing address of the employer was the same as the address of another business and that business's notice was not returned, the employer did not challenge the notice provided to the other business, and the employer failed to maintain a current notice on file with the Georgia State Board of Workers' Compensation as was required by O.C.G.A. § 34-9-102(i), which satisfied due process and focused on the mailing of the notice, rather than its receipt. *High Voltage Vending, LLC v. Odom*, 266 Ga. App. 537, 597 S.E.2d 428 (2004).

Evidence

This section itself created an exception to the hearsay rule. *Foster v. Continental Cas. Co.*, 141 Ga. App. 415, 233 S.E.2d 492 (1977) (see O.C.G.A. § 34-9-102).

This section made testimony that was previously inadmissible as hearsay admissible for the first time. *Commercial Union Ins. Co. v. Crews*, 139 Ga. App. 521, 229 S.E.2d 14 (1976) (see O.C.G.A. § 34-9-102).

Board bound by rules of evidence. — Board of Workers' Compensation is an administrative commission, with such jurisdiction, powers, and authority as may be conferred upon it by the General Assembly; it acts in a quasi-judicial capacity and therefore is bound by the rules of evidence. *American Cas. Co. v. Wilson*, 99 Ga. App. 219, 108 S.E.2d 137 (1959).

Only admissible evidence to be considered. — Board of Workers' Compensation or director thereof sits as a court, judging both

Evidence (Cont'd)

the law and the facts, rather than as a jury, so that while a jury considers all the evidence in the record and it is incumbent upon the party objecting to evidence to have it ruled out in order to avoid such consideration, the board or director sifts out inadmissible evidence and considers only that which is admissible under the rules of evidence, whether actually ruled out or not. *Atlanta Newspapers, Inc. v. Clements*, 88 Ga. App. 648, 76 S.E.2d 830 (1953); *United States Fid. & Guar. Co. v. Doyle*, 96 Ga. App. 745, 101 S.E.2d 600 (1957).

Admissibility of declarations and complaints of deceased. — In workers' compensation proceeding, declarations and complaints made by deceased were admissible and competent where there were no other witnesses to alleged injury and cause thereof. *City of Atlanta v. Crouch*, 91 Ga. App. 38, 84 S.E.2d 475 (1954).

Statements of employee after the fact without probative value. — Statements of employee tending to show that the employee suffered an injury and that the injury resulted in a hernia, having been made some time after the alleged injury and being merely narrative and descriptive of something which had fully taken place and become a thing of the past, had no probative value in establishing the fact that the employee was injured. *Bolton v. Columbia Cas. Co.*, 34 Ga. App. 658, 130 S.E. 535 (1925).

Letters and reports not subject to business record exception. — Letters and reports admitted in evidence pursuant to this section, although hearsay, are not subject to the business records exception. *Foster v. Continental Cas. Co.*, 141 Ga. App. 415, 233 S.E.2d 492 (1977) (see O.C.G.A. § 34-9-102).

Admission of certain hearsay evidence over defendant's objection will not justify setting aside findings made at hearing, which this section provided shall be as simple as reasonably may be. *Davis v. Menefee*, 34 Ga. App. 813, 131 S.E. 527 (1926) (see O.C.G.A. § 34-9-102).

Weight of expert witnesses' opinions. — Opinions of expert witnesses, while entitled to great weight, are advisory only, and the board is bound thereby only to the extent to which it gives credence to such opinions; this is especially true where the opinion evidence

is coextensive with the entire scope of investigation and would be decisive of the one issue to be determined. *Department of Revenue v. Graham*, 102 Ga. App. 756, 117 S.E.2d 902 (1960).

Uncontradicted testimony not binding. — The department (now board) is not bound in every case to accept the literal statements of a witness before it merely because such statements are not contradicted by direct evidence. Implications inconsistent with the testimony may arise from the proved facts, and in other ways the question of what is the truth may remain as an issue of fact despite uncontradicted evidence in regard thereto. *Cooper v. Lumbermen's Mut. Cas. Co.*, 179 Ga. 256, 175 S.E. 577 (1934).

Binding effect of stipulations by parties. — Board erred in reversing administrative law judge's decision after considering evidence which conflicted with a stipulation made by the parties during the hearing, as the parties prepared their cases with the stipulation in mind and therefore did not have an opportunity to present evidence on the issue. *Food Giant, Inc. v. Brown*, 174 Ga. App. 485, 330 S.E.2d 183 (1985).

Medical Evidence

O.C.G.A. § 34-9-102(e)(2) contains an exception to the rules of evidence for nonjury civil trials in this state by permitting the use of certain medical reports as evidence without requiring the personal appearance or deposition of the treating physician or other qualified medical practitioner, but that section is limited to hearings conducted by administrative law judges. *Binswanger Glass Co. v. Brooks*, 160 Ga. App. 701, 288 S.E.2d 61 (1981).

Purpose of amendment permitting introduction of medical reports was to reduce time and cost involved in workers' compensation cases. *Commercial Union Ins. Co. v. Crews*, 139 Ga. App. 521, 229 S.E.2d 14 (1976).

Presentation of live or deposition testimony of physician not required. — The 1975 amendment to this section, which provided for the first time that a physician's medical report may be admissible as direct examination, relieved the tendering party of the necessity of presenting the doctor's testimony either live at the hearing or by deposition. *Commercial Union Ins. Co. v. Crews*,

139 Ga. App. 521, 229 S.E.2d 14 (1976) (see O.C.G.A. § 34-9-102).

When report admissible. — A doctor's report was admissible under this section if it included any or all of five elements (history, examination, diagnosis, treatment, and prognosis) named in that section. *Foster v. Continental Cas. Co.*, 141 Ga. App. 415, 233 S.E.2d 492 (1977); *Spell v. Travelers Ins. Co.*, 147 Ga. App. 160, 248 S.E.2d 292 (1978) (see O.C.G.A. § 34-9-102).

The language of this section as to admissibility of doctor's reports was exclusive in character, stating that other things which may be found in a medical report are not admissible in evidence. *Foster v. Continental Cas. Co.*, 141 Ga. App. 415, 233 S.E.2d 492 (1977) (see O.C.G.A. § 34-9-102).

Doctor's report based on review of records held admissible. — Doctor's report that doctor conducted an independent medical evaluation of employee's condition based upon a review of the employee's medical records, the trial transcript, and exhibits, as well as research of medical literature, representing the history and diagnosis of employee's heart attack by a duly qualified medical practitioner was sufficient for purposes of O.C.G.A. § 34-9-102. *Southwire Co. v. Cato*, 179 Ga. App. 762, 347 S.E.2d 656 (1986).

No new ground of appeal based on admission or exclusion of medical evidence. — Although this section provided an opportunity for opposing counsel to object to medical reports, it did not provide a new ground of appeal based on a contention that evidence was illegally admitted or excluded. *Nationwide Mut. Ins. Co. v. Porter*, 150 Ga. App. 513, 258 S.E.2d 135 (1979) (see O.C.G.A. § 34-9-102).

Medical opinion following consultation not based on hearsay. — When psychiatrist has had personal consultation with patient, the psychiatrist's expert opinion concerning the cause of the patient's mental condition is not subject to objection that the opinion is based on hearsay. *Argonaut Ins. Co. v. Allen*, 123 Ga. App. 741, 182 S.E.2d 508 (1971).

Refusal of deposition of physician without opportunity for redirect examination proper. — Where the claimant tendered into evidence a physician's report, and the opposing party then took the physician's deposition for purposes of cross-examination, but

refused to permit the claimant to depose such physician on redirect, the administrative law judge properly held that claimant was entitled to redirect examination, under Ga. L. 1972, p. 510, § 3 (see O.C.G.A. § 9-11-30), and properly refused to admit the deposition unless and until claimant was afforded the opportunity for same. *Commercial Union Ins. Co. v. Crews*, 139 Ga. App. 521, 229 S.E.2d 14 (1976).

Where record open, error to refuse submission of doctor's deposition as rebuttal evidence. — There was error where an administrative law judge refused to allow an employer to take and submit a doctor's deposition as rebuttal evidence because the judge's own findings of fact provide that the record was open and O.C.G.A. § 34-9-102 gives the right to produce rebuttal evidence. *Brown Transp. Corp. v. Truett*, 174 Ga. App. 189, 329 S.E.2d 521 (1985).

Medical opinion not binding. — The deputy director, as trier of fact, is not bound to accept the opinion or theory of any particular medical witness. *Thomas v. U.S. Cas. Co.*, 218 Ga. 493, 128 S.E.2d 749 (1962); *Miller v. Travelers Ins. Co.*, 111 Ga. App. 245, 141 S.E.2d 223 (1965).

Conflicting medical testimony. — The director was authorized to disregard conflicting medical testimony and to draw the director's own conclusion from the chain of events, facts, and circumstances attending the claimant's loss of vision in claimant's right eye. *B.F. Goodrich Co. v. Arnold*, 88 Ga. App. 64, 76 S.E.2d 20 (1953).

While direct and positive testimony cannot arbitrarily be rejected by the trier of facts, this rule does not apply to the opinion evidence of physicians or other experts; accordingly, it was a question for the board's determination as to whether it would accept the testimony of one physician, which would have authorized an award for the claimant, or testimony of two other doctors, which would have authorized an award denying compensation. *U.S. Fid. & Guar. Co. v. Doyle*, 96 Ga. App. 745, 101 S.E.2d 600 (1957).

Expert opinion as to exertion sufficient to support finding. — Opinions of experts that the exertion shown by the evidence would be sufficient is also sufficient to authorize a finding to this effect on the part of fact-finding tribunal. *Fox v. Liberty Mut. Ins.*

Medical Evidence (Cont'd)

Co., 125 Ga. App. 285, 187 S.E.2d 305 (1972).

Remand for consideration of medical evidence. — The proper procedure where medical reports are submitted to the full board on review of the award is to remand the matter to an administrative law judge for a hearing under O.C.G.A. § 34-9-102 to consider the additional evidence. This will allow the opposing parties to cross-examine the witnesses or to produce rebuttal evidence. *Binswanger Glass Co. v. Brooks*, 160 Ga. App. 701, 288 S.E.2d 61 (1981).

Party not required to introduce evidence against party's will. — Where the administrative law judge (ALJ) announced that the record would be left open for 30 days to allow the defendants to submit the depositions of two treating physicians without indicating at that time that their right to submit either of these depositions would be contingent on their submission of the other, the judge erred in barring the defendants from submitting the deposition of one doctor into evidence without submitting the other. A party to an adversarial proceeding may not be required to introduce evidence against that party's will. *Red Roof Inn v. Lynn*, 203 Ga. App. 38, 416 S.E.2d 307 (1992).

Findings of Fact

Findings of fact required. — It is a requirement of law that the award of the director, deputy director, or board be accompanied by a statement of the findings of fact from the evidence in the case. *Hodges v. Fidelity & Cas. Co.*, 105 Ga. App. 273, 124 S.E.2d 435 (1962); *Pittman v. Travelers Ins. Co.*, 106 Ga. App. 169, 126 S.E.2d 463 (1962).

The provisions of O.C.G.A. § 34-9-102, insofar as they require that awards of the board must be accompanied by findings of fact, relate only to such awards as grant or deny compensation, or change the amount of compensation to be paid the employee. *Franchise Enters., Inc. v. Sullivan*, 190 Ga. App. 767, 380 S.E.2d 68 (1989).

An award of the Board of Workers' Compensation must be accompanied by a statement of the board's findings of fact. *Atlanta Transit Sys. v. Harcourt*, 94 Ga. App. 503, 95 S.E.2d 41 (1956); *Dudley v. Sears, Roebuck*

& Co., 111 Ga. App. 214, 141 S.E.2d 179 (1965).

Findings required for appeal. — A statement of findings of fact is required so that the losing party may intelligently prepare an appeal and that the cause may thereupon be intelligently reviewed. *Southeastern Express Co. v. Edmondson*, 30 Ga. App. 697, 119 S.E. 39 (1923); *McDaniel v. Employers Mut. Liab. Ins. Co.*, 104 Ga. App. 340, 121 S.E.2d 801 (1961); *Employers Mut. Liab. Ins. Co. v. Shipman*, 108 Ga. App. 184, 132 S.E.2d 568 (1963); *Lee v. General Accident Group*, 112 Ga. App. 197, 144 S.E.2d 457 (1965); *Fireman's Fund Am. Ins. Co. v. Hester*, 115 Ga. App. 39, 153 S.E.2d 622 (1967); *GMC v. Martin*, 119 Ga. App. 279, 167 S.E.2d 211 (1969); *Malone v. Fireman's Fund Ins. Co.*, 147 Ga. App. 264, 248 S.E.2d 544 (1978); *Carrie v. Continental Ins. Co.*, 147 Ga. App. 544, 249 S.E.2d 349 (1978); *Cincinnati Ins. Co. v. Roberts*, 148 Ga. App. 60, 251 S.E.2d 87 (1978); *Union Carbide Corp. v. Coffman*, 158 Ga. App. 360, 280 S.E.2d 140 (1981).

Findings of fact must consist of a concise but comprehensive statement of the cause and circumstances of the accident, as found to be true by the State Board of Workers' Compensation. *Atlanta Transit Sys. v. Harcourt*, 94 Ga. App. 503, 95 S.E.2d 41 (1956); *Dudley v. Sears, Roebuck & Co.*, 111 Ga. App. 214, 141 S.E.2d 179 (1965).

Requirement as to findings of fact contemplates a concise but comprehensive statement of the cause and circumstances of the accident, as the commission (now board) shall find it in truth to have occurred. Repetition of the evidence heard is not a compliance with this requirement, although it will not vitiate the findings if otherwise sufficiently stated, nor is it enough to state merely in the statutory language that the injury is found to have arisen out of and in the course of the employment. *Southeastern Express Co. v. Edmondson*, 30 Ga. App. 697, 119 S.E. 39 (1923).

Requirement that an award of the commission (now board) be accompanied by a statement of the findings of fact contemplates a concise but comprehensive statement of the cause and circumstances of the accident, as the commission (now board) shall find it to have occurred. It is not enough to state merely in the statutory language that the injury is or is not found to

have arisen out of and in the course of employment, but the statement must support the legal conclusions arrived at. *Metropolitan Cas. Ins. Co. v. Dallas*, 39 Ga. App. 38, 146 S.E. 37 (1928); *McDaniel v. Employers Mut. Liab. Ins. Co.*, 104 Ga. App. 340, 121 S.E.2d 801 (1961).

Requirement as to finding of facts contemplates a concise but comprehensive statement of the cause and circumstances of the accident, as the commission (now board) shall find it to have occurred. *Hodges v. Fidelity & Cas. Co.*, 105 Ga. App. 273, 124 S.E.2d 435 (1962).

Findings of fact must consist of a concise but comprehensive statement of the cause and circumstances of the accident, as found to be true by the Board of Workers' Compensation, and similar findings of fact upon any material issue in the case. *Noles v. Aragon Mills*, 110 Ga. App. 374, 138 S.E.2d 598 (1964); *Lee v. General Accident Group*, 112 Ga. App. 197, 144 S.E.2d 457 (1965); *U.S. Fid. & Guar. Co. v. Gentile*, 134 Ga. App. 318, 214 S.E.2d 406 (1975); *Malone v. Fireman's Fund Ins. Co.*, 147 Ga. App. 264, 248 S.E.2d 544 (1978); *Carrie v. Continental Ins. Co.*, 147 Ga. App. 544, 249 S.E.2d 349 (1978); *Cincinnati Ins. Co. v. Roberts*, 148 Ga. App. 60, 251 S.E.2d 87 (1978).

The requirement of a statement of the findings of fact contemplates a concise but comprehensive statement of the cause and circumstances of the accident, as the commission (now board) shall find it to have occurred. It is contemplated that the commission (now board) shall adjudicate and file a statement of the facts supporting the legal conclusions arrived at. *Dudley v. Sears, Roebuck & Co.*, 111 Ga. App. 214, 141 S.E.2d 179 (1965).

Legal precision not necessary. — Legal precision and nicety in the report of board's findings of law and fact should not be insisted upon. *Lee v. General Accident Group*, 112 Ga. App. 197, 144 S.E.2d 457 (1965); *Royal Indem. Co. v. Manley*, 115 Ga. App. 259, 154 S.E.2d 278 (1967); *Gatrell v. Employers Mut. Liab. Ins. Co.*, 226 Ga. 688, 177 S.E.2d 77 (1970).

Findings only required where compensation granted or denied. — Provisions of this section, insofar as they require that awards of the board must be accompanied by findings of fact, relate only to such awards as grant or

deny compensation to an employee. *Employers Mut. Liab. Ins. Co. v. Hood*, 137 Ga. App. 555, 224 S.E.2d 460 (1976); *West Point Pepperell, Inc. v. Luallen*, 147 Ga. App. 135, 248 S.E.2d 287 (1978) (see O.C.G.A. § 34-9-102).

Statement of the findings of fact and other matters pertinent to the questions at issue was required under this section only where there was an award. *Garner v. Owens-Illinois Glass Container*, 134 Ga. App. 917, 216 S.E.2d 709 (1975) (see O.C.G.A. § 34-9-102).

Ultimate conclusion to be supported by sufficient findings. — All that this section required was that the ultimate conclusion of the board be supported by findings which were sufficient to justify that conclusion. *West Point Pepperell, Inc. v. Adams*, 152 Ga. App. 3, 262 S.E.2d 212 (1979) (see O.C.G.A. § 34-9-102).

Finding of ultimate facts unwarranted without findings of fact unless demanded by all evidence. — Where there are no findings of fact, finding of ultimate facts is not warranted, unless possibly when all the evidence demands certain findings. *Hodges v. Fidelity & Cas. Co.*, 105 Ga. App. 273, 124 S.E.2d 435 (1962); *Dudley v. Sears, Roebuck & Co.*, 111 Ga. App. 214, 141 S.E.2d 179 (1965).

Specific facts and issues. — Findings of fact of board must address themselves to specific facts and material issues. *Carrie v. Continental Ins. Co.*, 147 Ga. App. 544, 249 S.E.2d 349 (1978).

Unsupported conclusion. — A mere statement that an injury arose out of and in the course of employment is not such a finding of fact as would justify an award when it stands unsupported by any other findings of fact to justify it as a conclusion. *Southeastern Express Co. v. Edmondson*, 30 Ga. App. 697, 119 S.E. 39 (1923); *American Mut. Liab. Ins. Co. v. Hardy*, 36 Ga. App. 487, 137 S.E. 113 (1927); *Hodges v. Fidelity & Cas. Co.*, 105 Ga. App. 273, 124 S.E.2d 435 (1962); *Dudley v. Sears, Roebuck & Co.*, 111 Ga. App. 214, 141 S.E.2d 179 (1965); *U.S. Fid. & Guar. Co. v. Gentile*, 134 Ga. App. 318, 214 S.E.2d 406 (1975).

It is not improper for the commission (now board) to give its conclusion in the statutory language, where the findings of fact as stated are sufficient to justify such conclusion, but a mere statement that the

Findings of Fact (Cont'd)

commission (now board) finds that the injury arose out of and in the course of employment is not such a finding of fact as would justify an award, when it stands unsupported by any other findings of fact to justify it as a conclusion. *McDaniel v. Employers Mut. Liab. Ins. Co.*, 104 Ga. App. 340, 121 S.E.2d 801 (1961).

Narrative of testimony insufficient. — The award cannot be lawfully based on mere findings as to what witnesses testified, in the absence of other specific findings of fact which would otherwise support an award. *Fireman's Fund Indem. Co. v. Peeples*, 97 Ga. App. 896, 104 S.E.2d 664 (1958).

Mere narrative of the testimony of the witnesses was not in compliance with this section. *State Hwy. Dep't v. Murphy*, 108 Ga. App. 830, 134 S.E.2d 821 (1964) (see O.C.G.A. § 34-9-102).

A mere narrative of testimony of the witnesses was not in compliance with this section because it was the duty of the board to weigh the evidence and decide what are the true facts. *Dudley v. Sears, Roebuck & Co.*, 111 Ga. App. 214, 141 S.E.2d 179 (1965) (see O.C.G.A. § 34-9-102).

A mere description of who testified or a mere narrative of witnesses' testimony was not in compliance with this section. *U.S. Fid. & Guar. Co. v. Gentile*, 134 Ga. App. 318, 214 S.E.2d 406 (1975) (see O.C.G.A. § 34-9-102).

Lump sum payment. — No findings of fact are necessary in awarding a lump sum payment. *West Point Pepperell, Inc. v. Luallen*, 147 Ga. App. 135, 248 S.E.2d 287 (1978).

As to payment of award in a lump sum, no definite findings of fact need be set out, other than the findings of the board to the effect that a lump sum settlement would be in the best interest of the claimant and would not work a hardship on the employer/insurer. *Employers Mut. Liab. Ins. Co. v. Hood*, 137 Ga. App. 555, 224 S.E.2d 460 (1976); *West Point Pepperell, Inc. v. Luallen*, 147 Ga. App. 135, 248 S.E.2d 287 (1978).

Finding of maximum improvement not proper. — As a separate, independent finding of fact, disassociated with the primary question as to the extent and probable duration of disability, finding that maximum improvement has been reached has no place

in workers' compensation law. Where such finding is made, it should be construed simply as a finding upon which is predicated the adjudication as to the probable duration of claimant's disability. *Borden Co. v. Fuerlinger*, 95 Ga. App. 556, 98 S.E.2d 410 (1957).

Inclusion in findings of some evidence that was not essential does not invalidate award. *Bryant v. J.C. Distribs., Inc.*, 108 Ga. App. 401, 133 S.E.2d 109 (1963).

Construction of findings upholding judgment to be adopted. — After the award, that construction of the findings which would render the judgment valid should be adopted in preference to a construction which would render such judgment invalid, where such construction is reasonable and can fairly be applied. *Royal Indem. Co. v. Manley*, 115 Ga. App. 259, 154 S.E.2d 278 (1967).

If statement of findings of fact is subject to two constructions, one which would render the award invalid and another which with equal reason would render the award valid, the statement should be so construed as to render the award valid. *Lee v. General Accident Group*, 112 Ga. App. 197, 144 S.E.2d 457 (1965); *Gatrell v. Employers Mut. Liab. Ins. Co.*, 226 Ga. 688, 177 S.E.2d 77 (1970).

Conclusions of administrative law judge superseded by those of board. — Where administrative law judge and full board have articulated the same facts and have reached a different conclusion based on those facts, findings and conclusions of the full board supersede those of the administrative law judge. *Assurance Co. of Am. v. Shepherd*, 155 Ga. App. 36, 270 S.E.2d 268 (1980).

Full board, on review, is not restricted by findings of single director as to the preliminary facts or the ultimate fact; no conclusion of the single director, whether preliminary or ultimate, is binding on the full board. *Peninsular Life Ins. Co. v. Brand*, 57 Ga. App. 526, 196 S.E. 264 (1938).

Adoption of findings by board. — If, upon application for review under former Code 1933, § 114-708 (see O.C.G.A. § 34-9-103), the full commission (now board) shall find the facts as they were found by the sole commissioner (administrative law judge), it will be sufficient if the statement of the commissioner's findings was adopted by the full commission (now board), without neces-

sity of restatement in detail. *Southeastern Express Co. v. Edmondson*, 30 Ga. App. 697, 119 S.E. 39 (1923).

Findings conclusive when supported by evidence and in absence of fraud. — Finding of fact by a director or deputy director of the board, when supported by any evidence and in the absence of fraud, is conclusive and binding upon the courts, and the judge of the superior court does not have any authority to set aside an award based on those findings of fact merely because the judge disagrees with the conclusions reached therein. *Department of Revenue v. Graham*, 102 Ga. App. 756, 117 S.E.2d 902 (1960).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) makes the findings of the board upon the facts final and conclusive, and in the absence of fraud such findings cannot be set aside by any court if there is any competent evidence to support it. *Hansard v. Georgia Power Co.*, 105 Ga. App. 486, 124 S.E.2d 926 (1962).

The Court of Appeals has no authority to disturb findings of fact made by the board if they are supported by any evidence. *Dudley v. Sears, Roebuck & Co.*, 115 Ga. App. 411, 154 S.E.2d 699 (1967).

An award of the Workers' Compensation Board will not be disturbed where there is any evidence to support it. *Alexander v. Globe Indem. Co.*, 105 Ga. App. 212, 124 S.E.2d 428 (1962).

Where there is any evidence to support the conclusion of the administrative law judge of total disability in a workers' compensation proceeding, trial or appellate courts cannot substitute findings of fact. *Rains v. Ford Motor Co.*, 158 Ga. App. 808, 282 S.E.2d 346 (1981).

Findings will not be set aside absent errors of law. — Findings of fact made by a director of the board or by the full board upon appeal, when supported by any competent evidence, are, in the absence of fraud, conclusive on the courts, and such findings will not be set aside in the absence of errors of law. *McIntyre v. Employers Mut. Liab. Ins. Co.*, 122 Ga. App. 424, 177 S.E.2d 191 (1970).

Award may be reversed when based on erroneous conclusions. — Findings of facts of State Board of Workers' Compensation are controlling in the superior court and

Court of Appeals in the absence of fraud, where such finding is supported by any competent evidence, but where the board arrives at an award by basing such findings on an erroneous conclusion drawn from the facts and the law applicable thereto, such award may be reversed by the superior court. *Parks v. American Fid. & Cas. Co.*, 97 Ga. App. 833, 104 S.E.2d 624 (1958).

Recommittal to board. — Failure of the commission (now board) to state its findings will not necessarily require a rehearing de novo, but the case may be recommitted in order for the commission (now board) to state its findings from the evidence already heard, as the reviewing court may direct. *Southeastern Express Co. v. Edmondson*, 30 Ga. App. 697, 119 S.E.2d 39 (1923).

Whenever courts feel that in making findings of facts the board has failed to weigh all the evidence, the practice has generally been to recommit the case to the board for further consideration. *Travelers Ins. Co. v. Merritt*, 124 Ga. App. 42, 183 S.E.2d 73 (1971).

Where the award did not show upon what facts the finding that claimant's disability was proximately caused by claimant's previous back injury was predicated and no facts supporting the findings that claimant was terminated or that claimant could no longer physically perform the sedentary work provided claimant by appellant employer were disclosed, the award was reversed and remanded to the state board of workers' compensation with direction that it make findings of fact in accordance with O.C.G.A. § 34-9-102(f). *Georgia-Pacific Corp. v. Clark*, 179 Ga. App. 541, 346 S.E.2d 911 (1986).

Remand to board unnecessary where facts not disputed. — It is not necessary to recommit a case to the board because of its failure to state findings of fact on issues as to which the facts disclosed by the record are undisputed. *Lee v. General Accident Group*, 112 Ga. App. 197, 144 S.E.2d 457 (1965).

If the board enters an award without making findings of fact upon which the award rests, the superior court must return the case to the board with directions to do so; however, where there are no findings of fact, but the facts as disclosed by the record are not in dispute, it is not necessary to return the case to the board simply to have it perform what

Findings of Fact (Cont'd)

would be an act of transcription. *Gatrell v.*

Employers Mut. Liab. Ins. Co., 121 Ga. App. 467, 174 S.E.2d 237, rev'd on other grounds, 226 Ga. 688, 177 S.E.2d 77 (1970).

OPINIONS OF THE ATTORNEY GENERAL**Sale of transcripts to other state agencies.**

— O.C.G.A. § 45-10-42 authorizes state board court reporters to sell workers' compensation transcripts prepared pursuant to O.C.G.A. § 34-9-102(g) to state agencies. 1983 Op. Att'y Gen. No. 83-56.

Transcripts as state property. — Inasmuch as the court reporters are full-time employees of the State Board of Workers' Compensation, the transcripts which are produced by those court reporters are the property of the

State Board of Workers' Compensation. 1986 Op. Att'y Gen. No. 86-47.

Sale of transcripts to third parties. —

Court reporters for the State Board of Workers' Compensation may sell workers' compensation transcripts to state agencies at any time when providing such transcripts to a party to the case, but they may not sell transcripts of workers' compensation hearings to third parties which are not state agencies. 1986 Op. Att'y Gen. No. 86-47.

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 547.

ALR. — Presumption against suicide in workmen's compensation cases, 36 ALR 397.

Denial of review of facts on appeal from commission or other body established under Workmen's Compensation Act as denial of due process of law, 39 ALR 1064.

Validity and applicability of statutes relating to use of highway by private motor carriers and contract motor carriers for hire, 109 ALR 550; 175 ALR 1333.

Proper tribunal for determination of questions relating to insurance under Workmen's Compensation Act, 127 ALR 473.

Necessity, form, and contents of findings of fact to support administrative determinations relating to workmen's compensation, 146 ALR 123.

Declaratory relief with respect to unemployment compensation, 14 ALR2d 826.

Workmen's compensation: use of medical books or treatises as independent evidence, 17 ALR3d 993.

34-9-103. Appeal of decision; remand; reconsideration, amendment, or revision of award.

(a) Any party dissatisfied with a decision of an administrative law judge of the trial division of the State Board of Workers' Compensation may appeal that decision to the appellate division of the State Board of Workers' Compensation which shall have original appellate jurisdiction in all workers' compensation cases. An application for review shall be made to the appellate division within 20 days of notice of the award. The appellee may institute cross appeal by filing notice thereof within 30 days of the notice of the award. If a timely application for review, cross appeal, or both, is made to the appellate division, the appellate division shall review the evidence and shall then make an award with findings of fact and conclusions of law. A copy of the award so made on review shall immediately be sent to the parties at dispute. Upon review, the appellate division may remand to an administrative law judge in the trial division any case before it for the purpose of reconsideration and correction of apparent errors and omissions and issuance of a new award, with or without the taking of additional

evidence, or for the purpose of taking additional evidence for consideration by the appellate division in rendering any decision or award in the case. The findings of fact made by the administrative law judge in the trial division shall be accepted by the appellate division where such findings are supported by a preponderance of competent and credible evidence contained within the records.

(b) Within the time limit provided by subsection (a) of this Code section for review by the board of an award made in accordance with Code Section 34-9-102 or within the time limit provided by Code Section 34-9-105 for appeal to a superior court, upon or without the suggestion of a party to the proceedings and notwithstanding the filing of an application for review or appeal, the board or any of its members or administrative law judges issuing an award shall have authority to reconsider, amend, or revise the award to correct apparent errors and omissions. Should an amended or revised award be issued, the time period for filing an application for review of the amended or revised award under subsection (a) of this Code section or for filing appeal to a superior court under Code Section 34-9-105 shall commence upon the date of issuance of the amended or revised award. (Ga. L. 1920, p. 167, § 58; Ga. L. 1925, p. 282, § 5; Code 1933, § 114-708; Ga. L. 1963, p. 141, § 14; Ga. L. 1975, p. 198, § 10; Ga. L. 1987, p. 806, § 2; Ga. L. 1988, p. 1679, § 19; Ga. L. 1994, p. 887, § 8; Ga. L. 1999, p. 817, § 1.)

Law reviews. — For article surveying developments in Georgia workers' compensation law from mid-1980 through mid-1981,

see 33 Mercer L. Rev. 323 (1981). For annual survey of workers' compensation, see 38 Mercer L. Rev. 431 (1986).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

JURISDICTION

PROCEDURE

EVIDENCE

FINDINGS OF FACT

CORRECTION OF APPARENT ERRORS

General Consideration

Board is not a court, but an administrative body which exercises judicial functions within the channels of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Continental Ins. Co. v. McDaniel*, 118 Ga. App. 344, 163 S.E.2d 923 (1968).

Constitutionality. — The standard of review in O.C.G.A. § 34-9-103(a) does not unconstitutionally shift any burden of proof to a party who prevailed before the administrative law judge and who did not have a burden of proof before the administrative law judge. *Syntec Indus., Inc. v. Godfrey*, 269

Ga. App. 170, 496 S.E.2d 905 (1998).

Decision of the board has same force and effect as judgment or decision of any other tribunal. *Hartford Accident & Indem. Co. v. Webb*, 109 Ga. App. 667, 137 S.E.2d 362 (1964).

Administration of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is vested in the Board of Workers' Compensation, which is expressly empowered to hear and determine claims arising under the law, and, as between the parties, the board's award has the same effect as a judgment rendered by a court of competent jurisdiction.

General Consideration (Cont'd)

tion. *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939).

Board exceeded authority. — State Board of Workers' Compensation exceeded its rule-making authority, as a matter of law, in creating an unpublished rule of appellate procedure that was inconsistent with O.C.G.A. § 34-9-103(b). *MARTA v. Reid*, 282 Ga. App. 877, 640 S.E.2d 300 (2006).

This section was applicable only to review by the full board of findings of fact and award of a single director. *Ideal Mut. Ins. Co. v. Ray*, 94 Ga. App. 785, 96 S.E.2d 377 (1956) (see O.C.G.A. § 34-9-103).

Participation of director making award in review. — Since former Code 1933, § 114-707 (see O.C.G.A. § 34-9-103) made it possible for one director to make an award and former Code 1933, § 114-708 (see O.C.G.A. § 34-9-105) provided for review thereof by all the directors, it necessarily followed that the proper construction of that section was that all the directors, including the director making the award in the first instance, shall review the award. *Wiley v. Bituminous Cas. Co.*, 76 Ga. App. 862, 47 S.E.2d 652 (1948).

Remedy of appeal for dissatisfaction with award. — Where a hearing is held and an award is made in favor of the claimant, if the claimant is dissatisfied with the amount of the award, claimant's remedy is by way of appeal. Where no appeal is taken, the award is conclusive and binding, and in the absence of fraud, accident, or mistake, claimant may not thereafter have the award increased, except upon a change in condition. *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939).

Right of either party to appeal. — Where there has been an award by a single commissioner (now administrative law judge), either party may apply for review by the entire board within the time specified, and the fact that the losing party in the hearing before the commissioner (now administrative law judge) makes an appeal to the superior court before the expiration of such trial will not subject such appeal to dismissal. *American Mut. Liab. Ins. Co. v. Lindsey*, 63 Ga. App. 658, 11 S.E.2d 512 (1940).

Appeal to court as waiver of right to appeal to board. — Appeal to the superior

court before the expiration of the seven (now 20) days is a waiver of the right to appeal to the board, but does not otherwise affect the rights of the parties. *American Mut. Liab. Ins. Co. v. Lindsey*, 63 Ga. App. 658, 11 S.E.2d 512 (1940).

Appeal to board as waiver of direct appeal to court. — Appeal from award of a single director to the full board within 20 days from the date of the award would be a waiver of the right of the appellant to appeal from such award directly to the superior court. *Rose City Foods, Inc. v. Usry*, 86 Ga. App. 307, 71 S.E.2d 649 (1952).

Finality of award absent appeal. — Failure to appeal within the time specified makes the award of the single commissioner (now administrative law judge) final. *American Mut. Liab. Ins. Co. v. Lindsey*, 63 Ga. App. 658, 11 S.E.2d 512 (1940).

Res judicata. — An approved award agreement, not appealed within the time provided by law, is res judicata as to matters determined therein. *Jeffares v. Travelers Ins. Co.*, 138 Ga. App. 903, 228 S.E.2d 1 (1976).

An award of compensation is res judicata until it is changed in the manner prescribed by law. *Yates v. Hall*, 189 Ga. App. 885, 377 S.E.2d 887, cert. denied, 189 Ga. App. 914, 377 S.E.2d 887 (1989).

Issues waived by failure to appeal to board. — Failure of the employer to appeal to the full board where all issues of law and fact which might have been asserted on the hearing before the deputy director could have been submitted and tried anew constituted waiver of its right to insist upon notice and opportunity to be heard, and such question could not be insisted upon for the first time on appeal to the superior court. *Bailey-Lewis-Williams of Ga., Inc. v. Thomas*, 103 Ga. App. 279, 119 S.E.2d 141 (1961).

If a claimant does not seek review by the full board or by the superior court of an issue within the time prescribed, the award becomes final as to that issue, and the claimant will not be entitled to a review by the Court of Appeals of the issue. *Bryant v. J.C. Distributions, Inc.*, 108 Ga. App. 401, 133 S.E.2d 109 (1963).

Withdrawal of appeal without consent of adverse party ineffective. — Where employer and insurance carrier appealed from the award of a single director to the full board within 20 days from the date of the

award and hearing on the appeal was set but before a hearing was held, the appeal was withdrawn by the appellants, without the claimant's consent, and another appeal was entered directly to the superior court, the judge of the superior court did not err in dismissing the appeal on motion of the claimant and remanding the case to be heard by the full board on the first appeal, as the attempt to dismiss or withdraw the first appeal without the consent of the adverse party was a nullity. *Rose City Foods, Inc. v. Usry*, 86 Ga. App. 307, 71 S.E.2d 649 (1952); *Atlanta Family Restaurants, Inc. v. Perry*, 209 Ga. App. 581, 434 S.E.2d 140 (1993).

Board's hearing on review is a de novo proceeding; it does not sit in the capacity of an appellate court. *Complete Auto Transit, Inc. v. Davis*, 106 Ga. App. 369, 126 S.E.2d 909 (1962).

Appeal to full board from award of a single director is a de novo proceeding. *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952); *Ideal Mut. Ins. Co. v. Ray*, 92 Ga. App. 273, 88 S.E.2d 428 (1955); *Gatrell v. Employers Mut. Liab. Ins. Co.*, 226 Ga. 688, 177 S.E.2d 77 (1970); *National Union Fire Ins. Co. v. Johnston*, 122 Ga. App. 332, 177 S.E.2d 125 (1970).

Where deputy director is authorized to hear and determine claimant's application for compensation, and from the evidence heard by the director makes findings of fact and on such findings awards compensation to claimant, and employer and its insurance carrier appeal in due time to the board, such appeal opens the entire case for a de novo hearing before the board as a fact-finding body. *Pacific Employers Ins. Co. v. West*, 213 Ga. 296, 99 S.E.2d 89 (1957).

Mere affirmation not contemplated. — Award by the board which affirmed the findings of a single director or deputy director is not such an award as was contemplated by this section, but is only an effort to pass on the case as if it had been appealed from a lower to a higher tribunal, and was not a trial de novo. *Sweatman v. Hartford Accident & Indem. Co.*, 96 Ga. App. 243, 99 S.E.2d 548 (1957) (see O.C.G.A. § 34-9-103).

Action only in appellate capacity reversible. — Where it appeared from the award entered that the board acted only in an appellate capacity, without deciding anew

the issues raised, such action was illegal and the award would be reversed. *American Cas. Co. v. Wilson*, 99 Ga. App. 219, 108 S.E.2d 137 (1959).

Standard of review of O.C.G.A. § 34-9-103(a), as amended in 1994, requiring the appellate division to accept findings of fact made by the administrative law judge where such findings are supported by the evidence, was inconsistent with the de novo consideration of all the evidence as applied by the appellate division. *Clinical Arts v. Smith*, 218 Ga. App. 681, 462 S.E.2d 757 (1995); *Truckstops of Am., Inc. v. Engram*, 220 Ga. App. 289, 469 S.E.2d 425 (1996).

Even though the 1994 amendment of O.C.G.A. § 34-9-103(a) became effective after the administrative law judge heard the case and rendered a decision, the appellate division erred by failing to apply the standard of review prescribed by the amended version since the statute is procedural. Additionally, there was no vested right in preserving appellate review of the decision under the prior version as the legislature did not express an intent that the amendment not be applied retroactively. *Clinical Arts v. Smith*, 218 Ga. App. 681, 462 S.E.2d 757 (1995); *Truckstops of Am., Inc. v. Engram*, 220 Ga. App. 289, 469 S.E.2d 425 (1996).

Even though the appellate division erroneously stated it was engaging in a de novo consideration of the evidence upon which the administrative law judge's findings were based, it in fact employed the proper standard of review where it substituted its findings for those of the ALJ to the extent it determined the ALJ's findings were unsupported by credible evidence. *Harrell v. City of Albany Police Dep't*, 219 Ga. App. 810, 466 S.E.2d 682 (1996).

In reviewing the testimony of medical experts, the appellate division was authorized to determine that the testimony of one was entitled to more credit and weight than that of the other and, even though there was evidence supporting the administrative law judge's finding, the award of the appellate division had to be affirmed. *Bennett-Murray, Inc. v. Barnes*, 222 Ga. App. 137, 473 S.E.2d 166 (1996).

The standard authorizes the appellate division to ensure that the administrative law judge's findings are supported by admissible evidence and to make determinations con-

General Consideration (Cont'd)

cerning the credibility of the evidence. *Bennett-Murray, Inc. v. Barnes*, 222 Ga. App. 137, 473 S.E.2d 166 (1996).

Where the appellate division's award did not mention which standard it employed in vacating the administrative law judge's award, i.e., the amended version of O.C.G.A. § 34-9-103(a) or the *de novo* review applicable under the former version, the case would be remanded for review under the proper standard. *AT & T v. Cotten*, 222 Ga. App. 261, 474 S.E.2d 102 (1996).

O.C.G.A. § 34-9-103(a), as amended in 1994, authorizes the appellate division to vacate the administrative law judge's findings of fact and conclusions of law as unsupported by a preponderance of the competent and credible evidence, and to substitute its own findings. *Bankhead Enters. v. Beavers*, 267 Ga. 506, 480 S.E.2d 840 (1997).

The 1994 amendment to O.C.G.A. § 34-9-103(a) did not change the standard of review to be applied by the superior court in reviewing the findings of the appellate division, i.e., the court may not substitute its findings for the division's findings of fact. The court is bound by the "any evidence" standard of review and is not authorized to substitute its judgment as to the weight of the evidence or credibility of the witnesses. *Owens Brockway Packaging, Inc. v. Hathorn*, 227 Ga. App. 110, 488 S.E.2d 495 (1997).

Equity proper forum for relief from erroneous award. — Relief from workers' compensation award in which employer was apparently erroneously found to be uninsured should properly have been sought in a court of equity pursuant to O.C.G.A. § 9-11-60. *Russell v. Fast Framers, Inc.*, 164 Ga. App. 771, 298 S.E.2d 303 (1982).

Reconsideration under subsection (b). — O.C.G.A. § 34-9-103(b) is not analogous to the statutory grant of authority to entertain a motion for new trial, but only authorizes the full board to entertain a motion for reconsideration of its prior award on the existing record. *Asplundh Tree Expert Co. v. Gibson*, 204 Ga. App. 853, 420 S.E.2d 797 (1992).

Appellate division's substitution of findings. — Workers' compensation appellate division is authorized to substitute its findings for those of a workers' compensation administrative law judge only when its alter-

native findings are supported by some evidence in the record. *Chaparral Boats, Inc. v. Heath*, 269 Ga. App. 339, 606 S.E.2d 567 (2004).

Attorney fees properly awarded. — Administrative law judge (ALJ) and the Georgia Workers' Compensation Board properly awarded an employer its attorney fees as: (1) the claimant did not appeal the ALJ's decision to require the claimant to submit to an examination, but simply defied it; (2) the blatant defiance of an ALJ order was evidence that the claimant defended the proceedings in part without reasonable grounds; (3) the claimant was not required to defy the order so as to present the claimant's justification for doing so; (4) the claimant had a chance to present the claimant's justification to the ALJ, and failed to reiterate the claimant's position on an appeal to the Board; and (5) the ALJ and the Board had some evidence upon which to base a finding that when the claimant contested the sanctions motion, the claimant did so without reasonable grounds. *Goswick v. Murray County Bd. of Educ.*, 281 Ga. App. 442, 636 S.E.2d 133 (2006), cert. denied, 2007 Ga. LEXIS 102 (Ga. 2007).

Cited in *Home Accident Ins. Co. v. Williams*, 33 Ga. App. 540, 126 S.E. 868 (1925); *American Mut. Liab. Ins. Co. v. Hardy*, 36 Ga. App. 487, 137 S.E. 113 (1927); *Lumbermen's Mut. Cas. Co. v. Lattimore*, 165 Ga. 501, 141 S.E. 195 (1928); *Macon v. U.S. Fid. & Guar. Co.*, 41 Ga. App. 774, 154 S.E. 702 (1930); *U.S. Cas. Co. v. Smith*, 46 Ga. App. 330, 167 S.E. 771 (1933); *Maryland Cas. Co. v. Sanders*, 49 Ga. App. 600, 176 S.E. 104 (1934); *Fralish v. Royal Indem. Co.*, 53 Ga. App. 557, 186 S.E. 567 (1936); *Fluellen v. Campbell Coal Co.*, 54 Ga. App. 355, 188 S.E. 54 (1936); *Merry Bros. Brick & Tile Co. v. Holmes*, 57 Ga. App. 281, 195 S.E. 223 (1938); *Glens Falls Indem. Co. v. Sockwell*, 58 Ga. App. 111, 197 S.E. 647 (1938); *Lumbermen's Mut. Cas. Co. v. Cook*, 195 Ga. 397, 24 S.E.2d 309 (1943); *Utica Mut. Ins. Co. v. Rolax*, 87 Ga. App. 733, 75 S.E.2d 205 (1953); *Sweatman v. Hartford Accident & Indem. Co.*, 100 Ga. App. 734, 112 S.E.2d 440 (1959); *Sears, Roebuck & Co. v. Wilson*, 215 Ga. 746, 113 S.E.2d 611 (1960); *Sweatman v. Hartford Accident & Indem. Co.*, 101 Ga. App. 920, 115 S.E.2d 596 (1960); *Dempsey v. Chevrolet Div.*, 102 Ga.

App. 408, 116 S.E.2d 509 (1960); Garrett v. Employers Mut. Liab. Ins. Co., 105 Ga. App. 308, 124 S.E.2d 450 (1962); Firth v. Liberty Mut. Ins. Co., 107 Ga. App. 285, 129 S.E.2d 812 (1963); Fidelity & Cas. Co. v. Ledford, 108 Ga. App. 326, 132 S.E.2d 858 (1963); Guess v. Liberty Mut. Ins. Co., 219 Ga. 581, 134 S.E.2d 783 (1964); Gusler v. Aetna Cas. & Sur. Co., 118 Ga. App. 846, 165 S.E.2d 877 (1968); Snider v. Liberty Mut. Ins. Co., 119 Ga. App. 118, 166 S.E.2d 379 (1969); Travelers Ins. Co. v. Lovins, 123 Ga. App. 113, 179 S.E.2d 539 (1970); Zurich Ins. Co. v. Robinson, 127 Ga. App. 113, 192 S.E.2d 533 (1972); Waters v. Travelers Ins. Co., 129 Ga. App. 761, 201 S.E.2d 176 (1973); Garner v. Owens-Illinois Glass Container, 134 Ga. App. 917, 216 S.E.2d 709 (1975); Kay v. Maryland Cas. Co., 135 Ga. App. 108, 217 S.E.2d 413 (1975); Fieldcrest Mills, Inc. v. Richard, 141 Ga. App. 702, 234 S.E.2d 345 (1977); Walker v. Continental Ins. Co., 142 Ga. App. 115, 235 S.E.2d 389 (1977); Wills v. St. Paul Fire & Marine Ins. Co., 143 Ga. App. 562, 239 S.E.2d 219 (1977); Favors v. Travelers Ins. Co., 150 Ga. App. 741, 258 S.E.2d 554 (1979); Transport Ins. Co. v. Ferguson, 156 Ga. App. 715, 275 S.E.2d 354 (1980); Seitzingers, Inc. v. Barnes, 161 Ga. App. 855, 289 S.E.2d 315 (1982); K-Mart Corp. v. Anderson, 163 Ga. App. 493, 295 S.E.2d 186 (1982); Hon Co. v. Dobbs, 165 Ga. App. 654, 302 S.E.2d 365 (1983); Dycol, Inc. v. Crump, 169 Ga. App. 930, 315 S.E.2d 460 (1984); Keenan v. Jackson & Keenan Constr. Co., 175 Ga. App. 730, 334 S.E.2d 329 (1985); Henderson v. Mrs. Smith's Frozen Foods, 182 Ga. App. 829, 357 S.E.2d 271 (1987); Owen of Ga., Inc. v. Waugaman, 185 Ga. App. 827, 366 S.E.2d 173 (1988); Gaddis v. Georgia Mt. Contractors, 213 Ga. App. 126, 443 S.E.2d 710 (1994); Textile Coating, Ltd. v. Ramirez, 223 Ga. App. 236, 477 S.E.2d 388 (1996); Logan v. St. Joseph Hosp., 227 Ga. App. 853, 490 S.E.2d 483 (1997).

Jurisdiction

No jurisdiction to review award without timely appeal. — Award of single director becomes final where there is no application for review filed with the full board within seven (now 20) days from the date of notice of award, and in such case the full board is without jurisdiction to review the award.

Dempsey v. Chevrolet Div., 102 Ga. App. 408, 116 S.E.2d 509 (1960).

Since the provision that an application for review must be made within seven (now 20) days after notice of the award is jurisdictional, it cannot be waived. Dempsey v. Chevrolet Div., 102 Ga. App. 408, 116 S.E.2d 509 (1960).

Full commission (now board) has no jurisdiction or authority to review final ruling granting an award where the application is not filed within the prescribed period. U.S. Cas. Co. v. Smith, 42 Ga. App. 774, 157 S.E. 351 (1931).

An award made by a sole commissioner (now administrative law judge) under former Code 1933, § 114-709 (see O.C.G.A. § 34-9-104), conferring authority upon the commission (now board) to modify any prior award or settlement on ground of a change in condition, is, for the purpose of review by the full commission (now board), to be treated as any other award by a sole commissioner (now administrative law judge), and to obtain such review the application therefor must be made within the prescribed period. U.S. Cas. Co. v. Smith, 42 Ga. App. 774, 157 S.E. 351 (1931).

Commission (now board) has no authority, after a full hearing and rendition of an award denying compensation to a claimant, to which no appeal is entered, to entertain another application by claimant, filed after the time provided for entering an appeal; and where more than two years passed since rendition of an award denying compensation, review of such previous award on the ground that it was contrary to law and was procured by fraud was not available. Sutton v. Macon Gas Co., 46 Ga. App. 299, 167 S.E. 543 (1933).

The State Board of Workers' Compensation may properly deny review of an application for benefits where an appeal to the full board is not marked filed until more than 30 (now 20) days after the original award decision. Argonaut Ins. Co. v. Hamilton, 146 Ga. App. 195, 245 S.E.2d 882 (1978).

Amended award must be issued within 20-day period. — While the board made the decision to amend the original award within the 30-day (now 20-day) period, it had no authority to issue the amended award after that time limit. Aetna Cas. & Sur. Co. v. Barden, 179 Ga. App. 442, 346 S.E.2d 588 (1986).

Jurisdiction (Cont'd)

Appeal to superior court does not affect jurisdiction to amend award. — Within the 20 days subsequent to the date that the board issues an award, it has authority to reconsider, amend, or revise that award for the limited purpose of correcting apparent errors and omissions. This authority exists notwithstanding the fact that an appeal to a superior court may already have been filed as to the original award during the same 20-day period. *Travelers Ins. Co. v. Adkins*, 200 Ga. App. 278, 407 S.E.2d 775 (1991).

Computation of time for applying for review. — The 30-day (now 20-day) period within which an application must be filed begins to run from the date that the legal requirement of giving notice has been satisfied. *Favors v. Travelers Ins. Co.*, 150 Ga. App. 741, 258 S.E.2d 554 (1979).

Notice is effective upon proper posting; hence, the critical date from which the 30 (now 20) days begins to run is the date of such posting, not the date of actual receipt. *Favors v. Travelers Ins. Co.*, 150 Ga. App. 741, 258 S.E.2d 554 (1979).

Where the board effectuates notice by regular mail, the critical date is three days after the date of mailing to the correct address, and the 30-day (now 20-day) period for filing is computed from that date. *Favors v. Travelers Ins. Co.*, 150 Ga. App. 741, 258 S.E.2d 554 (1979).

Objection to jurisdiction of board. — If the commission (now board), on the filing of an application by an employer, causes written notice to be served upon the injured employee or the employee's dependents, the person so notified may object to the jurisdiction of the commission (now board) on any ground that will show an absence of authority to inquire into the matter. *Ballenger v. Rock Run Iron Co.*, 166 Ga. 490, 143 S.E. 595 (1928).

Injunction not maintainable. — Where the commission (now board) causes notice to be served on an injured employee or the employee's dependents of the filing of an application by the employer, the employee or the dependents having a remedy at law, by filing with the commission (now board) objections to the jurisdiction of that body, a court of equity will not entertain a petition by such injured employee or the employee's

dependents, in which the only relief sought is an injunction to prevent the commission (now board) from taking and exercising jurisdiction in the matter. *Ballenger v. Rock Run Iron Co.*, 166 Ga. 490, 143 S.E. 595 (1928).

Procedure

Sufficient to mail notice of award to parties. — Under O.C.G.A. § 34-9-103, there is no requirement that a notice of an administrative law judge's award be mailed to the parties' counsel, and notice mailed to the parties is sufficient to start the time period running for appealing an award. *Forsyth County Bd. of Educ. v. Trusty*, 187 Ga. App. 470, 370 S.E.2d 793 (1988).

Procedure on review. — Where a claim for compensation was heard and determined by a single director or a deputy director, and timely application was made to the board, it was the function and duty of the board to hold a de novo hearing in the manner provided in this section. The board shall consider the case on the evidence before it, taken as provided, make independent findings of fact of its own, and render an award in accordance with its own findings of fact and law. *Sweatman v. Hartford Accident & Indem. Co.*, 96 Ga. App. 243, 99 S.E.2d 548 (1957); *S.S. Kresge Co. v. Bryant*, 122 Ga. App. 103, 176 S.E.2d 286 (1970) (see O.C.G.A. § 34-9-103).

Scope of review. — The appellate division was authorized after weighing the evidence and assessing credibility to resolve inconsistencies in evidence regarding causation or the extent of plaintiff's injuries in plaintiff's favor, unlike the administrative law judge. Because there was evidence supporting the appellate decision, the superior court erred in reversing it. *Johnson v. Weyerhaeuser Co.*, 231 Ga. App. 627, 499 S.E.2d 916 (1998).

Board must apply the law to the findings of fact and apply that law correctly. *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952).

Board bound by law as enacted. — The department (now board) is bound by what the law actually is rather than by a stipulation between the parties as to what it was, and in adjudicating a case upon a legal stipulation, it is its duty, if a point of law is erroneously stipulated, to look beyond it to the law as enacted. *Globe Indem. Co. v. Legien*, 47 Ga.

App. 539, 171 S.E. 185 (1933).

Burden of proof on claimant. — On appeal in all workers' compensation cases, the burden of proof is on the claimant. *Department of Revenue v. Graham*, 102 Ga. App. 756, 117 S.E.2d 902 (1960).

When appeal is entered, award of deputy director is vacated, and a new one must be entered by the full board. This may be done by adoption of the deputy director's award, or by making an entirely different award, but whatever is done must appear in the full board's order. *S.S. Kresge Co. v. Bryant*, 122 Ga. App. 103, 176 S.E.2d 286 (1970).

Affirmation or reversal of director's award. — On review of award of a single director, full board acts as a fact-finding body, and may affirm the award or may reverse it, if the evidence so authorizes. *Adams v. Utica Mut. Ins. Co.*, 88 Ga. App. 386, 76 S.E.2d 709 (1953); *Butler v. Fidelity & Cas. Co.*, 88 Ga. App. 620, 76 S.E.2d 813 (1953).

Board bound if supported by any competent evidence. — Upon review by the board of an award of a director or deputy director thereof, the board is a fact-finding body, and may render an award approving or disapproving the award of the deputy director, which is binding on the courts where supported by any competent evidence. *American Mut. Liab. Ins. Co. v. Jenkins*, 63 Ga. App. 777, 12 S.E.2d 80 (1940).

Director's award may be reversed even if supported by some evidence. — On review of the award of a single director, the full board acts as a fact-finding body, and when authorized by the evidence, it may reverse the award of the single director even though there is some evidence to support the director's findings. *Austin v. General Accident, Fire & Life Assurance Corp.*, 56 Ga. App. 481, 193 S.E. 86 (1937); *Watkins v. Hartford Accident & Indem. Co.*, 75 Ga. App. 462, 43 S.E.2d 549 (1947); *Davis v. American Mut. Liab. Ins. Co.*, 89 Ga. App. 57, 78 S.E.2d 557 (1953).

Appeal from an award of compensation made by one director to the full board opens the entire case as a de novo proceeding, and the board may, on review of the case, render an award notwithstanding the award appealed from. *Georgia Dep't of Revenue v. Hughes*, 99 Ga. App. 127, 108 S.E.2d 184 (1959).

On review from an award to the full board the entire case is a de novo proceeding, and the board acting as a fact-finding body may reverse the award of the deputy director, either from the evidence taken by the deputy or from additional evidence taken by order of the full board. *Travelers Ins. Co. v. Buice*, 124 Ga. App. 626, 185 S.E.2d 549 (1971).

Award in favor of employer authorized even if only claimant appeals. — Appeal from award of compensation made by one director to the full board opens the entire case as a de novo proceeding; and the board may, on review, render an award in favor of the employer and the insurance carrier denying compensation, notwithstanding the fact that the award appealed from awarded compensation to the claimant, who alone appealed on the ground that the amount awarded to claimant was insufficient as a matter of law. *Burel v. Liberty Mut. Ins. Co.*, 56 Ga. App. 716, 193 S.E. 791 (1937); *Malone v. Fireman's Fund Ins. Co.*, 147 Ga. App. 264, 248 S.E.2d 544 (1978).

Where evidence is sufficient to authorize but not to demand finding either way, on appeal from award of single director to the full board, the board is fully empowered to reverse the award on the ground that it considered the preponderance of the evidence to be in favor of the defendant, but it is not empowered to reverse on the ground that there is not sufficient evidence to support the award. *Ideal Mut. Ins. Co. v. Ray*, 92 Ga. App. 273, 88 S.E.2d 428 (1955).

Board's award conclusive if sustained by any evidence. — Award made upon review by all the directors of the board, setting aside a previous award by a single director upon issues of fact, is conclusive as to those issues if there is any evidence to sustain it. *Webb v. General Accident, Fire & Life Ins. Co.*, 72 Ga. App. 127, 33 S.E.2d 273 (1945).

Award made by a single director, affirmed by the full board, is conclusive as to issues of fact found, if there is any evidence to sustain it. *Standard Accident Ins. Co. v. Handspike*, 76 Ga. App. 67, 44 S.E.2d 704 (1947).

Where, after considering the whole record, the Court of Appeals is convinced that there is sufficient competent evidence to sustain an award of the hearing director and the full board, that court is without authority to disturb the findings. *Watkins v. Hartford Accident & Indem. Co.*, 75 Ga. App. 462, 43 S.E.2d 549 (1947).

Procedure (Cont'd)

Award made upon review by all directors of the board, affirming a previous award by one director upon issues of fact, is conclusive as to those issues if there is any evidence to sustain it. *General Accident, Fire & Life Assurance Corp. v. Rhodes*, 83 Ga. App. 837, 65 S.E.2d 254 (1951); *Hartford Accident & Indem. Co. v. Braswell*, 85 Ga. App. 487, 69 S.E.2d 385 (1952); *Baynes v. Liberty Mut. Ins. Co.*, 101 Ga. App. 85, 112 S.E.2d 826 (1960); *Davis v. Liberty Mut. Ins. Co.*, 110 Ga. App. 389, 138 S.E.2d 603 (1964).

Substantial evidence standard applied on review. — Employee's weekly amount of temporary total disability benefits was properly increased to the amount that reflected two-thirds of what was deemed the weekly wage, pursuant to O.C.G.A. § 34-9-261, and the employee failed to show entitlement to more than that amount; accordingly, pursuant to the standard of review of the State Board of Workers' Compensation's appellate division, pursuant to O.C.G.A. § 34-9-103(a), and the substantial evidence standard to be applied on judicial review, the wage amount required affirmation. *Dallas v. Flying J, Inc.*, 279 Ga. App. 786, 632 S.E.2d 389 (2006).

Supported award cannot be set aside, absent fraud. — An award made upon review by all the directors of the board, affirming an award by a single director upon issues of fact, is conclusive as to those issues, if there is any evidence to sustain it; and, in the absence of fraud, such award cannot be set aside. *Reeves v. Royal Indem. Co.*, 73 Ga. App. 2, 35 S.E.2d 473 (1945); *Hartford Accident & Indem. Co. v. Davis*, 73 Ga. App. 10, 35 S.E.2d 521 (1945).

Where there is any competent evidence to support an award of the board, in the absence of fraud, the superior court and Court of Appeals are without authority to set it aside. *Watkins v. Hartford Accident & Indem. Co.*, 75 Ga. App. 462, 43 S.E.2d 549 (1947).

Award must be complied with until superseded. — The fact that the employee has suffered an injury compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) may be conclusively established by an agreement filed with and approved by the board, or by an award of the

board after hearing evidence; regardless of which method is employed, it is a decision or judgment which must be complied with until it is superseded by a new award. *Hartford Accident & Indem. Co. v. Webb*, 109 Ga. App. 667, 137 S.E.2d 362 (1964); *American Mut. Liab. Ins. Co. v. Chandler*, 112 Ga. App. 574, 145 S.E.2d 816 (1965).

The original award is conclusive on both the employer and the employee as to the extent of disability of the employee, as found by the commission (now board), and as to the continuance thereof, until superseded by a new award. *Hartford Accident & Indem. Co. v. Webb*, 109 Ga. App. 667, 137 S.E.2d 362 (1964).

Newly discovered evidence. — On appeal, a compensation case may not be remanded to the board for newly discovered evidence. *Hartford Accident & Indem. Co. v. Snyder*, 126 Ga. App. 31, 189 S.E.2d 919 (1972), overruled on other grounds, *Sprayberry v. Commercial Union Ins. Co.*, 140 Ga. App. 758, 232 S.E.2d 111 (1976), overruled on other grounds, *Brown Transp. Co. v. James*, 243 Ga. 701, 257 S.E.2d 242 (1979).

Award affirmed by board and court not subject to further review. — The board had no authority to review an award denying compensation to the claimant where the award had been affirmed by the full board and by the judge of the superior court and was not appealed from. *Martin v. United States Fid. & Guar. Co.*, 58 Ga. App. 59, 197 S.E. 660 (1938).

Evidence

Fact-finding body. — When a case was brought before the full board under this section, the board became a fact-finding body. *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952) (see O.C.G.A. § 34-9-103).

On review, the full board acts as a fact-finding body. *Atkinson v. Fairforest Co.*, 90 Ga. App. 425, 83 S.E.2d 243 (1954).

No right to demand retrial. — On appeal to the full board, neither party as a matter of right can demand that the case be tried as though no hearing had been held. *Adams v. Utica Mut. Ins. Co.*, 88 Ga. App. 386, 76 S.E.2d 709 (1953).

The full board has authority to hear additional evidence when a case is before it on review, when this is deemed advisable by the

board, but this does not mean that a party has the right to try their case over again as though it had not been tried, unless, in the discretion of the board, this is deemed advisable. *Adams v. Utica Mut. Ins. Co.*, 88 Ga. App. 386, 76 S.E.2d 709 (1953).

Party may offer evidence as well as move for exclusion of evidence. — Party to appeal may offer evidence before the board and may act to have matter in the record that is not proper for consideration as evidence excluded or removed from consideration. *Peters v. Liberty Mut. Ins. Co.*, 113 Ga. App. 41, 147 S.E.2d 26 (1966).

Board may consider evidence heard by director, take additional testimony, or remand. — Under this section, the board may make findings of fact and reach conclusions of law based thereon in the same manner as the single director; the board may take the evidence heard by the single director and make findings of fact therefrom, may take additional testimony, or may remand the case to the single director to take additional evidence. *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952) (see O.C.G.A. § 34-9-103).

The full board may remand the case to a single director for the purpose of taking additional testimony. *Butler v. Fidelity & Cas. Co.*, 88 Ga. App. 620, 76 S.E.2d 813 (1953).

Witnesses permitted. — The full board may hear the parties at issue and their representatives and witnesses, if this is deemed advisable. *Adams v. Utica Mut. Ins. Co.*, 88 Ga. App. 386, 76 S.E.2d 709 (1953); *Butler v. Fidelity & Cas. Co.*, 88 Ga. App. 620, 76 S.E.2d 813 (1953); *Pacific Employers Ins. Co. v. West*, 213 Ga. 296, 99 S.E.2d 89 (1957); *Insurance Co. of N. Am. v. Dimaio*, 120 Ga. App. 214, 170 S.E.2d 258 (1969); *Travelers Ins. Co. v. Buice*, 124 Ga. App. 626, 185 S.E.2d 549 (1971).

Appeal to the board is a de novo proceeding, where either party can raise any issue affecting the case, and the board may hear the parties and their representatives and witnesses. *Peters v. Liberty Mut. Ins. Co.*, 113 Ga. App. 41, 147 S.E.2d 26 (1966).

Taking additional evidence is discretionary. — The board's power to order the taking of additional evidence on review is discretionary. *Continental Ins. Co. v. McDaniel*, 118 Ga. App. 344, 163 S.E.2d 923 (1968); *Cameron v. American Can Co.*, 120 Ga. App. 236, 170 S.E.2d 267 (1969).

The full board is not obliged to take additional testimony where it is not deemed advisable to do so. *Southeastern Express Co. v. Edmondson*, 30 Ga. App. 697, 119 S.E. 39 (1923); *Adams v. Utica Mut. Ins. Co.*, 88 Ga. App. 386, 76 S.E.2d 709 (1953); *Butler v. Fidelity & Cas. Co.*, 88 Ga. App. 620, 76 S.E.2d 813 (1953).

Hearing before the full board is de novo; the parties may offer additional evidence, and the board has discretion in hearing additional testimony. *American Cas. Co. v. Wilson*, 99 Ga. App. 219, 108 S.E.2d 137 (1959).

In hearing an appeal de novo from an award by a deputy director, the board has discretion as to whether it will hear additional testimony or pass anew upon the evidence introduced before the deputy director. *Young v. American Ins. Co.*, 110 Ga. App. 269, 138 S.E.2d 385 (1964).

Guidance for exercise of discretion. — The board, in exercising its power to take additional evidence on review, may properly be guided by principles applicable in the courts in passing on motions for new trial based on newly discovered evidence. *Insurance Co. of N. Am. v. Dimaio*, 120 Ga. App. 214, 170 S.E.2d 258 (1969); *Binswanger Glass Co. v. Brooks*, 160 Ga. App. 701, 288 S.E.2d 61 (1981).

Newly discovered evidence. — While former Civil Code 1910, § 6086 (see O.C.G.A. § 5-5-23), relating to newly discovered evidence as ground for new trial, was not part of workers' compensation law, upon an application for review the full commission (now board), in determining whether on account of newly discovered evidence it will rehear witnesses, may properly be guided by considerations similar to those referred to in that section. *Southeastern Express Co. v. Edmondson*, 30 Ga. App. 697, 119 S.E. 39 (1923).

Abuse of discretion. — The board's power to order the taking of additional evidence on review is a discretionary one, and must not be disturbed except in cases where it is manifestly abused. *Insurance Co. of N. Am. v. Dimaio*, 120 Ga. App. 214, 170 S.E.2d 258 (1969); *Hartford Accident & Indem. Co. v. Snyder*, 126 Ga. App. 31, 189 S.E.2d 919 (1972), overruled on other grounds, *Sprayberry v. Commercial Union Ins. Co.*, 140 Ga. App. 758, 232 S.E.2d 111 (1976),

Evidence (Cont'd)

overruled on other grounds, *Brown Transp. Co. v. James*, 243 Ga. 701, 257 S.E.2d 242 (1979).

Under this section and the rules promulgated by the board, the board may or may not hear or order additional evidence taken, as in its discretion may be deemed advisable; the exercise of its discretion in such a matter may, in a proper case, be the subject of review by the courts. *Adams v. Utica Mut. Ins. Co.*, 88 Ga. App. 386, 76 S.E.2d 709 (1953); *Butler v. Fidelity & Cas. Co.*, 88 Ga. App. 620, 76 S.E.2d 813 (1953) (see O.C.G.A. § 34-9-103).

No discretion to refuse evidence erroneously rejected in first instance. — While the full board has discretion as to whether or not it shall hear new evidence or review only the evidence before the deputy director, that discretion does not extend to cases where evidence which was properly offered in the first instance and erroneously rejected is reoffered for consideration by the full board. *American Cas. Co. v. Wilson*, 99 Ga. App. 219, 108 S.E.2d 137 (1959).

Duty to consider all evidence properly before director. — Upon a review by the full board of all the evidence which was before the single director, it is the duty of that body to consider all evidence properly before the single director, even though erroneously excluded and not considered by the director. *American Cas. Co. v. Wilson*, 99 Ga. App. 219, 108 S.E.2d 137 (1959).

Authority to order taking of testimony on own motion. — If, for some reason, employer is estopped from making application to take additional testimony, it does not follow that the board itself, in its discretion and under its statutory authority, could not order it taken. *Cameron v. American Can Co.*, 120 Ga. App. 236, 170 S.E.2d 267 (1969).

Order granting or denying additional testimony not required. — There was no requirement in this section that the board enter an order formally and expressly granting or denying a party's application to have additional evidence taken. *Insurance Co. of N. Am. v. Dimaio*, 120 Ga. App. 214, 170 S.E.2d 258 (1969) (see O.C.G.A. § 34-9-103).

No abuse shown in refusal to take additional medical testimony. — Where three

doctors examined the claimant, and their testimony was before the single director when findings and award in favor of claimant were made by the director and before the full board on review, it was not shown that the full board acted in excess of its powers or abused its discretion in refusing to reopen the hearing to take additional testimony on the question of whether corrective surgical treatment should be ordered. *Butler v. Fidelity & Cas. Co.*, 88 Ga. App. 620, 76 S.E.2d 813 (1953).

Receipt of medical records evidence not authorized under section. — While the full board does have discretion to hear additional testimony, O.C.G.A. § 34-9-103 makes absolutely no provision for the receipt of medical records as evidence. *Binswanger Glass Co. v. Brooks*, 160 Ga. App. 701, 288 S.E.2d 61 (1981).

New findings unnecessary. — The fact that the full board took additional testimony did not necessitate a new and distinct finding if full board did not see fit to change the award of the single director. *Watkins v. Hartford Accident & Indem. Co.*, 75 Ga. App. 462, 43 S.E.2d 549 (1947).

Consideration of admissible evidence only. — The board or a single director thereof sits as a court, judging both the law and the facts, rather than as a jury, so that the board or a director thereof sifts out inadmissible evidence and considers only that which is admissible under the rules of evidence, whether actually ruled out or not. *Atlanta Newspapers, Inc. v. Clements*, 88 Ga. App. 648, 76 S.E.2d 830 (1953); *U.S. Fid. & Guar. Co. v. Doyle*, 96 Ga. App. 745, 101 S.E.2d 600 (1957).

Record held to show consideration of testimony taken. — Where the full board stated that after exhaustive and painstaking review of the entire record it unanimously affirmed the award of the single director, the record indicated that the board did take into account the additional testimony taken. *Watkins v. Hartford Accident & Indem. Co.*, 75 Ga. App. 462, 43 S.E.2d 549 (1947).

Reference to all evidence not required. — There is no requirement that specific reference be made to all the evidence, and the mere failure to refer to all the evidence in the findings of fact does not establish that the board did not consider the evidence in its review of the matter. *Roberson v.*

Engelhard Corp., 190 Ga. App. 674, 379 S.E.2d 524, cert. denied, 190 Ga. App. 899, 379 S.E.2d 524 (1989).

Binding effect of stipulations by parties. — Board erred in reversing administrative law judge's decision after considering evidence which conflicted with a stipulation made by the parties during the hearing, as the parties prepared their cases with the stipulation in mind and therefore did not have an opportunity to present evidence on the issue. *Food Giant, Inc. v. Brown*, 174 Ga. App. 485, 330 S.E.2d 183 (1985).

Board sole judge of credibility of witness. — In acting upon a prior award, the full board as a fact-finding body is the sole judge of the credibility of witnesses. *Travelers Ins. Co. v. Buice*, 124 Ga. App. 626, 185 S.E.2d 549 (1971).

Expert opinions not conclusive. — In determining award from the evidence, it is the duty of the board to consider all the surrounding facts and circumstances concerning the inquiry, together with the testimony of the witnesses; in this consideration the opinions of expert witnesses are not conclusive upon the board, but may be disregarded. *Continental Cas. Co. v. Bennett*, 69 Ga. App. 683, 26 S.E.2d 682 (1943).

Findings of Fact

Findings required. — The board, on de novo hearing, is required to make findings of fact on which to base its decision. *Pacific Employers Ins. Co. v. West*, 213 Ga. 296, 99 S.E.2d 89 (1957).

Board not bound by director's findings and conclusions. — The full board on review is not restricted by any of the findings of the single director as to the preliminary facts or the ultimate fact, and no conclusion of the single director, whether preliminary or ultimate, is binding on the full board. *Peninsular Life Ins. Co. v. Brand*, 57 Ga. App. 526, 196 S.E. 264 (1938).

The full board has the power and right to consider a claim entirely anew by hearing evidence, making findings of fact, and making findings of law, just as if the claim had not been heard before the single director, even though findings of fact of the single director are supported by some evidence. *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952).

Adoption of findings or making of new findings by board. — Where the parties introduce no additional evidence at the hearing before the board, the board can adopt the deputy director's findings of fact as its own findings of fact or it can make independent and different findings of fact from evidence heard by the deputy director. *Pacific Employers Ins. Co. v. West*, 213 Ga. 296, 99 S.E.2d 89 (1957).

Where no additional evidence is offered by the parties, the full board may adopt the deputy director's findings of fact as its own findings of fact, or it may make independent and different findings of fact from the evidence heard by the deputy director, but it must do one or the other. *American Cas. Co. v. Wilson*, 99 Ga. App. 219, 108 S.E.2d 137 (1959).

Appeal to the full board from the action of a deputy director invokes a de novo proceeding in the matter, which must result in the full board's own findings of fact and award. If, on appeal, the parties introduce no additional evidence, the full board may, based on the evidence heard by the deputy director, adopt the deputy director's findings of fact as its own or it may make additional findings or independent and different findings. *Gatrell v. Employers Mut. Liab. Ins. Co.*, 121 Ga. App. 467, 174 S.E.2d 237, rev'd on other grounds, 226 Ga. 688, 177 S.E.2d 77 (1970).

Where the award of the full board specifically states that the board reviewed the entire record and made the same findings as the deputy director, the award cannot be attacked as having made no independent findings of fact. *Colbert v. American Fire & Cas. Co.*, 124 Ga. App. 808, 186 S.E.2d 432 (1971), aff'd sub nom. *Colbert v. Apex Carpet Finishers, Inc.*, 229 Ga. 770, 194 S.E.2d 468 (1972).

Duty to make new findings where director's findings not approved. — It is the duty of the board to make new findings of fact, if they deem it necessary and do not approve the findings of the single director; this the board may do by taking additional evidence or by using the evidence before the single director. *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952).

Acceptance of findings with different application of law. — The full board may accept the findings of fact made by a single

Findings of Fact (Cont'd)

director while ruling that the director did not apply the correct law to such facts. *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952).

Findings of administrative law judge superseded. — A finding by the full board supersedes a finding by a director or deputy director, where supported by the evidence. *Liberty Mut. Ins. Co. v. Williams*, 129 Ga. App. 354, 199 S.E.2d 673 (1973).

Where the administrative law judge and the full board have articulated the same facts and have reached a different conclusion based on those facts, the findings and conclusions of the full board supersede those of the administrative law judge. *Assurance Co. of Am. v. Shepherd*, 155 Ga. App. 36, 270 S.E.2d 268 (1980).

Board's findings binding. — Upon appeal to the superior court from any final award or any other final decision of the board, findings of fact made by the board within its power are, in the absence of fraud, conclusive and binding upon all the courts. *Redd v. U.S. Cas. Co.*, 83 Ga. App. 838, 65 S.E.2d 255 (1951).

A director on hearing acts in lieu of and for the board, and the director's findings of fact are conclusive unless set aside. Where the board does not set such findings aside but approves them and bases an improper ruling of law thereon, a superior court, in holding that the board made an erroneous ruling of law, is nevertheless bound by the facts as found by the single director and adopted by the board. *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952).

The full board may review the evidence taken before a single director and, based thereon, reverse the award in whole or in part. Its findings of fact, when supported by any competent evidence, are binding upon the courts. *Burnett v. King*, 88 Ga. App. 771, 77 S.E.2d 772 (1953).

Properly supported findings of fact of the board are binding upon the courts, and where the findings support an award the courts cannot disturb it. *Garrett v. Employers Mut. Liab. Ins. Co.*, 105 Ga. App. 308, 124 S.E.2d 450 (1962).

Because a decision rendered by the Georgia Board of Workers' Compensation that an

employee was no longer entitled to benefits for a work-related injury was supported by some evidence, the superior court exceeded its authority in reversing the decision. *Bibb County Bd. of Educ. v. Bembry*, 286 Ga. App. 878, 650 S.E.2d 427 (2007).

Superior court may not vacate and set aside a corrected award of Workers' Compensation Board as being null and void and of no effect whatsoever. *Denton v. U.S. Fid. & Guar. Co.*, 158 Ga. App. 849, 282 S.E.2d 350 (1981).

Remand of order for lack of findings. — An order of the board which neither sets forth findings of fact nor adopts those of the director must be remanded to the board, even though the board adopted the award of the director with an amendment which added certain findings of fact. *Garrell v. Employers Mut. Liab. Ins. Co.*, 121 Ga. App. 467, 174 S.E.2d 237, rev'd on other grounds, 226 Ga. 688, 177 S.E.2d 77 (1970).

Remand for findings unnecessary where facts undisputed. — While in a proceeding before the commission (now board) the award must be accompanied with a statement of the findings of fact upon which it is made, which contemplates a concise but comprehensive statement of the cause and circumstances of the accident as the commission (now board) shall find it in truth to have occurred, it is not necessary, even where no such finding of fact accompanies the award, to remand a case to the commission (now board) in order that findings of fact be stated in a case where the facts as disclosed by the record are undisputed. *Employers' Liab. Assurance Corp. v. Montgomery*, 45 Ga. App. 634, 165 S.E. 903 (1932).

Support of judgment from findings. — On appeal, one or two facts found by the full board may be sufficient to authorize the order or judgment, or it may take finding of all the facts to authorize the order or judgment. Moreover, merely because the evidence fails to support one or more findings of fact, reversal is not necessarily required if the evidence supports a sufficient number of findings of fact, all of which taken together support the judgment or order. *Peninsular Life Ins. Co. v. Brand*, 57 Ga. App. 526, 196 S.E. 264 (1938).

Correction of Apparent Errors

Under O.C.G.A. § 34-9-103, board may correct the award as to apparent errors or

omissions "within the time limit provided" in which to appeal the board's order. *Denton v. U.S. Fid. & Guar. Co.*, 158 Ga. App. 849, 282 S.E.2d 350 (1981).

Authority to amend awards. — The 1975 amendment to this section, which added subsection (b), gave the board authority to amend its awards to correct obvious errors. *Cotton States Ins. Co. v. Bates*, 140 Ga. App. 428, 231 S.E.2d 445 (1976) (see O.C.G.A. § 34-9-103).

In revising its initial award on a motion for reconsideration, the board acted within its authority when it confined itself to the existing record and certain facts it erroneously omitted in its initial consideration. *Gibson v. Lindale Mfg. Co.*, 218 Ga. App. 163, 460 S.E.2d 543 (1995).

O.C.G.A. § 34-9-103(b) only permits amendment to correct obvious errors and was not intended to open the case for a de novo hearing. *Scott v. Tremco, Inc.*, 199 Ga. App. 606, 405 S.E.2d 347, cert. denied, 199 Ga. App. 907, 405 S.E.2d 347 (1991).

O.C.G.A. § 34-9-103(b) gives the full board authority to amend its awards to correct obvious errors. This is to allow the full board to correct mistakes in an award which appear in the record of the case. The intent of subsection (b) is not to open the case for a de novo hearing in regard to whether compensation is payable. *Asplundh Tree Expert Co. v. Gibson*, 204 Ga. App. 853, 420 S.E.2d 797 (1992).

Correction of mistakes appearing in record. — The intent of the 1975 amendment to this section, adding subsection (b), was to allow the board to correct mistakes in an award which appear in the record of the case. *Cotton States Ins. Co. v. Bates*, 140 Ga. App. 428, 231 S.E.2d 445 (1976) (see O.C.G.A. § 34-9-103).

The intent of the 1975 amendment to this

section, adding subsection (b), was not to open the case for a de novo hearing in regard to whether compensation was payable. *Cotton States Ins. Co. v. Bates*, 140 Ga. App. 428, 231 S.E.2d 445 (1976) (see O.C.G.A. § 34-9-103).

The purpose of the statute permitting amendment of an award within the period for seeking appellate review, O.C.G.A. § 34-9-103, is only to permit correction of mistakes which appear in the record. It was not intended to open the case for a de novo hearing. *McGinty v. Alfred L. Simpson & Co.*, 188 Ga. App. 718, 374 S.E.2d 217 (1988).

When award may be amended or revised.

— The original award must be amended or revised "within" the applicable 30-day (now 20-day) period; it cannot be "reconsidered" during the 30-day (now 20-day) period and then subsequently amended or revised. *Aetna Cas. & Sur. Co. v. Barden*, 179 Ga. App. 442, 346 S.E.2d 588 (1986).

Award based on erroneous reliance on caselaw. — The full board clearly had the authority to vacate its original award and to issue a revised award pursuant to O.C.G.A. § 34-9-103(b) after the full board found that the award was issued based upon an erroneous reliance upon caselaw. *Asplundh Tree Expert Co. v. Gibson*, 204 Ga. App. 853, 420 S.E.2d 797 (1992).

Award, not based on apparent error, void.

— The board, being an administrative body possessing only the power conferred upon it by statute, has no authority under O.C.G.A. § 34-9-103(b) to reconsider and vacate an award which contained no apparent error or omission, and accordingly the board's subsequent award is null and void. *Dougherty County Bd. of Educ. v. Lundy*, 183 Ga. App. 550, 359 S.E.2d 403, cert. denied, 183 Ga. App. 906, 359 S.E.2d 403 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 632 et seq.

ALR. — Relief from settlement or compromise of claim under Workmen's Compensation Act upon ground of fraud or mistake respecting amount of compensation to which employee was entitled, 121 ALR 1270.

Workmen's compensation: character or

status of right or claim within provision of act requiring or authorizing approval by the court or commission of settlement or compromise, 153 ALR 285.

Workmen's compensation: time and jurisdiction for review, reopening, modification, or reinstatement of award or agreement, 165 ALR 9.

Right to workers' compensation for emo-

tional distress or like injury suffered by stimuli involving personnel action, 82 claimant as a result of sudden emotional ALR5th 149.

34-9-104. Modification of award or order contained in prior decision in event of change in condition.

(a) *“Change in condition” defined; benefits.*

(1) As used in this Code section, the term “change in condition” means a change in the wage-earning capacity, physical condition, or status of an employee or other beneficiary covered by this chapter, which change must have occurred after the date on which the wage-earning capacity, physical condition, or status of the employee or other beneficiary was last established by award or otherwise.

(2) When an injury is not catastrophic, as defined in subsection (g) of Code Section 34-9-200.1, and the employee is not working, the board shall determine that a change in condition for the better has occurred and the employee shall be entitled to the payment of benefits for partial disability in accordance with Code Section 34-9-262 if it is determined that the employee has been capable of performing work with limitations or restrictions for 52 consecutive weeks. Within 60 days of the employee’s release to return to work with restrictions or limitations, the employer shall provide notice to the employee on a form provided by the board that will inform the employee that he or she has been released to work with limitations or restrictions, will include an explanation of the limitations or restrictions, and will inform the employee of the general terms of this Code section. In no event shall an employee be eligible for more than 78 aggregate weeks of benefits for total disability while such employee is capable of performing work with limitations or restrictions. No provision of this paragraph shall be interpreted to prevent a change in condition from occurring pursuant to paragraph (1) of this subsection or to prevent an employee from becoming eligible for benefits for total disability should such employee subsequently become totally disabled after exhausting 52 consecutive weeks or 78 aggregate weeks of such benefits while capable of performing work with limitations or restrictions. Whenever an employer seeks to convert an employee from benefits for total disability to benefits for partial disability as provided in this paragraph, such employer may convert the benefits unilaterally by filing a form indicating the reason for the conversion as prescribed by rule of the board.

(3) For the purposes of calculating temporary partial benefits as contemplated by this Code section, benefits shall be paid as follows:

(A) When an employee is receiving the maximum benefits allowed under Code Section 34-9-261, the employer shall cause to be paid the employee an amount equal to the maximum benefit allowed under Code Section 34-9-262; or

(B) When an employee is receiving less than the maximum allowed by Code Section 34-9-261, the employer shall continue to pay the employee the same benefits as provided by Code Section 34-9-261 not to exceed the maximum benefit provided by Code Section 34-9-262.

(b) *Modification of prior final decision.* The board on its own motion may propose or any party may apply under this Code section for another decision because of a change in condition ending, decreasing, increasing, or authorizing the recovery of income benefits awarded or ordered in the prior final decision, provided that the prior decision of the board was not based on a settlement; and provided, further, that at the time of application not more than two years have elapsed since the date the last payment of income benefits pursuant to Code Section 34-9-261 or 34-9-262 was actually made under this chapter; provided, however, any party may file for benefits solely under Code Section 34-9-263 not more than four years from the date the last payment of income benefits pursuant to Code Section 34-9-261 or 34-9-262 was actually made under this chapter. If, at the time of application, the foregoing requirements have been met but the prior decision is then on appeal to the courts, the entering of a decision on the application shall be deferred pending final ruling of the courts.

(c) *Interlocutory orders.* On application of either party, for good cause shown, at any time while a claim is pending, the administrative law judge or the board may enter an interlocutory order suspending the payment of all or part of or increasing or decreasing the income benefits due under the decision sought to be modified. Good cause, as shown by preliminary evidence in the form of affidavits, sworn documents, depositions, interrogatories, or medical reports, may include, but not be limited to, an unjustified refusal to accept suitable and available employment, an increase or decrease in the physical impairment or wage-earning capacity of the employee, or the granting of continuance.

(d) *Retroactive effect of decision.*

(1) Subject to the limitation in subsection (a) of this Code section that a change of condition was a change which occurred after the date on which the wage-earning capacity, physical condition, or status of the employee was last established by award or otherwise, the award or order contained in the final decision entered by the administrative law judge or the board shall be effective as of the time of change in condition as found by the administrative law judge or board, notwithstanding the retroactive effect of the award or order, provided that no execution following a judgment entered under Code Section 34-9-106 shall be affected.

(2) If the decision determines that an overpayment of income benefits has been made and no future income benefits are due, the administrative law judge or the board, in its discretion, may order the employee or beneficiary to repay to the employer or the insurer the sum of the

overpayments. Where there has been determined an overpayment of income benefits and future income benefits were due, the decision shall order the overpayment to be recovered by shortening the period of future weekly income benefits or by reducing the weekly benefit, or both.

(e) *Credits to employer for lump sum or advance payments.* Where a lump sum payment or an advance payment has been made to an employee under Code Section 34-9-222 and a subsequent change in condition is found to have occurred, the employer shall be entitled to credit against future income benefits equal to the amount of the lump sum or advance payment. This shall be accomplished by reducing the period of future weekly income benefits or by reducing the weekly benefit, or both. (Ga. L. 1920, p. 167, § 45; Code 1933, § 114-709; Ga. L. 1937, p. 528; Ga. L. 1968, p. 3, § 5; Ga. L. 1972, p. 149, § 1; Ga. L. 1973, p. 232, § 9; Ga. L. 1978, p. 2220, § 13; Ga. L. 1990, p. 1409, § 3; Ga. L. 1992, p. 1942, § 11; Ga. L. 1998, p. 1508, § 3; Ga. L. 2006, p. 676, § 2/HB 1240.)

The 2006 amendment, effective July 1, 2006, substituted “the employer shall provide notice to the employee” for “the employee shall receive notice from the employer” near the middle of the second sentence in paragraph (a)(2).

Law reviews. — For article discussing injury as a result of aggravation, see 14 Ga. St. B.J. 135 (1978). For article surveying recent legislative and judicial developments regarding Georgia’s insurance laws, see 31 Mercer L. Rev. 117 (1979). For article surveying Georgia cases in the area of workers’ compensation from June 1979 through May 1980, see 32 Mercer L. Rev. 261 (1980). For article surveying developments in Georgia workers’ compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981). For annual survey of workers’ compensation, see 38 Mercer L. Rev. 431 (1986). For article, “Change in Condition and New

Accident: The Difference Between the Two, Elements of Each, and Burdens of Proof,” see 46 Mercer L. Rev. 35 (1994). For review of 1998 legislation relating to labor and industrial relations, see 15 Ga. St. U. L. Rev. 185 (1998). For annual survey article discussing workers’ compensation law, see 52 Mercer L. Rev. 505 (2000). For article, “Workers’ Compensation,” see 53 Mercer L. Rev. 521 (2001). For survey article on workers’ compensation law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For annual survey of law of workers’ compensation, see 56 Mercer L. Rev. 479 (2004). For annual survey of workers’ compensation law, see 57 Mercer L. Rev. 419 (2005). For annual survey of workers’ compensation law, see 58 Mercer L. Rev. 453 (2006).

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
OVERPAYMENTS
CHANGE IN CONDITION
RETROACTIVE EFFECT

General Consideration

This section was the only authority for review of judgment of the board. *Travelers Ins. Co. v. Haney*, 92 Ga. App. 319, 88 S.E.2d 492 (1955) (see O.C.G.A. § 34-9-104).

Award is res judicata until changed according to law. — An award of compensation is res judicata until it is changed in the manner prescribed by law. *Yates v. Hall*, 189 Ga. App. 885, 377 S.E.2d 887, cert. denied, 189 Ga.

App. 914, 377 S.E.2d 887 (1989).

Board may review award on hearing held pursuant to application filed under this section. — seeking a new award on account of further change in condition. *Roper Corp. v. Reynolds*, 142 Ga. App. 402, 236 S.E.2d 103 (1977) (see O.C.G.A. § 34-9-104).

Review of award. — Under this section, an award may be reviewed upon the application of any party at interest on the ground of a change in condition, and compensation payments increased or decreased accordingly. *Brazier v. U.S. Fid. & Guar. Co.*, 99 Ga. App. 588, 109 S.E.2d 309 (1959) (see O.C.G.A. § 34-9-104).

Authority of board to determine change in condition on own motion. — On its own motion, the board has full authority before judicial determination and within the time specified to determine existence of a change in condition and make an award based on its findings. *Maryland Cas. Co. v. Gattis*, 119 Ga. App. 16, 165 S.E.2d 875 (1969).

Board may review an award on the ground of a change in condition on its own motion. *Fulton Cotton Mills v. Lashley*, 123 Ga. App. 528, 182 S.E.2d 180 (1971).

Duty of board to examine into application for review. — Application for review upon ground of change in condition presents a quasi-new case, although it is not a new proceeding, and it is the duty of the commission (now board) to examine into it, if the matter sought to be reviewed has not been judicially determined or becomes res adjudicata, and if the commission (now board) still has jurisdiction of the subject matter. *Ingram v. Liberty Mut. Ins. Co.*, 63 Ga. App. 493, 11 S.E.2d 499 (1940).

Number of applications under section not limited. — There is no limit on the number of applications which either employer or employee may make on the ground of a change in condition. *Ware v. Swift & Co.*, 59 Ga. App. 836, 2 S.E.2d 128 (1939); *Travelers Ins. Co. v. Haney*, 92 Ga. App. 319, 88 S.E.2d 492 (1955).

Application must be brought while board has jurisdiction. — There is no provision in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) requiring that an application for a review under this section must be made within any certain period, but an employee did not have unlimited time within which to apply for review, as such

proceeding must be brought while the department (board) had jurisdiction of the subject matter. *London Guarantee & Accident Co. v. Boynton*, 54 Ga. App. 419, 188 S.E. 265 (1936) (see O.C.G.A. § 34-9-104).

Running of statute of limitations. — The date of last payment of benefits by the employer would start the running of the two-year statute of limitation only if, in fact, those are the only benefits due to the claimant. If, however, the claimant was potentially due other benefits which were not paid, then the statute of limitation does not commence simply because the employer decides to suspend payments. *Bateman v. Merico, Inc.*, 190 Ga. App. 710, 379 S.E.2d 526, cert. denied, 190 Ga. App. 897, 379 S.E.2d 526 (1989).

Administrative law judge correctly ruled that the statute of limitations did not begin to run until the last day on which income benefits were actually paid to the employee, including the penalty payments as income payments for such purposes. *Tube v. Hurston*, 261 Ga. App. 525, 583 S.E.2d 198 (2003).

Two year statute of limitation contained in O.C.G.A. § 34-9-104 does not begin running until all income benefits, including permanent partial disability (PPD) payments, due under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., have been paid. Therefore, because an employee had never been paid the employee's PPD benefits, they were potentially due and the statute of limitation did not bar the employee's claim. *Wet Walls, Inc. v. Ledezma*, 266 Ga. App. 685, 598 S.E.2d 60 (2004).

One-year limitation not applicable. — Limitation provided in former Code 1933, § 114-305 (see O.C.G.A. § 34-9-82), barring right to compensation unless a claim was filed within one year after the accident, did not apply to a claim properly and timely filed under former Code 1933, § 114-709 (see O.C.G.A. § 34-9-104), based on a change in condition of the claimant. *Campbell Coal Co. v. Render*, 48 Ga. App. 547, 173 S.E. 245 (1934); *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952); *Old Colony Ins. Co. v. Bennett*, 108 Ga. App. 499, 133 S.E.2d 415 (1963).

Untimely claim is barred. — Where aged and illiterate claimant was not advised of claimant's rights to obtain additional compensation, and did not make any inquiry as

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to claimant's rights until more than three years after claimant's injury and receipt of compensation therefor, claimant's claim was barred. *Priest v. Exposition Cotton Mills*, 86 Ga. App. 301, 71 S.E.2d 743 (1952).

Where employee failed to apply to the board within two years for a hearing on account of a change of condition, the employee cannot later seek to avoid the effects of a contract which the employee signed agreeing that the employee had received all the compensation to which the employee was entitled under the original award and all subsequent awards. *Atlanta Coca Cola Bottling Co. v. Gates*, 225 Ga. 824, 171 S.E.2d 723 (1969).

Voluntarily paid medical-only benefits. — If a worker wishes to preserve the worker's lifetime right to treatment for a work injury for which no treatment is needed within a one-year period, a claim must be filed; the legislature did not intend for the voluntary payment of medical-only benefits to have forever negated the need for filing a claim. *Wier v. Skyline Messenger Serv.*, 203 Ga. App. 673, 417 S.E.2d 693, cert. denied, 203 Ga. App. 908, 417 S.E.2d 693 (1992).

Relief of parties from res judicata in particular instances. — It is not the purpose of Ga. L. 1920, p. 167, § 45 (see O.C.G.A. § 34-9-104) to abolish entirely the doctrine of res judicata; but it was intended to relieve the parties from this doctrine in the particular instances named therein. *Home Accident Ins. Co. v. McNair*, 173 Ga. 566, 161 S.E. 131 (1931), answer conformed to, 44 Ga. App. 659, 162 S.E. 635 (1932); *Fidelity & Cas. Co. v. Leckie*, 52 Ga. App. 591, 183 S.E. 642 (1935); *Travelers Ins. Co. v. Haney*, 92 Ga. App. 319, 88 S.E.2d 492 (1955); *Chevrolet Div., GMC v. Dempsey*, 212 Ga. 560, 93 S.E.2d 703 (1956) (see O.C.G.A. § 34-9-104).

There is no provision which automatically cancels award which the board has made to an employee who has sustained a compensable injury. *Hayes v. Consolidated Freightways*, 131 Ga. App. 77, 205 S.E.2d 40 (1974).

The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) contains no provision which automatically cancels an award which the board has made to an employee

for a compensable injury, but it does make ample provision for review of the award when there is a change in the condition of the employee. *Guess v. Liberty Mut. Ins. Co.*, 219 Ga. 581, 134 S.E.2d 783 (1964); *Hartford Accident & Indem. Co. v. Webb*, 109 Ga. App. 667, 137 S.E.2d 362 (1964).

Cause of disability determined by first award. — Under this section, on an application to review an award based on a change in condition of claimant, cause of claimant's condition and disability on which original award was predicated, are to be taken as adjudicated by the first award. *Hartford Accident & Indem. Co. v. Camp*, 69 Ga. App. 758, 26 S.E.2d 679 (1943) (see O.C.G.A. § 34-9-104).

Only ruling that is res judicata is that injury arose out of and in course of employment. *Manufacturers Cas. Co. v. Huskins*, 93 Ga. App. 10, 90 S.E.2d 604 (1955).

Contention that present disability is not result of original injury not precluded. — Fact that compensation was paid on original injury does not preclude employer and insurer from contending that present disability, if any, did not stem from original injury. *Hall v. Saint Paul-Mercury Indem. Co.*, 96 Ga. App. 567, 101 S.E.2d 94 (1957).

Board may make new or different award. — Where the evidence before the commission (now board) authorizes a finding that there has been a change in the condition of the claimant, a new award of compensation, based upon such changed condition, may be entered, although the original award may have been based upon a disability found by the commission (now board), at the time of making such original award, to be permanent. *South v. Indemnity Ins. Co. of N. Am.*, 39 Ga. App. 47, 146 S.E. 45 (1928), cert. denied, 39 Ga. App. 843 (1929).

Awards of the commission (now board) are subject to review whenever there is a change in condition of the employee, and on such review the commission (now board) is authorized to make another and different award. *General Accident, Fire & Life Assurance Corp. v. Beatty*, 174 Ga. 314, 162 S.E. 668 (1932).

Since the board is not a court and has no jurisdiction to declare the rights of the parties as a superior court, it can merely determine the amount of compensation and the time of payment, and change the award it

previously made. *Pacific Employers Ins. Co. v. King*, 133 Ga. App. 458, 211 S.E.2d 396 (1974), overruled on other grounds, *Seaboard Fire & Marine Ins. Co. v. Smith*, 146 Ga. App. 893, 247 S.E.2d 607 (1978).

Binding effect of board's award on courts.

— In a hearing before the board to determine whether there had been a change in condition of claimant, where the only evidence was opinion evidence, the Court of Appeals was powerless to reverse findings of fact of the board when there was any legal evidence in the record to support the award, in the absence of fraud. *Evans v. New Amsterdam Cas. Co.*, 62 Ga. App. 666, 9 S.E.2d 706 (1940).

Superior court, on appeal from award of the board, is without authority to reverse and set it aside where it is supported by any competent evidence. *Bituminous Cas. Corp. v. Wilbanks*, 68 Ga. App. 631, 23 S.E.2d 519 (1942).

Where there is evidence that diagnosis of claimant's condition has changed and also evidence to support finding that there has been no change in condition, award of compensation supported by any competent evidence is binding on the courts. *Employers Mut. Liab. Ins. Co. v. Sheets*, 105 Ga. App. 734, 125 S.E.2d 569 (1962).

Where proper causation in a change of condition hearing is established under the "any evidence" rule by the testimony of the employee and the employee's medical witness, the appellate court will not reverse. *North Ga. Technical & Vocational Sch. v. Boatwright*, 144 Ga. App. 66, 240 S.E.2d 563 (1977).

Under this section, the board had jurisdiction to determine a change in condition, and such determination, resulting in termination of the right to compensation, unless appealed, was a final award which was binding and conclusive as to all questions of fact and was entitled to res judicata effect in subsequent actions in superior court to recover for overpayment of benefits. *Seaboard Fire & Marine Ins. Co. v. Smith*, 146 Ga. App. 893, 247 S.E.2d 607 (1978) (see O.C.G.A. § 34-9-104).

Distinction between finality of awards granting and denying compensation is that the case is kept pending where compensation is awarded, while a judgment denying compensation in the first instance is made a

final judgment, ending the entire case for all purposes, in which case the only remedy is an appeal from the award within the time prescribed. *U.S. Fid. & Guar. Co. v. Garner*, 76 Ga. App. 87, 45 S.E.2d 109 (1947); *Travelers Ins. Co. v. Haney*, 92 Ga. App. 319, 88 S.E.2d 492 (1955).

No power to reopen case after finding of exemption from chapter. — Neither upon its own motion nor upon application of employer and claimant has the commission (now board) the power and authority, under Ga. L. 1920, p. 167, § 45 or other provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), to pass an order reopening a case and granting another hearing for the taking of evidence, and to reconsider the case upon its merits, after the commission (now board) has entered an order finding that the employee was a farm employee and therefore exempt from coverage of that law. *Gravitt v. Georgia Cas. Co.*, 158 Ga. 613, 123 S.E. 897 (1924) (see O.C.G.A. § 34-9-104).

Denial for refusal of tendered medical treatment. — Where, on a hearing before the commission (now board), compensation from the date of the injury was denied claimant for refusal to accept tendered medical services, this judgment, in the absence of any possible subsequent change in condition, amounted to an adjudication of claimant's right to compensation from the date of injury to the date of refusal of medical services. *Teems v. American Mut. Liab. Ins. Co.*, 41 Ga. App. 100, 151 S.E. 826 (1930).

Original award conclusive until superseded. — Award of board was res judicata until a new agreement was entered into between the parties or application was made for a hearing to show a "change in condition" or the employer showed a change in condition on a hearing held under this section. *Complete Auto Transit, Inc. v. Davis*, 101 Ga. App. 849, 115 S.E.2d 482 (1960) (see O.C.G.A. § 34-9-104).

Award of the board providing for the payment of compensation on account of total disability was res judicata as to the existence of such disability and the compensation due thereunder until such time as it was set aside either by an approved final settlement receipt or by a subsequent award entered under this section finding a change in condition. *Pacific Employers Ins. Co. v.*

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Shoemake, 105 Ga. App. 432, 124 S.E.2d 653 (1962) (see O.C.G.A. § 34-9-104).

Original award is conclusive on both employer and employee as to extent of disability and continuance thereof, until superseded by a new award. *Hartford Accident & Indem. Co. v. Webb*, 109 Ga. App. 667, 137 S.E.2d 362 (1964).

Until it is changed or modified in the manner provided by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), an award has the same force and effect as the decision or judgment of any other tribunal known to our system of jurisprudence. *American Mut. Liab. Ins. Co. v. Chandler*, 112 Ga. App. 574, 145 S.E.2d 816 (1965).

Determinations of disability and dependency conclusive to time of hearing. — While the doctrine of res judicata does not make forever conclusive the determinations of the issues of the amount of disability and dependency, such determinations are conclusive as to those issues up to and at the time of the hearing, and remain conclusive unless a change in condition or dependency occurring after such hearing is shown. *Fishen v. Campbell Coal Co.*, 95 Ga. App. 410, 98 S.E.2d 179 (1957).

Res judicata not applicable to amount of compensation. — Where original award allows compensation in some amount, doctrine of res judicata, while it applies to questions of whether there was an injury and whether that injury arose out of the course of employment, does not apply to questions of whether claimant was entitled to compensation and in what amount. *Rhindress v. Atlantic Steel Co.*, 71 Ga. App. 898, 32 S.E.2d 554 (1944).

Application based on change arising since hearing held not barred by pendency of appeal. — Pendency in appellate court from judgment of superior court affirming the board in denying an increase in compensation on account of an alleged change in condition since the former award does not deprive the board of jurisdiction to entertain another application for claimant for additional compensation on account of a change in condition arising since the hearing upon which the award appealed from was based. *Ingram v. Liberty Mut. Ins. Co.*, 63 Ga. App. 493, 11 S.E.2d 499 (1940).

Degree of disability established absent showing of change in condition. — After a question of percentage of disability has been decided it is res judicata, and the mere fact that on a change of condition hearing there was expert testimony of a lesser degree of disability that testimony would not authorize decreasing the disability award, absent specific testimony by a physician, who treated claimant throughout, that claimant's condition had changed. *Security Ins. Group v. Slusher*, 144 Ga. App. 2, 240 S.E.2d 272 (1977).

Physical condition of employee remains open to inquiry. *Globe Indem. Co. v. Lankford*, 35 Ga. App. 599, 134 S.E. 357 (1926); *South v. Indemnity Ins. Co. of N. Am.*, 39 Ga. App. 47, 146 S.E. 45 (1928), cert. denied, 39 Ga. App. 843 (1929); *Williams v. U.S. Cas. Co.*, 47 Ga. App. 517, 170 S.E. 894 (1933); *Burkhart v. Argonaut Ins. Co.*, 239 Ga. 608, 238 S.E.2d 400 (1977).

If future developing facts and circumstances show a change in condition with reference to an employee by reason of this previous injury, such as would actually diminish the average weekly wages received by the employee, so that an award should be made, the law provides for such a contingency; and a ruling denying recovery would not operate as res judicata barring a proper award. *American Mut. Liab. Ins. Co. v. Hampton*, 33 Ga. App. 476, 127 S.E. 155 (1925).

Under this section, upon application to review a previous award upon a change in condition, only the physical condition of the employee remained open to inquiry. *Ingram v. Liberty Mut. Ins. Co.*, 62 Ga. App. 789, 10 S.E.2d 99 (1940) (see O.C.G.A. § 34-9-104).

Award of compensation is final insofar as it adjudicates that claimant sustained an accidental injury arising out of and in the course of claimant's employment, resulting in disability, and also determines the extent of claimant's disability at the time of its rendition; but the extent of claimant's disability is subject to periodic review because physical conditions almost invariably improve or deteriorate with the passing of time. *American Employer's Ins. Co. v. Hardeman*, 91 Ga. App. 462, 85 S.E.2d 805 (1955).

Finding by the board that claimant was permanently and totally disabled, where appeal to the superior court was denied there

and no exception was taken, does not bar rehearing on alleged ground of change in condition. *Travelers Ins. Co. v. Haney*, 92 Ga. App. 319, 88 S.E.2d 492 (1955).

Adjudication under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), relating to total disability, was not res judicata and binding on the parties in a case of an alleged change in condition subsequently arising under former Code 1933, § 114-709 (see O.C.G.A. § 34-9-104). *Brazier v. U.S. Fid. & Guar. Co.*, 99 Ga. App. 588, 109 S.E.2d 309 (1959).

Jurisdiction. — Where an employer's overpayment claim arose out of the claimant's change in condition case, the claimant's withdrawal of a claim for reinstatement of income benefits did not operate to extinguish the jurisdiction of the Board of Workers' Compensation. *Bahadori v. Sizzler*, 230 Ga. App. 52, 505 S.E.2d 23 (1998).

Change in condition not prerequisite to review. — The power of the Board of Workers' Compensation to adjudicate overpayment claims is not limited to change in condition cases; the board is authorized to adjudicate all overpayment issues. *Bahadori v. Sizzler*, 230 Ga. App. 52, 505 S.E.2d 23 (1998).

Change in condition as prerequisite to review. — Right to review an award is not unlimited; there must be a change in the condition of the employee before a proceeding can be instituted to review an award. *Home Accident Ins. Co. v. McNair*, 173 Ga. 566, 161 S.E. 131 (1931), answer conformed to, 44 Ga. App. 659, 162 S.E. 635 (1932).

Award granting an employee compensation for the total loss of the use of a leg is not a final and conclusive adjudication as to employee's right to recover the amount of compensation granted for the number of weeks specified; such an award is subject to review by the commission (now board) upon the application of either the employer or the employee, whenever either brings oneself within the terms of Ga. L. 1920, p. 167, § 45 (see O.C.G.A. § 34-9-104). *Home Accident Ins. Co. v. McNair*, 173 Ga. 566, 161 S.E. 131 (1931), answer conformed to, 44 Ga. App. 659, 162 S.E. 635 (1932).

On the hearing of an application for compensation on the ground of a change in condition, the commission (now board) can make no award of compensation unless

there has been a change in condition. *Interstate Tel. Co. v. Holt*, 45 Ga. App. 85, 163 S.E. 234 (1932).

No provision of law is made for a second claim once there has been an adjudication, right or wrong, of the same subject matter between the same parties on the first claim, which is binding until set aside, there being no question of any change in condition. *Hicks v. Standard Accident Ins. Co.*, 52 Ga. App. 828, 184 S.E. 808 (1936).

Where there is no change in condition, department (now board) cannot rehear case on its merits and make an award increasing weekly compensation payments. *Fralish v. Royal Indem. Co.*, 53 Ga. App. 557, 186 S.E. 567 (1936).

It is only where there has been a change in condition of the claimant since original award that the board may, on review, alter or change the original award. *Ingram v. Liberty Mut. Ins. Co.*, 62 Ga. App. 789, 10 S.E.2d 99 (1940).

Board is without authority to increase or decrease an award for permanent partial or total disability except on a changed condition. *Moore v. American Liab. Ins. Co.*, 67 Ga. App. 259, 19 S.E.2d 763 (1942).

Original award operates as res judicata as to all questions determined therein, and cannot be disturbed by the board except where it appears from the evidence on second hearing that since the first award the physical condition and capacity of claimant for work has changed, increasing, decreasing, or ending claimant's disability as the case may be. *Hartford Accident & Indem. Co. v. Camp*, 69 Ga. App. 758, 26 S.E.2d 679 (1943).

Jurisdiction of the commission (now board) to review an award is based on certain conditions precedent; there must be a change in the condition of the employee before a proceeding can be instituted to review the award. *Travelers Ins. Co. v. Haney*, 92 Ga. App. 319, 88 S.E.2d 492 (1955).

Board had no power to reopen or rehear a case, after a prior award, on its merits or for purposes of modification, except upon application for a hearing on a change of condition under former Code 1933, § 114-709 (see O.C.G.A. § 34-9-104), or where an application for review had been made under former Code 1933, § 114-708 (see O.C.G.A. § 34-9-103). *Dempsey v.*

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Chevrolet Div., 102 Ga. App. 408, 116 S.E.2d 509 (1960).

Board is an administrative body, having no jurisdiction beyond that granted to it by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), and it does not have power to vacate or set aside an order or to modify it in the absence of a change of condition. *St. Paul Fire & Marine Ins. Co. v. Bridges*, 106 Ga. App. 621, 127 S.E.2d 699 (1962).

Where, after application by employee for determination of a change in condition resulting from alleged reinjury was denied, employee filed an original application for compensation based upon the same occurrence, denial of compensation on basis of res judicata was authorized. *Hartley v. Aetna Cas. & Sur. Co.*, 115 Ga. App. 697, 155 S.E.2d 716 (1967).

Board has no authority or power to vacate, set aside, or modify a final award in the absence of a change of condition. *Bush v. Fidelity & Cas. Co.*, 121 Ga. App. 718, 175 S.E.2d 114 (1970).

Board does not have authority to modify an award in the absence of a change in claimant's condition. *Fulton Cotton Mills v. Lashley*, 123 Ga. App. 528, 182 S.E.2d 180 (1971).

Inquiry authorized to be made on review under this section was strictly limited to a change in condition. *Hartford Accident & Indem. Co. v. Webb*, 109 Ga. App. 667, 137 S.E.2d 362 (1964); *Security Ins. Group v. Gillespie*, 125 Ga. App. 163, 186 S.E.2d 575 (1971) (see O.C.G.A. § 34-9-104).

Showing of search for employment not required. — Workers' compensation claimant who is on restricted duty due to a compensable injury and is discharged because of those restrictions is not required to show that claimant has made a diligent effort to obtain employment in order to receive benefits. *Padgett v. Waffle House, Inc.*, 269 Ga. 105, 498 S.E.2d 499 (Ga 1998).

Although an employer's claim for repayment of income benefits can be brought before the Workers' Compensation Board, O.C.G.A. § 34-9-104(d)(2) is not so broad as to allow an employer to seek repayment of any overpayment under any circumstance. Rather paragraph (d)(2) is narrowly tailored so as to permit the Board to adjudicate an

overpayment claim only when it arises in the context of a change of condition hearing. *Bahadori v. National Union Fire Ins. Co.*, 270 Ga. 203, 507 S.E.2d 467 (1998).

Board not authorized to entertain application based on change in condition after denial of compensation. — Commission (now board) does not have authority, after a full hearing and rendition of an award denying compensation to which no appeal is entered, to entertain another application by an employee, filed after the time provided for entering appeal, for compensation for the same injury, based upon an alleged change in condition. *Martin v. United States Fid. & Guar. Co.*, 58 Ga. App. 59, 197 S.E. 660 (1938); *Carney v. Travelers Ins. Co.*, 101 Ga. App. 42, 112 S.E.2d 696 (1960).

If original award of the board adjudicates that employee is not entitled to compensation in any amount, and no appeal is duly taken therefrom, doctrine of res judicata applies to this determination; hence, the physical condition of an employee does not remain open for further inquiry, and the case is ended. *Rhindress v. Atlanta Steel Co.*, 71 Ga. App. 898, 32 S.E.2d 554 (1944).

Where there is an award denying compensation on an initial hearing of a claim, there can be no review of the award because of a change in condition, no matter what the reason for denial of compensation was. *U.S. Fid. & Guar. Co. v. Garner*, 76 Ga. App. 87, 45 S.E.2d 109 (1947).

Notice to employee of benefit change. — Employer was not entitled to reduction of employee's disability benefits from the temporary total disability rate to the temporary partial disability rate since the employer failed to give the employee notice within 60 days of the employee's release to return to work pursuant to O.C.G.A. § 34-9-104. *City of Atlanta v. Sumlin*, 258 Ga. App. 643, 574 S.E.2d 827 (2002).

Running of limitation period at time of original injury against claim for change of condition. — The limitation period in effect at the time of claimant's original injury did not begin to run against the employee's claim for change of condition until the form giving notice of final payment of benefits was filed. *Georgia Forestry Comm'n v. Darley*, 165 Ga. App. 641, 353 S.E.2d 818 (1983).

The claimant's application for weekly benefits based on a change in condition was not

barred by the two-year statute of limitations in former subsection (b), which did not commence on the date on which the employer filed the notice of final payment because of the continued payment of medical benefits by the employer. *Georgia-Pacific Corp. v. Sanders*, 171 Ga. App. 799, 320 S.E.2d 850 (1984) (decided under section existing prior to 1978 amendment, as claim arose from injury occurring in 1974).

Statute of limitations does not begin to run from a notice of "final payment" of a claim when final payment has not actually been made. *Dunaway v. R.I.A.S., Inc.*, 176 Ga. App. 181, 335 S.E.2d 470 (1985).

Cited in *U.S. Cas. Co. v. Smith*, 34 Ga. App. 363, 129 S.E. 880 (1925); *Robertson v. Aetna Life Ins. Co.*, 37 Ga. App. 703, 141 S.E. 504 (1928); *Home Accident Ins. Co. v. McNair*, 44 Ga. App. 659, 162 S.E. 635 (1932); *Sears, Roebuck & Co. v. Griggs*, 48 Ga. App. 585, 173 S.E. 194 (1934); *Helms v. Continental Cas. Co.*, 50 Ga. App. 267, 177 S.E. 915 (1934); *Columbia Cas. Co. v. Whiten*, 51 Ga. App. 42, 179 S.E. 630 (1935); *Wilkins v. Travelers Ins. Co.*, 52 Ga. App. 142, 182 S.E. 628 (1935); *Continental Cas. Co. v. Haynie*, 182 Ga. 608, 186 S.E. 683 (1936); *Fidelity & Cas. Co. v. Clements*, 53 Ga. App. 622, 186 S.E. 764 (1936); *London Guarantee & Accident Co. v. Ritchey*, 53 Ga. App. 628, 186 S.E. 863 (1936); *Travelers Ins. Co. v. Reid*, 54 Ga. App. 13, 186 S.E. 887 (1936); *Miller v. Indemnity Ins. Co.*, 55 Ga. App. 644, 190 S.E. 868 (1937); *Travelers Ins. Co. v. Anderson*, 185 Ga. 105, 194 S.E. 193 (1937); *Thomas v. Lumbermens Mut. Cas. Co.*, 57 Ga. App. 434, 195 S.E. 894 (1938); *Milam v. Ford Motor Co.*, 61 Ga. App. 614, 7 S.E.2d 37 (1940); *Employers' Liab. Assurance Corp. v. Johnson*, 62 Ga. App. 416, 8 S.E.2d 542 (1940); *McFarley v. New Amsterdam Cas. Co.*, 63 Ga. App. 344, 11 S.E.2d 76 (1940); *American Mut. Liab. Ins. Co. v. Jenkins*, 63 Ga. App. 777, 12 S.E.2d 80 (1940); *Bituminous Cas. Corp. v. Lockett*, 65 Ga. App. 829, 16 S.E.2d 614 (1941); *City of Hapeville v. Preston*, 67 Ga. App. 350, 20 S.E.2d 202 (1942); *Lumbermen's Mut. Cas. Co. v. Cook*, 195 Ga. 397, 24 S.E.2d 309 (1943); *Kirkland v. Employers Liab. Assurance Corp.*, 195 Ga. 402, 24 S.E.2d 676 (1943); *London Guarantee & Accident Co. v. Pittman*, 69 Ga. App. 146, 25 S.E.2d 60 (1943); *Kirkland v. Employers Liab. Assurance Corp.*, 69 Ga. App.

433, 25 S.E.2d 723 (1943); *Fidelity & Cas. Co. v. Brooks*, 70 Ga. App. 355, 28 S.E.2d 343 (1943); *Hardware Mut. Cas. Co. v. Wilson*, 72 Ga. App. 574, 34 S.E.2d 634 (1945); *Maryland Cas. Co. v. Stephens*, 76 Ga. App. 723, 47 S.E.2d 108 (1948); *Wiley v. Bituminous Cas. Co.*, 76 Ga. App. 862, 47 S.E.2d 652 (1948); *Georgia Marine Salvage Co. v. Merritt*, 82 Ga. App. 111, 60 S.E.2d 419 (1950); *Fulton Bag & Cotton Mills v. Dean*, 82 Ga. App. 494, 61 S.E.2d 584 (1950); *Royal Indem. Co. v. Bannister*, 82 Ga. App. 845, 62 S.E.2d 765 (1950); *Great Am. Indem. Co. v. Usry*, 87 Ga. App. 821, 75 S.E.2d 270 (1953); *National Sur. Corp. v. Orvin*, 209 Ga. 878, 76 S.E.2d 705 (1953); *Fulton Bag & Cotton Mills v. Speaks*, 90 Ga. App. 685, 83 S.E.2d 872 (1954); *Arnold v. Indemnity Ins. Co.*, 94 Ga. App. 493, 95 S.E.2d 29 (1956); *Ideal Mut. Ins. Co. v. Ray*, 94 Ga. App. 785, 96 S.E.2d 377 (1956); *Borden v. Fuerlinger*, 95 Ga. App. 556, 98 S.E.2d 410 (1957); *Fireman's Fund Indem. Co. v. Wade*, 97 Ga. App. 125, 102 S.E.2d 640 (1958); *Cowart v. Employers Mut. Liab. Ins. Co.*, 98 Ga. App. 126, 105 S.E.2d 384 (1958); *Milledgeville State Hosp. v. Clodfelter*, 99 Ga. App. 49, 107 S.E.2d 289 (1959); *National Sur. Corp. v. Nelson*, 99 Ga. App. 95, 107 S.E.2d 718 (1959); *Simpson v. Liberty Mut. Ins. Co.*, 99 Ga. App. 629, 109 S.E.2d 876 (1959); *Manus v. Liberty Mut. Ins. Co.*, 100 Ga. App. 289, 111 S.E.2d 103 (1959); *American Sur. Corp. v. Bush*, 100 Ga. App. 819, 112 S.E.2d 635 (1959); *Allen v. Queen Ins. Co.*, 101 Ga. App. 9, 112 S.E.2d 772 (1960); *Sears, Roebuck & Co. v. Wilson*, 215 Ga. 746, 113 S.E.2d 611 (1960); *Liberty Mut. Ins. Co. v. Simpson*, 101 Ga. App. 480, 114 S.E.2d 141 (1960); *St. Paul Fire & Marine Ins. Co. v. White*, 103 Ga. App. 607, 120 S.E.2d 144 (1961); *Fidelity & Cas. Co. v. King*, 104 Ga. App. 261, 121 S.E.2d 284 (1961); *St. Paul Fire & Marine Ins. Co. v. Durden*, 104 Ga. App. 541, 122 S.E.2d 262 (1961); *Green v. Lumbermen's Mut. Cas. Co.*, 105 Ga. App. 540, 124 S.E.2d 925 (1962); *Cardin v. Riegel Textile Corp.*, 217 Ga. 797, 125 S.E.2d 62 (1962); *American Mut. Liab. Ins. Co. v. Quick*, 106 Ga. App. 59, 126 S.E.2d 431 (1962); *Complete Auto Transit, Inc. v. Davis*, 106 Ga. App. 369, 126 S.E.2d 909 (1962); *Anglin v. St. Paul-Mercury Indem. Co.*, 106 Ga. App. 395, 126 S.E.2d 913 (1962); *Zurich Ins. Co. v. Cooper*, 106 Ga. App. 437, 127

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- S.E.2d 165 (1962); *Surmiak v. Standard Accident Ins. Co.*, 106 Ga. App. 479, 127 S.E.2d 334 (1962); *Continental Cas. Co. v. Bump*, 106 Ga. App. 826, 128 S.E.2d 525 (1962); *Fidelity & Cas. Co. v. Parham*, 218 Ga. 640, 129 S.E.2d 868 (1963); *Armour & Co. v. Youngblood*, 107 Ga. App. 505, 130 S.E.2d 786 (1963); *Awbrey v. Davis*, 219 Ga. 598, 134 S.E.2d 785 (1964); *Cardin v. Riegel Textile Corp.*, 219 Ga. 695, 135 S.E.2d 284 (1964); *Murdock v. Perkins*, 219 Ga. 756, 135 S.E.2d 869 (1964); *Bump v. Continental Cas. Co.*, 109 Ga. App. 228, 136 S.E.2d 14 (1964); *Employers Ins. Co. v. Wright*, 110 Ga. App. 773, 140 S.E.2d 51 (1964); *Hackel v. Fidelity & Cas. Co.*, 111 Ga. App. 190, 140 S.E.2d 923 (1965); *Pittsburgh Plate Glass Co. v. Bailey*, 111 Ga. App. 609, 142 S.E.2d 388 (1965); *Brown v. Liberty Mut. Ins. Co.*, 113 Ga. App. 490, 148 S.E.2d 436 (1966); *Proctor v. Dixie Bell Mills, Inc.*, 113 Ga. App. 787, 149 S.E.2d 550 (1966); *Travelers Ins. Co. v. Floyd*, 114 Ga. App. 487, 151 S.E.2d 816 (1966); *Fidelity & Cas. Co. v. Whitehead*, 114 Ga. App. 630, 152 S.E.2d 706 (1966); *Stone v. Citizens Cas. Co.*, 114 Ga. App. 805, 152 S.E.2d 894 (1966); *Aetna Cas. & Sur. Co. v. Groover*, 115 Ga. App. 418, 154 S.E.2d 828 (1967); *National Engine Rebuilding, Inc. v. Noles*, 116 Ga. App. 762, 159 S.E.2d 178 (1967); *Simpson v. Travelers Ins. Co.*, 117 Ga. App. 43, 159 S.E.2d 294 (1967); *Standard Accident Ins. Co. v. Skinner*, 118 Ga. App. 288, 163 S.E.2d 321 (1968); *Snider v. Liberty Mut. Ins. Co.*, 119 Ga. App. 118, 166 S.E.2d 379 (1969); *McMullen v. Liberty Mut. Ins. Co.*, 119 Ga. App. 410, 167 S.E.2d 360 (1969); *Mauldin v. Georgia Cas. Sur. Co.*, 119 Ga. App. 406, 167 S.E.2d 371 (1969); *Sessoms Co. v. Colburn*, 225 Ga. 238, 167 S.E.2d 643 (1969); *Hartford Accident & Indem. Co. v. Carroll*, 121 Ga. App. 78, 172 S.E.2d 869 (1970); *Williams v. Bituminous Cas. Co.*, 121 Ga. App. 175, 173 S.E.2d 250 (1970); *City of Atlanta v. Price*, 121 Ga. App. 240, 173 S.E.2d 750 (1970); *Morris v. Liberty Mut. Ins. Co.*, 122 Ga. App. 436, 177 S.E.2d 174 (1970); *Martin v. GMC, Fisher Body Div.*, 226 Ga. 860, 178 S.E.2d 183 (1970); *Davis v. Caldwell*, 53 F.R.D. 373 (N.D. Ga. 1971); *Employers Mut. Liab. Ins. Co. v. Turner*, 126 Ga. App. 24, 189 S.E.2d 862 (1972); *New Hampshire Ins. Co. v. Riddle*, 126 Ga. App. 96, 190 S.E.2d 100 (1972); *Maryland Cas. Co. v. Johnson*, 126 Ga. App. 468, 191 S.E.2d 90 (1972); *Zurich Ins. Co. v. Robinson*, 127 Ga. App. 113, 192 S.E.2d 533 (1972); *Liberty Mut. Ins. Co. v. Williams*, 129 Ga. App. 354, 199 S.E.2d 673 (1973); *Coggins Granite Indus., Inc. v. Jones*, 129 Ga. App. 886, 201 S.E.2d 646 (1973); *Morrison Assurance Co. v. Hodges*, 130 Ga. App. 436, 203 S.E.2d 629 (1973); *Purser v. Hartford Accident & Indem. Co.*, 131 Ga. App. 508, 206 S.E.2d 100 (1974); *Spengler v. Employers Com. Union Ins. Co.*, 131 Ga. App. 443, 206 S.E.2d 693 (1974); *Pope v. Aetna Life & Cas. Co.*, 132 Ga. App. 798, 209 S.E.2d 246 (1974); *Pritchett v. Liberty Mut. Ins. Co.*, 133 Ga. App. 505, 211 S.E.2d 443 (1974); *Kay v. Maryland Cas. Co.*, 135 Ga. App. 108, 217 S.E.2d 413 (1975); *Gulf Ins. Co. v. Williamson*, 137 Ga. App. 79, 222 S.E.2d 885 (1975); *Webb v. U.S. Fid. & Guar. Ins. Co.*, 139 Ga. App. 494, 229 S.E.2d 7 (1976); *Insurance Co. of N. Am. v. Puckett*, 139 Ga. App. 772, 229 S.E.2d 550 (1976); *Security Ins. Group v. Slusher*, 141 Ga. App. 307, 233 S.E.2d 268 (1977); *Fieldcrest Mills, Inc. v. Richard*, 141 Ga. App. 702, 234 S.E.2d 345 (1977); *Southern Bell Tel. & Tel. Co. v. Lemmon*, 142 Ga. App. 141, 235 S.E.2d 588 (1977); *St. Paul Fire & Marine Ins. Co. v. Lee*, 142 Ga. App. 233, 235 S.E.2d 659 (1977); *Hartford Ins. Co. v. White*, 142 Ga. App. 307, 235 S.E.2d 740 (1977); *Argonaut Ins. Co. v. Marshall*, 144 Ga. App. 217, 240 S.E.2d 767 (1977); *Jackson v. Georgia Bldg. Auth.*, 144 Ga. App. 275, 241 S.E.2d 54 (1977); *Jackson v. Seaboard Fire & Marine Ins. Co.*, 144 Ga. App. 531, 241 S.E.2d 636 (1978); *Gardner v. Fireman's Fund Ins. Co.*, 145 Ga. App. 863, 245 S.E.2d 19 (1978); *City Council v. Nevils*, 149 Ga. App. 688, 255 S.E.2d 140 (1979); *Owens-Illinois, Inc. v. Lewis*, 150 Ga. App. 637, 258 S.E.2d 293 (1979); *Southern Cotton Oil Co. v. Lockett*, 150 Ga. App. 835, 258 S.E.2d 644 (1979); *Outler v. Southern Bell Tel. & Tel. Co.*, 152 Ga. App. 424, 263 S.E.2d 230 (1979); *Bond v. Employers Ins. Co.*, 154 Ga. App. 244, 268 S.E.2d 354 (1980); *Smith v. Van's Equip. Co.*, 158 Ga. App. 460, 280 S.E.2d 870 (1981); *Beers Constr. Co. v. Stephens*, 162 Ga. App. 87, 290 S.E.2d 181 (1982); *Hart v. Owens-Illinois, Inc.*, 250 Ga. 397, 297 S.E.2d 462 (1982); *Coosa Baking Co. v. Thomas*, 165 Ga. App. 313, 299 S.E.2d 145 (1983);

Buckley v. Sears Roebuck & Co., 165 Ga. App. 838, 299 S.E.2d 744 (1983); Hart v. Owens-Illinois, Inc., 165 Ga. App. 681, 302 S.E.2d 701 (1983); Georgia Power Co. v. Brown, 169 Ga. App. 45, 311 S.E.2d 236 (1983); Moore Bus. Forms, Inc. v. Matthews, 170 Ga. App. 106, 316 S.E.2d 552 (1984); Georgia Mental Health Inst. v. Padgett, 171 Ga. App. 353, 319 S.E.2d 524 (1984); Hampton v. Howard Baer, Inc., 172 Ga. App. 513, 323 S.E.2d 701 (1984); Scandrett v. Talmadge Farms, Inc., 174 Ga. App. 547, 330 S.E.2d 772 (1985); Brake Supply Co. v. Banks, 175 Ga. App. 242, 333 S.E.2d 129 (1985); ITT-Thompson Indus., Inc. v. Wheeler, 179 Ga. App. 92, 345 S.E.2d 614 (1986); Caldwell v. Perry, 179 Ga. App. 682, 347 S.E.2d 286 (1986); Sanders v. Georgia-Pacific Corp., 181 Ga. App. 757, 353 S.E.2d 849 (1987); Jackson v. Peachtree Hous. Div., 187 Ga. App. 612, 371 S.E.2d 112 (1988); Raley v. Lanco Paint & Drywall, 190 Ga. App. 462, 379 S.E.2d 196 (1989); Transus, Inc. v. Fleck, 204 Ga. App. 306, 418 S.E.2d 817 (1992); Watson v. Universal Ceramics, Inc., 209 Ga. App. 135, 433 S.E.2d 104 (1993); Atlanta Hilton & Towers v. Gaither, 210 Ga. App. 343, 436 S.E.2d 71 (1993); State v. Bardge, 211 Ga. App. 307, 439 S.E.2d 1 (1993); Continental Grain Co. v. Thomas, 218 Ga. App. 240, 459 S.E.2d 623 (1995); L.C.P. Chems. v. Strickland, 221 Ga. App. 742, 472 S.E.2d 471 (1996); Georgia-Pacific Corp. v. Arline, 225 Ga. App. 800, 484 S.E.2d 678 (1997); Mickens v. Western Prob. Det. Ctr., 244 Ga. App. 268, 534 S.E.2d 927 (2000); Baugh-Carroll v. Hospital Authority of Randolph County, 248 Ga. App. 591, 545 S.E.2d 690 (2001); City of Poulan v. Hodge, 275 Ga. 483, 569 S.E.2d 499 (2002); Stephenson v. Roper Pump Co., 261 Ga. App. 131, 581 S.E.2d 741 (2003); Reliance Elec. Co. v. Brightwell, 284 Ga. App. 235, 643 S.E.2d 742 (2007).

Overpayments

Statutes of limitations applicable to overpayment claims. — Because O.C.G.A. § 34-9-104 (d)(2) provides that a claim for overpayment of benefits can only be brought within the context of a change of condition case, the two-year statute of limitations is applicable to a claim for the overpayment of income benefits, and it is of no import that this ruling results in a two-year statute for an

overpayment claim in an administrative action and a four-year statute for a reimbursement claim in civil court. Bahadori v. National Union Fire Ins. Co., 270 Ga. 203, 507 S.E.2d 467 (1998).

Claimant was not entitled to temporary total disability and temporary partial disability benefits where claimant already collected a lump sum payment for permanent partial disability, and the method of crediting the overpayment was not set forth with sufficient specificity. Universal Ceramics, Inc. v. Watson, 177 Ga. App. 345, 339 S.E.2d 304 (1985).

Applicability of section to overpayments.

— The two-year limitation period for modification of a prior award based on a change of condition, contained in O.C.G.A. § 34-9-104(b), does not apply to overpayment cases; instead the four-year limitation period contained in O.C.G.A. § 9-3-25 applies. Bahadori v. Sizzler, 230 Ga. App. 52, 505 S.E.2d 23 (1998).

Repayment of overpayments. — The effect of the 1978 amendment, which expanded the jurisdiction of the board to include the power to order an employee to repay to an insurer any amount determined to be overpayments of income benefits, is to economize on the number of actions necessary to finally resolve all the issues presented in an overpayment situation by eliminating the need for an insurer (or employer) to bring a second action in a different forum in order to recover the amount of the overpayment. Georgia Cas. & Sur. Co. v. Randall, 162 Ga. App. 532, 292 S.E.2d 118 (1982), overruled on other grounds, Bahadori v. Sizzler #1543, 230 Ga. App. 52, 505 S.E.2d 23 (1997), Bahadori v. National Union Fire Ins. Co., 270 Ga. 203, 507 S.E.2d 467 (1998).

Since Ga. L. 1978, p. 2220 is applicable to actions taken on or after July 1, 1978, (except for provisions of that Act creating substantive rights) and since the right of action for money had and received existed before its enactment, the board is competent to make a determination as to repayment of overpayments for injuries occurring before July 1, 1978. Georgia Cas. & Sur. Co. v. Randall, 162 Ga. App. 532, 292 S.E.2d 118 (1982), overruled on other grounds, Bahadori v. Sizzler #1543, 230 Ga. App. 52, 505 S.E.2d 23 (1997), Bahadori v. National Union Fire Ins. Co., 270 Ga. 203, 507 S.E.2d 467 (1998).

Overpayments (Cont'd)

Action by workers' compensation carrier to recover overpayment of benefits is in the nature of an action for money had and received. *Georgia Cas. & Sur. Co. v. Randall*, 162 Ga. App. 532, 292 S.E.2d 118 (1982), overruled on other grounds, *Bahadori v. Sizzler #1543*, 230 Ga. App. 52, 505 S.E.2d 23 (1997), *Bahadori v. National Union Fire Ins. Co.*, 270 Ga. 203, 507 S.E.2d 467 (1998).

Change in Condition

Change in award authorized where disability increases or decreases. — Where developing facts and circumstances show a change in condition with reference to claimant by reason of claimant's previous injury, such as would show an increase or decrease in the extent of claimant's disability, a former award may be changed by the department (now board) upon application for review thereof. *Fralish v. Royal Indem. Co.*, 53 Ga. App. 557, 186 S.E. 567 (1936).

Construction of O.C.G.A. § 34-9-104(a)(1) and (b). — Court of Appeals properly affirmed the judgment of the superior court, noting that an award of medical expenses was held to be an award of compensation within the meaning of the original Workmen's Compensation Act, O.C.G.A. § 34-9-1 et seq., and in applying that principle to find that the change-in-condition statute applied to cases in which income benefits had not been paid. *Footstar, Inc. v. Liberty Mut. Ins. Co.*, 281 Ga. 448, 637 S.E.2d 692 (2006).

Award for total disability, while open-ended, subject to modification. — Compensation for total disability is necessarily open-ended according to the terms of O.C.G.A. § 34-9-261, which sets no ceiling on the number of weeks such benefits may be required to be paid. Such an award is, however, subject to modification on the application of either party based on a change in condition. *Diers v. House of Hines, Inc.*, 168 Ga. App. 282, 308 S.E.2d 611 (1983).

Separate hearing rather than retrial of issues was proper remedy. — Where claimant appellant argued that claimant received benefits only for an 18 percent permanent partial impairment, that claimant's condition had worsened since then, and that the board of workers' compensation should

have scheduled another hearing to make a determination concerning an increase in that rating, appellant's remedy in this regard did not lie in seeking a retrial of the issues presented at the 1985 hearing, but in requesting a separate hearing pursuant to subsection (b) of O.C.G.A. § 34-9-104 for a change in condition within two years of the final ruling on appeal. *Sanders v. Georgia-Pacific Corp.*, 192 Ga. App. 439, 385 S.E.2d 101, cert. denied, 192 Ga. App. 903, 385 S.E.2d 101 (1989).

Award not modifiable where condition not changed. — Where disability at first hearing was determined to be total, and at second hearing board found that the disability was continuous, but with no change in condition, board could not modify the initial award based upon a change in condition, as the extent of the disability remained the same from the time of the first hearing to the time of the application for a change in condition. *Moore v. American Liab. Ins. Co.*, 67 Ga. App. 259, 19 S.E.2d 763 (1942).

Award supported by evidence of deterioration not precluded by claimant's testimony of continuous total disability. — If claimant's condition has in fact changed for the worse, as shown by competent evidence, claimant will be entitled to a new award, even though under claimant's own testimony claimant was totally disabled at the time of both hearings, that fact alone would not preclude an award in claimant's favor otherwise supported by competent evidence that claimant's condition had in fact deteriorated. *Magnus Metals Div. of Nat'l Lead Co. v. Stephens*, 111 Ga. App. 448, 142 S.E.2d 123 (1965).

Where a change for the worse in claimant's physical condition was shown by competent evidence, a new award was authorized, notwithstanding that claimant testified claimant's condition was worse at the second hearing but that claimant was totally incapacitated at the time of both hearings. *Chatahoochee Camp Sch. v. Cole*, 117 Ga. App. 505, 161 S.E.2d 78 (1968).

Claimant cannot have "change in condition" under this section unless there has been a previous award granting compensation. *Hartford Accident & Indem. Co. v. Mauldin*, 147 Ga. App. 230, 248 S.E.2d 528 (1978); *Paideia Sch. v. Geiger*, 192 Ga. App. 723, 386 S.E.2d 381 (1989) (see O.C.G.A. § 34-9-104).

Prior award required. — Where no prior award was ever made between the parties or approved by the board, statutory provision relating to “change of condition” is not applicable. *Williams v. Morrison Assurance Co.*, 138 Ga. App. 191, 225 S.E.2d 778 (1976).

Claimant must have previously received benefits. — A “change in condition” can occur only when the claimant has previously received benefits for a compensable job-related injury. Thus, where claimant never received workers’ compensation benefits for claimant’s original on-the-job injury, then, by definition, claimant cannot have undergone a “change in condition”, and the administrative law judge’s finding that claimant sustained a “change in condition” was erroneous as a matter of law. *Northbrook Property & Cas. Ins. Co. v. Babyak*, 186 Ga. App. 339, 367 S.E.2d 567, writ of cert. vacated, 258 Ga. 484, 373 S.E.2d 21 (1988).

“Potential” benefits at time of injury bars modification. — Where there is evidence to support a finding that a claimant was potentially due other income benefits at the time of the compensable injury and was not paid such benefits, O.C.G.A. § 34-9-104(b) is not applicable. “Potential” means not that the type of disability may arise in the future, but rather that there is evidence that it existed at the time, although no claim was made for it. *Justice v. R.D.C., Inc.*, 187 Ga. App. 198, 369 S.E.2d 493 (1988).

Disability plan payment not change in condition. — Disability plan payments to an employee did not constitute a “change in condition” authorizing modification of an award of compensation benefits. *Webb v. City of Atlanta*, 228 Ga. App. 278, 491 S.E.2d 492 (1997).

Increased disability not justified by proof of greater disability prior to original award. — Mere proof by claimant that prior to the original award claimant was injured in a greater degree than that found by the board and that claimant’s original injury has continued in the same degree and to the same extent does not justify an increased award based on change of condition, such change not having occurred subsequent to the award. *Travelers Ins. Co. v. Hammond*, 90 Ga. App. 595, 83 S.E.2d 576 (1954).

“Maximum improvement” not ground for hearing. — Since “maximum improvement”

has no place in workers’ compensation law, when a request for hearing on this ground is made it should be declined. *Brazier v. United States Fid. & Guar. Co.*, 99 Ga. App. 588, 109 S.E.2d 309 (1959).

Section inapplicable to new and distinct injury. — This section applied only to a change in condition of an original injury and had no relationship to a new and distinct injury. *Reliance Ins. Co. v. Jones*, 149 Ga. App. 298, 254 S.E.2d 388 (1979) (see O.C.G.A. § 34-9-104).

Words “change in condition” apply only to a change in condition of the original injury, and have no relationship to a new and distinct injury. *Employers Mut. Liab. Ins. Co. v. Young*, 129 Ga. App. 282, 199 S.E.2d 552 (1973), later appeal, 134 Ga. App. 369, 214 S.E.2d 381 (1975).

Change in condition means different condition from that existent when award was made; hence, a continued incapacity of the same kind and character, for the same injury, is not a change in condition. *Hartford Accident & Indem. Co. v. Carroll*, 75 Ga. App. 437, 43 S.E.2d 722 (1947).

When hearing is sought for the purpose of increasing or decreasing compensation payable on the basis of a change of condition, the evidence must show a changed condition arising from future developments, as distinguished from conditions existing at the time of the original award or settlement. *Riegel Textile Corp. v. Vinyard*, 88 Ga. App. 753, 77 S.E.2d 760 (1953).

By “change in condition” is meant a change in physical condition of claimant subsequent to entering of award; and where on a hearing based on a change in condition it appears that claimant’s condition has not changed for the worse since the previous award, the claimant cannot prevail, even though the previous award gave claimant a rating of disability less than claimant actually suffered or erroneously denied claimant compensation altogether. *Magnus Metals Div. of Nat’l Lead Co. v. Stephens*, 111 Ga. App. 448, 142 S.E.2d 123 (1965).

Change in condition exists where maximum improvement has not been reached and subsequent developments show additional impairment, and does not exist where condition of claimant is the same as at the time of initial hearing. *Ingram v. Liberty Mut. Ins. Co.*, 62 Ga. App. 789, 10 S.E.2d 99 (1940).

Change in Condition (Cont'd)

Evidence showing change in condition since original award required. — In order for an award finding a change in condition to be authorized, there must be evidence to authorize finding that claimant's condition has changed since the original award. *Travelers Ins. Co. v. Boyer*, 102 Ga. App. 248, 116 S.E.2d 6 (1960).

Subsequent to award. — Change in condition referred to in this section was one which occurred subsequently to an award. *Chicago Bridge & Iron Co. v. Cole*, 70 Ga. App. 599, 28 S.E.2d 900 (1944) (see O.C.G.A. § 34-9-104).

Statutory test for "change in condition" under this section was economic condition proximately caused by previous accidental injury. *Jenkins Enters., Inc. v. Williams*, 122 Ga. App. 840, 178 S.E.2d 926 (1970); *Morrison Assurance Co. v. Hodges*, 130 Ga. App. 436, 203 S.E.2d 629 (1973); *North Ga. Technical & Vocational Sch. v. Boatwright*, 144 Ga. App. 66, 240 S.E.2d 563 (1977); *Employers Ins. v. Carnes*, 148 Ga. App. 767, 252 S.E.2d 654 (1979) (see O.C.G.A. § 34-9-104).

Where injury is one that comes within the provisions of former Code 1933, § 114-404 or § 114-405 (see O.C.G.A. § 34-9-261 or § 34-9-262), relating to total and temporary partial disability, "change in condition" meant an economic change in condition occasioned by employee's return or ability to return to work for the same or any other employer. *Morrison Assurance Co. v. Hodges*, 130 Ga. App. 436, 203 S.E.2d 629 (1973).

In order for the board to terminate employee's eligibility for benefits, evidence must prove an improved economic condition. *Spell v. Travelers Ins. Co.*, 147 Ga. App. 160, 248 S.E.2d 292 (1978).

Even though claimant's physical condition may have remained unchanged, a change in earning capacity predicated upon the accidental injury is considered a change in condition. *Hartford Accident & Indem. Co. v. Bristol*, 242 Ga. 287, 248 S.E.2d 661 (1978).

This section was designed to determine whether an economic change in condition had occurred, for better or for worse, so that a change in income benefits was appropri-

ate. *General Ins. Co. of Am. v. Bradley*, 152 Ga. App. 600, 263 S.E.2d 446 (1979) (see O.C.G.A. § 34-9-104).

Change in claimant's earning capacity predicated upon accidental injury is considered "change in condition". *Employers Ins. v. Carnes*, 148 Ga. App. 767, 252 S.E.2d 654 (1979).

Administrative law judge (ALJ) should have considered a claimant's entitlement to temporary partial disability benefits in a case where the claimant was fired from the job at which the disabling injury was incurred and, after a diligent job search, the claimant took a lesser paying job as a waitress for a continuing disability incident to the compensable one; the ALJ improperly imposed an additional burden of proof on the claimant by requiring the claimant to prove that the acceptance of lower-paying employment was proximately caused by the compensable work-related injury. *Roberts v. Jones Co.*, 277 Ga. App. 517, 627 S.E.2d 139 (2006).

Ability or inability to work determinative. — Board does not have jurisdiction to determine anything but a change in condition in the economic status of the employee occasioned by the employee's ability or inability to return to work for the same or any other employer, which inability is proximately caused by accidental injury. *Burkhart v. Argonaut Ins. Co.*, 239 Ga. 608, 238 S.E.2d 400 (1977).

Inability of employer to provide work as "change in condition." — Where claimant was able and willing to work but employer could no longer provide claimant with work which claimant was physically capable of doing, claimant suffered an "economic change in condition" under this section, and was entitled to benefits for partial disability. *Jenkins Enters., Inc. v. Williams*, 122 Ga. App. 840, 178 S.E.2d 926 (1970) (see O.C.G.A. § 34-9-104).

Employee required to show causal relationships between injury and inability to secure job. — Where employee sustained a compensated back injury and after medical treatment returned to work with the same employer, performing less strenuous duties, but was thereafter laid off when the employer had no more work for the employees, the employee was required by this section to prove that the employee's inability to secure suitable employment elsewhere was proxi-

mately caused by the employee's previous accidental injury. *Hartford Accident & Indem. Co. v. Bristol*, 242 Ga. 287, 248 S.E.2d 661 (1978) (see O.C.G.A. § 34-9-104).

Claimant seeking modification of an award or order was required by this section to show that inability to secure suitable employment was proximately caused by previous accidental injury. *Employers Ins. v. Carnes*, 148 Ga. App. 767, 252 S.E.2d 654 (1979); *Independent Life & Accident Ins. Co. v. Cox*, 207 Ga. App. 402, 427 S.E.2d 862 (1993) (see O.C.G.A. § 34-9-104).

Stroke suffered by employee after termination of employment could not be considered compensable as a "superadded injury" where it neither constituted a "change in condition" nor occurred on the job. *Paideia Sch. v. Geiger*, 192 Ga. App. 723, 386 S.E.2d 381 (1989).

Where the employer terminated the claimant for a reason unrelated to claimant's original work injury, the fact that the claimant did not actually return to work before the termination did not affect the need for claimant to connect the economic change to the work injury as cause and to show a diligent but unsuccessful effort to find suitable employment following termination. *Waycross Molded Prods., Inc. v. McKelvin*, 234 Ga. App. 46, 505 S.E.2d 826 (1998).

Employment offered must be suitable to employee's injured capacity. — Where there is absolutely no evidence that the employment offered the employee is suitable to the employee's injured capacity, the mere refusal of such employee to continue in the employment of the employer after having received an injury does not bar the employee from compensation. *DeKalb County Merit Sys. v. Johnson*, 151 Ga. App. 405, 260 S.E.2d 506 (1979).

Superior court erroneously reversed the decision of the Georgia Board of Workers' Compensation's Appellate Division that the former employer did not show under O.C.G.A. § 34-9-104(a) that suitable work was available; evidence supported the Division's decision, as many of the jobs recommended by the rehabilitation counselor were unsuitable, and even if the Division found that the counselor failed to take actions that would have violated Board rules and subjected the counselor to civil penalties under O.C.G.A. § 34-9-18, this did not ren-

der insufficient evidence sufficient. *Korner v. Educ. Mgmt. Corp.*, 281 Ga. App. 322, 635 S.E.2d 892 (2006), cert. denied, 2007 Ga. LEXIS 104 (Ga. 2007).

Claimant must show inability to work for any employer. — In a change in condition hearing, burden is on claimant to show that because of change claimant is unable to work for any employer; by making no effort to obtain other work suitable to claimant's impaired physical condition, claimant fails to prove claimant is unable to work for any employer. *Brown v. Gulf Ins. Co.*, 141 Ga. App. 819, 234 S.E.2d 552 (1977).

Economic change of condition resulted where claimant returned to work after claimant's original compensable injury and without approval of claimant's attending physician and was given light duties for four weeks, and then was required by the employer to operate a machine similar to the one on which claimant was originally injured, and upon refusal to do so because of weakened condition, was discharged; employer's action could be the basis for compensation. *Bibb Co. v. Epps*, 143 Ga. App. 540, 239 S.E.2d 210 (1977).

Loss of job for economic reasons not connected with physical condition did not show change in condition as contemplated by this section. *Royal Indem. Co. v. Warren*, 102 Ga. App. 501, 116 S.E.2d 757 (1960) (see O.C.G.A. § 34-9-104).

Showing of improved economic condition by return to work or ability to do so. — Improved economic condition is proved by evidence that employee's physical condition has improved to the point that the employee has either already returned to work or has the ability to return to work for the same or any other employer. *Spell v. Travelers Ins. Co.*, 147 Ga. App. 160, 248 S.E.2d 292 (1978).

Medical evidence which established without dispute that claimant had been released to return to work, both by claimant's treating physician and by a consulting neurosurgeon prior to the suspension of benefits, authorized the board, as the finder of fact, to conclude that the employer carried its burden of proving that claimant was no longer suffering from any disability as a result of claimant's work-related injury. *Fairway Transp., Inc. v. Brewer*, 192 Ga. App. 871, 386 S.E.2d 674, cert. denied, 192 Ga. App.

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901, 386 S.E.2d 674 (1989).

Merely going back to work does not show change in condition for the better. *Liberty Mut. Ins. Co. v. Archer*, 108 Ga. App. 563, 134 S.E.2d 204 (1963).

Mere fact of employee's return to work does not conclusively show that the employee has recovered from an injury. *Liberty Mut. Ins. Co. v. Archer*, 108 Ga. App. 563, 134 S.E.2d 204 (1963).

Mere fact of employee's return to work does not conclusively show that the employee has recovered from an injury, nor does it show a change in condition for the better. *Commonwealth Ins. Co. v. Arnold*, 112 Ga. App. 140, 144 S.E.2d 194 (1965).

Termination of benefits where employee no longer medically restricted from performance of available job. — Where there was medical testimony that neither the employee's physical nor psychological illnesses would prohibit the employee from returning to work, and competent evidence that the employee's medical restrictions would not prevent the employee from performing the job made available to the employee by the employer, the board was authorized to conclude that the employee's change in condition precluded continuation of the employee's disability benefits. *Hart v. Owens-Illinois, Inc.*, 151 Ga. App. 435, 260 S.E.2d 490 (1979).

Employee undergoing change of condition may still be unable to obtain other employment. — The evidence was sufficient to sustain a finding that claimant underwent a change of condition and was able to do light work and perform basic carpentry duties but was limited in lifting and carrying heavy items due to pain, and, while economic conditions might have been such that job opportunities in claimant's field were scarce, the medical evidence and claimant's corroborating testimony indicated that, because of claimant's disability, claimant would have been unable to obtain other employment even if it were available. *King v. Piedmont-Warner Dev.*, 177 Ga. App. 176, 338 S.E.2d 758 (1985).

Cessation of compensation when employee recovers or earns former wage. — In cases of temporary incapacity, compensation ceases when an employee recovers from an

injury or is earning the same wage as the employee was at time of injury. *Rhindress v. Atlanta Steel Co.*, 71 Ga. App. 898, 32 S.E.2d 554 (1944).

Where claimant was fully recovered from injury received on the job and no longer suffered any disability therefrom, termination of benefits based on a change in condition was proper although claimant suffered from current disability due to an automobile accident which was not job related. *Williams Bros. Lumber Co. v. Magee*, 162 Ga. App. 865, 292 S.E.2d 477 (1982).

Economic gain from investment not "change in condition." — Economic change in condition referred to in this section did not include economic improvement resulting from mere investment. *Armstrong v. Allstate Ins. Co.*, 135 Ga. App. 278, 217 S.E.2d 486 (1975) (see O.C.G.A. § 34-9-104).

Showing of specific amount of wages is not so much element of proof required for a finding of change of condition as it is an item required for calculation purposes. *Newton v. Liberty Mut. Ins. Co.*, 148 Ga. App. 224, 251 S.E.2d 138 (1978).

Requirements to terminate compensation. — To terminate compensation because of a change in condition, an employer must show a change in the wage earning capacity, physical condition, or status of an employee, and, to do so, the employer must show the ability to return to work and that suitable work is available. *Peterson/Puritan, Inc. v. Day*, 157 Ga. App. 827, 278 S.E.2d 674 (1981).

Impairment of earning capacity must change to alter disability from temporary total to permanent partial. — Mere evidence of a change in the employee's physical condition does not authorize, much less demand, a change in an employee's benefits from temporary total to permanent partial. Rather, in order to change an employee's benefits from those already being received under O.C.G.A. § 34-9-261 (temporary total) to those authorized under O.C.G.A. § 34-9-263 (permanent partial), it is necessary to show that the employee's earning capacity has changed and that the employee no longer suffers a total impairment of the employee's earning capacity as the result of the employee's work-related injury. *Hensel Phelps Constr. Co. v. Manigault*, 167 Ga. App. 599, 307 S.E.2d 79 (1983).

Consideration of increased pain and difficulty with resultant loss of earning capacity proper. — Where increased pain and difficulty of working result in loss of earning capacity, with consequent actual decrease of earned income, these factors may be taken into consideration on a hearing based on a change of condition for the purpose of determining the percentage of disability. *Riegel Textile Corp. v. Vinyard*, 88 Ga. App. 753, 77 S.E.2d 760 (1953).

Increased pain and difficulty not determinative in and of themselves. — Inasmuch as element of pain and suffering, or increased discomfort or difficulty in performing one's duties, is not taken into consideration by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), claimant's back injuries, in and of themselves, did not require a finding that there had been any change in condition which would authorize payment of compensation for loss of earning capacity. *Hall v. St. Paul-Mercury Indem. Co.*, 96 Ga. App. 567, 101 S.E.2d 94 (1957).

"Change of condition" means change of physical condition of claimant subsequent to first award. *Travelers Ins. Co. v. Hammond*, 90 Ga. App. 595, 83 S.E.2d 576 (1954); *Chevrolet Div., GMC v. Dempsey*, 97 Ga. App. 309, 103 S.E.2d 81 (1958); *Aetna Cas. & Sur. Co. v. Dunagan*, 111 Ga. App. 801, 143 S.E.2d 423 (1965).

Meaning of change of condition. — Proceeding under this section was to determine whether a change in the physical condition of claimant had taken place, as a matter of fact, since the previous adjudication, and consequently, to determine whether the compensation then being paid shall be ended, diminished, or increased. *City of Atlanta v. Padgett*, 68 Ga. App. 96, 22 S.E.2d 197 (1942) (see O.C.G.A. § 34-9-104).

Phrase "change in condition", within the meaning of this section, was not subject to a narrow construction and did not necessarily relate to a change in condition in respect of a particular or specific injury only; rather, said phrase had a broader meaning, and included any change in the physical condition of claimant subsequent to the entering of the award which stemmed or resulted from the accident in question. *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952); *GMC, Fisher Body Div. v. Bowman*, 107 Ga. App. 335, 130

S.E.2d 163 (1963); *United States Cas. Co. v. Truett*, 108 Ga. App. 322, 132 S.E.2d 789 (1963) (see O.C.G.A. § 34-9-104).

Evidence supported the finding of the Appellate Division of the Board of Workers' Compensation that the employee experienced a change in condition for the better under O.C.G.A. § 34-9-104(a)(1), which authorized suspension of workers' compensation benefits; employee could return to medium duty maintenance work and did not need continued medical treatment. *Jones County Bd. of Educ. v. Patterson*, 255 Ga. App. 166, 564 S.E.2d 777 (2002).

Term "change in condition" meant a change in the wage-earning capacity, physical condition, or status of an employee and the worker had clearly experienced a change in condition in the sense that the worker's wage-earning capacity increased since the worker was laid off by a former employer and began a production company for which the worker performed almost all of the work, even though the worker received no net income from the production company since the worker put most of the worker's earnings back into the company in order to make it grow. *WAGA-TV, Inc. v. Yang*, 256 Ga. App. 224, 568 S.E.2d 58 (2002).

Claimant need not necessarily show change for worse. — Claimant need not necessarily show, during a proceeding brought under this section, that claimant's medical or physical condition changed for the worse. *Hartford Accident & Indem. Co. v. Bristol*, 242 Ga. 287, 248 S.E.2d 661 (1978) (see O.C.G.A. § 34-9-104).

Change of condition for the better may be shown even though claimant is not actually working, has sought no work, may be unwilling to try to work, or has received no offer of employment from claimant's former employer or another, if there is evidence to support a finding of some improvement which discloses an ability to return to work. *Hopper v. Continental Ins. Co.*, 121 Ga. App. 850, 176 S.E.2d 109 (1970).

Compensability of further disability or death caused by injury after return to work.

— If employee suffers a compensable injury, returns to work, and thereafter suffers further disability which was the proximate result of the injury received, such further disability was compensable; where death thereafter results to the employee, its cause

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being traceable to the injury received, such death was compensable. *Employers' Liab. Assurance Corp. v. Johnson*, 62 Ga. App. 416, 8 S.E.2d 542 (1940).

Claim was time barred. — Superior court erred in affirming the finding of the State Board of Workers' Compensation Appellate Division that a worker had suffered a change of condition for the worse, under O.C.G.A. § 34-9-104, not a new injury, and that the worker's change of condition claim against the employer was not time-barred by § 34-9-104 (b); in fact, the worker's claim for additional TTD benefits was time-barred because the claim was filed more than two years after the employer last paid the worker TTD benefits. *Mech. Maint., Inc. v. Yarbrough*, 264 Ga. App. 181, 590 S.E.2d 148 (2003).

Claimant not deprived of right to compensation where disabled after time of hearing.

— Where board finds that claimant suffered an accident arising out of and in the course of claimant's employment, claimant is entitled to medical expenses incurred, and where board finds that claimant may suffer further permanent disability and require an operation and incur further medical expenses, but finds that up to the time of the hearing claimant has not incurred the requisite lost time from employment to entitle claimant to temporary total compensation, claimant is not thereby deprived of claimant's right to compensation when the injury causes claimant to be unable to continue work after the time of the hearing; the facts place the case directly under the purview of "change in condition." *GMC, Chevrolet Div. v. Dempsey*, 93 Ga. App. 423, 91 S.E.2d 850, *aff'd*, 212 Ga. 560, 93 S.E.2d 703 (1956).

Effect of compensation for one of several injuries in same accident. — Where employee receives several injuries in one accident, and compensation is granted as to one but denied as to the others, such denial of compensation for the latter injuries is not res judicata and does not preclude review with regard to those injuries upon an application for review based on change in condition, for the reason that the award granting compensation as to the one injury serves to keep the case open and pending during the statutory period with regard to a change in claimant's

physical condition. *U.S. Fid. & Guar. Co. v. Garner*, 76 Ga. App. 87, 45 S.E.2d 109 (1947).

Two specific injuries may be compensated as such. — Two specific injuries, such as an injury to the wrist and to the back, may both result from the same accident and may be compensated for as such, even though both do not develop, arise, or become known at the same time. *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952); *GMC, Fisher Body Div. v. Bowman*, 107 Ga. App. 335, 130 S.E.2d 163 (1963); *U.S. Cas. Co. v. Truett*, 108 Ga. App. 322, 132 S.E.2d 789 (1963).

One accident can cause two compensable injuries, one arising immediately and being temporary only, the compensation therefor being paid under an approved agreement, and the other being permanent but not becoming known until later, but within two years from the date of the payment of the approved agreement for compensation. *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952).

Two related injuries, such as an injury to the back which first becomes disabling, and an injury to the leg, which stems from the back injury but is not disabling at first, may properly be held to result from the identical accident and may be compensated for, even though the disability from both does not develop, arise, or become known at the same time. *GMC, Fisher Body Div. v. Bowman*, 107 Ga. App. 335, 130 S.E.2d 163 (1963).

Compensability for change from specific to general disability. — Under this section, additional compensation may be awarded for a change in condition from a specific disability to a general disability. *Waters v. NABISCO*, 113 Ga. App. 170, 147 S.E.2d 676 (1966) (see O.C.G.A. § 34-9-104).

If there is a causal relationship between claimant's original specific disability and a later general disability, claimant is entitled to compensation for total incapacity irrespective of the fact that the result of the injury at first amounted merely to a specific disability. *Waters v. NABISCO*, 113 Ga. App. 170, 147 S.E.2d 676 (1966).

Impairment of use of foot in addition to loss of toes as change in condition. — Where, at the time of award for loss of toes, it was impossible, because maximum improvement had not been reached, to deter-

mine the effect which the original injury had upon the employee's foot, and subsequent development in the employee's condition showed that as a result of the original injury there was an impairment in the use of the foot, the original award was subject to review upon the ground of a change in condition. *General Accident, Fire & Life Assurance Corp. v. Beatty*, 45 Ga. App. 104, 163 S.E. 302 (1932).

Change in condition and new accident distinguished. — "New accident" may be caused by aggravation of a previous compensable injury by continued work, whereas a change of physical and economic condition results from a gradual deterioration stemming from the wear and tear of ordinary, nonemployment work, rather than from job-related activities. *United States Fid. & Guar. Co. v. Reynolds*, 146 Ga. App. 615, 247 S.E.2d 199 (1978).

Where claimant sustains an injury and is awarded compensation during claimant's period of disability, then returns to normal life and claimant's employment, and performs claimant's normal duties or ordinary work, as a result of which, and not because of a specific job-related incident, claimant's condition gradually worsens to the point that claimant can no longer continue to perform claimant's ordinary work, this gradual worsening or deterioration is considered a change in claimant's condition and not a new accident. *Central State Hosp. v. James*, 147 Ga. App. 308, 248 S.E.2d 678 (1978).

"Change in condition" applies where claimant is injured, draws compensation, and thereafter returns to work, but as a result of performing normal duties, claimant's condition worsens to the point that claimant cannot continue claimant's employment; only where claimant goes back to work after injury, without any agreement or award as to that injury having been issued or approved by the board, will the "new accident" theory apply. *Hartford Ins. Group v. Stewart*, 147 Ga. App. 733, 250 S.E.2d 184 (1978).

Where there is no actual new accident, ordinarily distinguishing feature that will characterize disability as either a "change of condition" or a "new accident" is the intervention of new circumstances. *Certain v. United States Fid. & Guar. Co.*, 153 Ga. App. 571, 266 S.E.2d 263 (1980).

Whether new accident or change of condition has occurred is a question of fact for the administrative law judge. *United States Fid. & Guar. Co. v. Reynolds*, 146 Ga. App. 615, 247 S.E.2d 199 (1978).

Whether an employee's inability to continue working has been caused by a new accident or a change in condition is a question of fact for the administrative law judge. *Northbrook Property & Cas. Ins. Co. v. Babyak*, 186 Ga. App. 339, 367 S.E.2d 567, writ of cert. vacated, 258 Ga. 484, 373 S.E.2d 21 (1988).

Wear and tear of ordinary life as "change in condition." — Even if wear and tear of ordinary life or ordinary work to some extent aggravates a preexisting infirmity, when that infirmity itself, stemming from original trauma, continues to worsen, the point where the employee is no longer able to continue the employee's work is not a new accident but is a change of physical and economic condition entitling claimant to compensation under the original award. *St. Paul Fire & Marine Ins. Co. v. Hughes*, 125 Ga. App. 328, 187 S.E.2d 551 (1972).

Where claimant receives an injury and is paid compensation during the period of claimant's disability, then returns to work and performs the normal duties of claimant's employment for a period of time, and subsequently claimant's condition worsens as the result of performing claimant's usual duties and the wear and tear of ordinary life to the point that claimant is no longer able to perform the ordinary work of claimant's employment, claimant is considered to have had a change in condition, rather than a new accident. *Central State Hosp. v. James*, 147 Ga. App. 308, 248 S.E.2d 678 (1978).

Where claimant received an injury, drew compensation, and then returned to work, and subsequently, due to normal wear and tear of performing claimant's ordinary duties, again became disabled, and there was no specific job related incident which would have constituted a new accident, claimant underwent a "change in condition" and did not sustain a new injury. *Zurich Am. Ins. Cos. v. Sargent*, 147 Ga. App. 672, 250 S.E.2d 11 (1978).

Subsequent total disability of claimant who changed employers after compensated injury was the result of gradual worsening of claimant's condition due to normal wear

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and tear of performing normal duties of employment, and was therefore a "change in condition" rendering the former employer liable for workers' compensation benefits, not a new injury which would place such liability upon claimant's last employer. *Hartford Accident & Indem. Co. v. Troglin*, 148 Ga. App. 715, 252 S.E.2d 213 (1979).

Second accident partially precipitating disability as new injury. — Where claimant sustains a second accident, as the result of a specific job related incident which aggravates a preexisting condition resulting from a prior accident, the second accident which aggravated the preexisting condition is considered a new injury if it at least partially precipitates claimant's disability, whether claimant is immediately disabled or continues to work after the second accident and claimant's condition gradually worsens until claimant is forced to cease employment. *Central State Hosp. v. James*, 147 Ga. App. 308, 248 S.E.2d 678 (1978).

New accident due to new circumstances with new employer. — Where claimant left the old employer and went to work in a different environment with a new employer, the activity performed for the new employer exceeding the limits of the light duty offered by the old employer, and the inability to continue to work occurred with the new employer, there were such "new" circumstances that it had to be concluded that there was a new accident as of the date of the inability to work. *Certain v. United States Fid. & Guar. Co.*, 153 Ga. App. 571, 266 S.E.2d 263 (1980).

Running of statute on new accident. — Where claimant is injured on the job but continues to perform the duties of claimant's employment until claimant is forced to cease work because of the gradual worsening of claimant's condition, which is at least partly attributable to claimant's physical activity in continuing to work subsequent to claimant's injury, the one-year statute of limitation begins to run from the date claimant was forced to cease employment on the theory that the date of the "new accident" is the date that the disability manifests itself. *Central State Hosp. v. James*, 147 Ga. App. 308, 248 S.E.2d 678 (1978).

Limitation period for claim for same injury causing initial disability. — Where

claimant received weekly income benefits for the period of claimant's disability, a claim filed by the claimant for the same injury which caused the claimant's disability was a claim for a change in condition, and not an initial claim, and the claim was therefore governed by the two-year limitations period of O.C.G.A. § 34-9-104(b). *Clarke v. Samson Mfg. Co.*, 177 Ga. App. 149, 338 S.E.2d 738 (1985).

Additional injuries claim time barred by expiration of benefits. — A change in condition analysis did not apply to a claim of additional injuries resulting from an original compensable injury when the injury occurred more than two years after the last payment of income benefits. *J.M. Huber Corp. v. Holliday*, 228 Ga. App. 4, 491 S.E.2d 74 (1997).

Burden on party claiming change in condition. — Prime requisite of review under this section was that there be a change in the employee's physical condition between the time of the review and any award made by the board, and the burden of establishing this is upon the party claiming a change in condition. *Fortson v. American Sur. Co.*, 92 Ga. App. 625, 89 S.E.2d 671 (1955) (see O.C.G.A. § 34-9-104).

Where an award has been entered by the board in favor of the claimant and is still outstanding, that award is conclusive as to the disability of claimant and continuance thereof; and the burden of proof is on the employer to show a change in condition of claimant which would authorize the board to make a new award ending or diminishing compensation previously awarded. *Hartford Accident & Indem. Co. v. Webb*, 109 Ga. App. 667, 137 S.E.2d 362 (1964).

Burden on employer is to prove a change for the better as to all injuries received by the employee by reason of accident for which compensation was due. *Gorman v. Employers Mut. Liab. Ins. Co.*, 113 Ga. App. 500, 148 S.E.2d 463 (1966).

Burden is on employer to show a change in physical condition. *J.D. Jewell, Inc. v. Pirkle*, 117 Ga. App. 745, 161 S.E.2d 920 (1968).

If an employer begins to make payments and continues over a period of time but then abruptly ceases those payments, the burden should not necessarily be on the employee to establish the employee's entire case, but

instead, even though the employee might request the hearing, the employer should have the burden of showing a change in condition to justify cessation of the payments. On the other hand, if after beginning to make payments, the employer timely files a Form WC 2 and a Form WC 3, a "Notice to Controvert Payment of Compensation," then certainly there are good reasons to place the burden on the employee to establish the employee's claim since this is the initial hearing of the matter and not a change in condition. *Cornell-Young v. Minter*, 168 Ga. App. 325, 309 S.E.2d 159 (1983).

As the claimant's condition had never been established by award or otherwise prior to the hearing on the claim, the claimant had the burden of proof in the matter and the appellate division erred in shifting the burden to the employer at whatever point in time during the hearing the claimant established a work-related disability. *Dan Vaden Chevrolet v. Mann*, 234 Ga. App. 500, 506 S.E.2d 653 (1998).

Where the record contained some evidence which supported the finding of the administrative law judge that the claimant failed to sustain the burden of establishing a change in condition, the superior court erred in substituting its own judgment and reversing the board's award. *Georgia-Pacific Corp. v. Wilson*, 240 Ga. App. 123, 522 S.E.2d 700 (1999).

Because an employee used the employee's leave benefits in lieu of receiving workers' compensation benefits (WCB) when the employee sustained a compensable injury but was unaware of the employee's entitlement to the WCB, the employee sustained an economic injury, and accordingly, the employee was entitled to an award of temporary total disability income benefits for the time that the employee was out; it was error to conclude that the employer's use of the employee's leave time constituted an "award" so that the burden of proving a subsequent change in condition was on the employee pursuant to O.C.G.A. § 34-9-104, as the employee did not contend that the employee's earning capacity was diminished. *Glisson v. Rooms To Go*, 270 Ga. App. 689, 608 S.E.2d 50 (2004).

Filing of Form WC-104. — When an employer first reduced and then terminated an

employee's temporary total disability benefits, the employer had to strictly comply with O.C.G.A. § 34-9-104(a)(2) and Ga. Bd. Workers' Comp. R. 104 by filing a Form WC-104 and a supporting medical opinion with the State Board of Workers' Compensation; a medical opinion issued before an administrative law judge's opinion establishing the employee's condition, pursuant to § 34-9-104(a)(1), did not satisfy this requirement, nor did a medical opinion issued before the employee underwent knee surgery, which clearly rendered the employee temporarily totally disabled, under § 34-9-104(a)(1). *MARTA v. Bridges*, 276 Ga. App. 220, 623 S.E.2d 1 (2005).

When an employer first reduced and then terminated an employee's temporary total disability benefits, the employer had to strictly comply with O.C.G.A. § 34-9-104(a)(2) and Ga. Bd. Workers' Comp. R. 104 by filing a Form WC-104 and a supporting medical opinion with the State Board of Workers' Compensation; the employer did not satisfy this burden by filing a Form WC-104 in the trial court because that could not supplement the record before the State Board of Workers' Compensation or an administrative law judge as the trial court was an appellate body in this case. *MARTA v. Bridges*, 276 Ga. App. 220, 623 S.E.2d 1 (2005).

Showing required where employee claims change. — To establish a change of condition, as opposed to a new injury, it must be shown either that the condition has grown worse, or alternatively, that it has improved; that because of this change, claimant is unable to continue to work or conversely is able to work with a lesser degree of disability; that because of inability to work claimant suffers from partial or total loss of income or conversely that because inability to work has been lessened, claimant is fully or partially employable and the loss of income has been fully or partially alleviated; and lastly, if an inability to work persists, that such inability was proximately caused by a previous accidental injury. *Wills v. St. Paul Fire & Marine Ins. Co.*, 143 Ga. App. 562, 239 S.E.2d 219 (1977).

In order to receive workers' compensation benefits based on a change in condition, a claimant must establish by a preponderance of the evidence that: first, he or she suffered

Change in Condition (Cont'd)

a loss of earning power as a result of a compensable work-related injury; second, that claimant continues to suffer physical limitations attributable to that injury; and, third, that claimant has made a diligent, but unsuccessful effort to secure suitable employment following termination. *Maloney v. Gordon County Farms*, 265 Ga. 825, 462 S.E.2d 606 (1995).

Claimant does not have to show why not hired by prospective employer. — Once claimant has offered evidence in support of a claim for benefits because of a change in condition, the board may in its discretion draw reasonable inferences from that evidence that despite claimant's good faith efforts, claimant's inability to obtain employment was proximately caused by the continuing disability. This opinion reverses *Gordon County Farms v. Maloney*, 214 Ga. App. 253, 447 S.E.2d 623 (1994) and overrules *Aden's Minit Market v. Landon*, 202 Ga. App. 219, 413 S.E.2d 738 (1991) and *Autolite v. Glaze*, 211 Ga. App. 780, 440 S.E.2d 497 (1994) to the extent that these cases impose an additional burden on the claimant to prove the reasons why claimant was not hired by a prospective employer. *Maloney v. Gordon County Farms*, 265 Ga. 825, 462 S.E.2d 606 (1995).

Showing required where employer or insurer seeks change. — To show a change of condition, an employer or insurer must show: (1) a physical change in claimant for the better; (2) ability to return to work because of the change; and (3) availability of work to decrease or terminate loss of income. *Hercules, Inc. v. Adams*, 143 Ga. App. 91, 237 S.E.2d 631 (1977); *Commercial Union Ins. Co. v. Weeks*, 155 Ga. App. 20, 270 S.E.2d 259 (1980).

Employer satisfied burden of showing an employee could work, even though the employer rejected the employee for a sedentary position after the employee failed a drug test. *Freeman v. Continental Baking Co.*, 212 Ga. App. 855, 443 S.E.2d 520 (1994).

Burden not shifted by showing of unsuccessful work attempt. — Fact that claimant attempted to work one day and was unable to continue is not such proof of claimant's recovery and ability to work as would throw the burden upon the claimant to show a

change in condition thereafter. *General Accident Fire & Life Assurance Corp. v. Teal*, 100 Ga. App. 314, 111 S.E.2d 113 (1959).

Consideration of entire record by court. — In reaching determination as to whether or not change of condition has occurred, court may consider the entire record. *GMC, Chevrolet Div. v. Dempsey*, 93 Ga. App. 423, 91 S.E.2d 850, aff'd, 212 Ga. 560, 93 S.E.2d 703 (1956).

Discovery of board error not change of condition. — Discovery that board's finding of no insurance was erroneous did not constitute a "change of condition" within the meaning of O.C.G.A. § 34-9-104. *Russell v. Fast Framers, Inc.*, 164 Ga. App. 771, 298 S.E.2d 303 (1982).

Effect of administrative law judge's analysis. — A notation in the administrative law judge's award that a doctor could not state "to a reasonable degree of medical certainty" that claimant's medical condition was related to claimant's accident did not show an erroneous application of a heightened standard of proof since the finding was but one of several relied on for determining that claimant had not proven a causal relationship between the accident and claimant's condition. *United Family Life Ins. Co. v. Sasser*, 224 Ga. App. 871, 482 S.E.2d 491 (1997).

Evidence showing that claimant was not paid due benefits. — Where there is evidence to support a finding that a claimant was potentially due other income benefits at the time of the compensable injury and was not paid the benefits, then the limitations period in O.C.G.A. § 34-9-104(b) is inapplicable. *Metropolitan Atlanta Rapid Transit Auth. v. Ledbetter*, 184 Ga. App. 518, 361 S.E.2d 878, cert. denied, 184 Ga. App. 910, 361 S.E.2d 878 (1987).

Admissibility of testimony of doctors who examined claimant after original proceeding. — In proceeding concerning change of claimant's condition, board's holding that testimony of two doctors who had not examined claimant at or before filing of original claim could not be considered was erroneous; this testimony was admissible. *American Mut. Liab. Ins. Co. v. Grimes*, 100 Ga. App. 51, 109 S.E.2d 837 (1959).

Evidence supported determination that permanent partial disability payments due employee had not been paid and, therefore,

that the employee's claim for change of condition was not barred by the provisions of O.C.G.A. § 34-9-104(b). *Holt's Bakery v. Hutchinson*, 177 Ga. App. 154, 338 S.E.2d 742 (1985).

Retroactive Effect

"Medical only" claims. — O.C.G.A. § 34-9-104(b) applied to "medical only" claims if a compensable injury was established by an award; the workers' compensation board properly found that a worker suffered a change in condition for the worse rather than a new injury, and that an insurer was liable for the worker's income benefits because a prior "medical only" award found the worker's injury compensable. *Footstar, Inc. v. Stevens*, 275 Ga. App. 329, 620 S.E.2d 588 (2005), *aff'd*, 281 Ga. 448, 637 S.E.2d 692 (2006).

This section authorized the board to find a change of condition as of the time it actually occurred, even though it may result in a retroactive award. *United States Fid. & Guar. Co. v. Kelley*, 131 Ga. App. 6, 205 S.E.2d 38 (1974) (see O.C.G.A. § 34-9-104).

Award under this section may apply retroactively to the time that change of condition was found to have occurred. *Foster v. Continental Cas. Co.*, 141 Ga. App. 415, 233 S.E.2d 492 (1977) (see O.C.G.A. § 34-9-104).

Meaning of "retroactive." — Word "retroactive" in subsection (d) of this section meant that the change in condition might date to the actual date of the change as found, which would in some cases be found to have come before the application for hearing was made. *Noles v. National Engine Rebuilding Co.*, 119 Ga. App. 833, 169 S.E.2d 185 (1969), *aff'd*, 227 Ga. 608, 182 S.E.2d 112 (1971) (see O.C.G.A. § 34-9-104).

Repayment of benefits. — The administrative law judge was authorized to order repayment of benefits only dating back to the last award of benefits and could not require the worker to repay benefits received prior to that date. *Aldrich v. City of Lumber*

City, 273 Ga. 461, 542 S.E.2d 102 (2001).

Subsection (b) of O.C.G.A. § 34-9-104 is prospective to the extent that it applies only to any action taken on or after its effective date but retrospective to the extent that it is applicable to pending cases in which the accident or injury occurred prior to its effective date. *Hart v. Owens-Illinois, Inc.*, 161 Ga. App. 831, 289 S.E.2d 544 (1982).

The two-year statute of limitations in subsection (b) of O.C.G.A. § 34-9-104 is not procedural and does not apply to injuries occurring before the 1978 effective date. *Buckley v. Sears, Roebuck & Co.*, 165 Ga. App. 838, 299 S.E.2d 744 (1983).

Since subsection (b) of O.C.G.A. § 34-9-104 creates a substantive right, the 1978 amendment to subsection (b) (Ga. L. 1978, p. 2220, § 13), providing that a proceeding based on a change of condition may not be instituted more than two years after date of final payment of benefits, does not apply to a case where the claimant's injury occurred prior to July 1, 1978, the effective date of the amendment. *Hart v. Owens-Illinois, Inc.*, 250 Ga. 397, 297 S.E.2d 462 (1982).

For proceedings based on a change in condition where the claimant's injury occurred prior to July 1, 1978, the provisions of subsection (b) of O.C.G.A. § 34-9-104 as it appeared prior to the 1978 amendment (Ga. L. 1978, p. 2220, § 13) apply and bar the proceeding if instituted more than two years after notification of final payment was received by the Board of Workers' Compensation. *Hart v. Owens-Illinois, Inc.*, 250 Ga. 397, 297 S.E.2d 462 (1982).

Two-year limitations period established in subsection (b) of O.C.G.A. § 34-9-104 was inapplicable to claimant whose original injury occurred prior to the effective date of the 1978 amendment to that section, and prior provision, under which limitations period began to run after the board was notified that final payment of claim had been made pursuant to a board order, was applicable. *Coosa Baking Co. v. Thomas*, 165 Ga. App. 313, 299 S.E.2d 145 (1983).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 609 et seq.

C.J.S. — 100 C.J.S., Workers' Compensation,

§ 514. 101 C.J.S., Workers' Compensation, §§ 1501 et seq., 1550.

ALR. — Workmen's compensation: power

or duty of commission to direct payment to another of balance remaining unpaid upon award at termination of right of person to whom it was originally made, 108 ALR 158.

Workmen's compensation: character or status of right or claim within provision of act requiring or authorizing approval by the court or commission of settlement or compromise, 153 ALR 285.

Retroactive application of statutes regarding enforcement of awards under Workmen's Compensation Acts, 155 ALR 558.

Workmen's compensation: time and jurisdiction for review, reopening, modification, or reinstatement of award or agreement, 165 ALR 9.

Workmen's compensation: crediting employer or insurance carrier with earnings of employee reemployed, or continued in employment, after injury, 175 ALR 725; 84 ALR2d 1108.

Workmen's compensation: crediting employer or insurance carrier with earnings of employee reemployed, or continued in employment, after injury, 84 ALR2d 1108.

Workers' compensation: incarceration as terminating benefits, 54 ALR4th 241.

Workers' compensation: reopening lump-sum compensation payment, 26 ALR5th 127.

34-9-105. When award deemed final; appeal to superior court; grounds for setting aside decisions; appeal to Court of Appeals.

(a) Any award of the administrative law judge provided for in Code Section 34-9-102 for which no timely application for review has been filed or any award of the members of the board upon such review as provided in Code Section 34-9-103 shall, in either event, as the case may be, and subject to the other provisions of this chapter, be a final award and shall be conclusive and binding as to all questions of fact.

(b) Either party to the dispute may, within 20 days from the date of any such final award or within 20 days from the date of any other final order or judgment of the members of the board, but not thereafter, appeal from the decision in such final award or from any other final decision of the board to the superior court of the county in which the injury occurred or, if the injury occurred outside the state, to the superior court of the county in which the original hearing was held, in the manner and upon the grounds provided in this Code section. Said appeal shall be filed with the board in writing stating generally the grounds upon which such appeal is sought. In the event of an appeal, the board shall, within 30 days of the filing of the notice of appeal with the board, transmit certified copies of all documents and papers in its file together with a transcript of the testimony taken and its findings of fact and decision to the clerk of the superior court to which the case is appealable, as provided in this subsection. The case so appealed may then be brought by either party upon ten days' written notice to the other before the superior court for a hearing upon such record, subject to an assignment of the case for hearing by the court; provided, however, if the court does not hear the case within 60 days of the date of docketing in the superior court, the decision of the board shall be considered affirmed by operation of law unless a hearing originally scheduled to be heard within the 60 days has been continued to a date certain by order of the court. In the event a hearing is held later than 60 days after the date of docketing in

the superior court because same has been continued to a date certain by order of the court, the decision of the board shall be considered affirmed by operation of law if no order of the court disposing of the issues on appeal has been entered within 20 days after the date of the continued hearing. If a case is heard within 60 days from the date of docketing in the superior court, the decision of the board shall be considered affirmed by operation of law if no order of the court dispositive of the issues on appeal has been entered within 20 days of the date of the hearing. *

(c) The findings made by the members within their powers shall, in the absence of fraud, be conclusive; but upon such hearing the court shall set aside the decision if it is found that:

- (1) The members acted without or in excess of their powers;
- (2) The decision was procured by fraud;
- (3) The facts found by the members do not support the decision;
- (4) There is not sufficient competent evidence in the record to warrant the members making the decision; or
- (5) The decision is contrary to law.

(d) No decision of the board shall be set aside by the court upon any grounds other than one or more of the grounds stated in subsection (c) of this Code section. In the event a hearing is not held and a decision is not rendered by the superior court within the time provided in subsection (b) of this Code section, the decision of the board shall, by operation of law, be affirmed. The date of entry of judgment for purposes of appeal pursuant to Code Section 5-6-35 of a decision affirmed by operation of law without action of the superior court shall be the last date on which the superior court could have taken action under subsection (b) of this Code section. Upon the setting aside of any such decision of the board, the court may recommit the controversy to the board for further hearing or proceedings in conformity with the judgment and opinion of the court; or such court may enter the proper judgment upon the findings, as the nature of the case may demand. Such decree of the court shall have the same effect and all proceedings in relation thereto shall, subject to the other provisions of this chapter, thereafter be the same as though rendered in an action heard and determined by the court.

(e) Any party in interest who is aggrieved by a judgment entered by the superior court upon an appeal from a decision of the board to the superior court may have such judgment reviewed by the Court of Appeals within the time and in the manner provided by law. In case of an appeal from the decision of the board, the appeal shall operate as a supersedeas if the employer has complied with the provisions of this chapter respecting insurance; and no such employer shall be required to make payment of the award involved in the questions made in the case so appealed until such

questions at issue therein shall have been fully determined in accordance with this chapter. (Ga. L. 1920, p. 167, § 59; Code 1933, § 114-710; Ga. L. 1963, p. 141, § 15; Ga. L. 1979, p. 619, § 4; Ga. L. 1987, p. 806, § 3; Ga. L. 1988, p. 535, § 1; Ga. L. 1988, p. 1679, § 20; Ga. L. 1989, p. 579, § 2; Ga. L. 1997, p. 1367, § 4.)

Cross references. — Procedure for appeals from decisions of superior courts reviewing decisions of the board, § 5-6-35.

Editor's notes. — Ga. L. 1988, p. 535, § 2, not codified by the General Assembly, provided: "This Act shall become effective on July 1, 1988, and shall apply to all awards or decisions of the administrative law judges or members of the State Board of Workers' Compensation issued on or after July 1, 1988."

Law reviews. — For article surveying developments in Georgia workers' compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981). For annual

survey of workers' compensation, see 38 Mercer L. Rev. 431 (1986). For annual survey of law of workers' compensation, see 56 Mercer L. Rev. 479 (2004). For annual survey of workers' compensation law, see 58 Mercer L. Rev. 453 (2006).

For note discussing compensation under this chapter for original injuries aggravated by subsequent injury, continued employment, or ordinary activity, see 31 Mercer L. Rev. 325 (1979).

For comments on Baggett Transp. Co. v. Barnes, 108 Ga. App. 68, 132 S.E.2d 229 (1963), see 26 Ga. B.J. 214 (1963); 16 Mercer L. Rev. 357 (1964).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

TRANSMITTAL OF RECORD

FINDINGS AND AWARDS, GENERALLY

CONCLUSIVE EFFECT OF FINDINGS OR AWARD

RECOMMITMENT, REMAND, OR ENTRY OF JUDGMENT

SUPERSEDEAS

General Consideration

Constitutionality of the provision as to the finality and binding effect of the award and findings of fact of the board, see *City of Macon v. Benson*, 176 Ga. 502, 166 S.E. 26 (1932).

Regarding the unconstitutionality of the 1963 amendment to former Code 1933, § 114-710, Ga. L. 1963, p. 141, § 15, see *Baggett Transp. Co. v. Barnes*, 108 Ga. App. 68, 132 S.E.2d 229 (1963), for comments, see 26 Ga. B.J. 214 (1963) and 16 Mercer L. Rev. 357 (1964).

Superior court's jurisdiction is defined by this section. — Jurisdiction of the superior court in cases appealed from the department (now board) is not as provided in other laws relating to appeals, but is as defined in Ga. L. 1920, p. 167, § 59 (see O.C.G.A. § 34-9-105). *Department of Indus. Relations v. Travelers' Ins. Co.*, 177 Ga. 669,

170 S.E. 883, answer conformed to, 47 Ga. App. 553, 171 S.E. 169 (1933).

Superior courts have jurisdiction of the person and subject matter in appeals from awards of the board. *Bentley v. Buice*, 102 Ga. App. 101, 115 S.E.2d 706 (1960).

O.C.G.A. § 34-9-105 confers subject matter jurisdiction on the superior courts of this state. *Fowler v. Aetna Cas. & Sur. Co.*, 159 Ga. App. 190, 283 S.E.2d 69 (1981).

The venue provisions of O.C.G.A. § 34-9-105 do not limit the subject matter jurisdiction of the superior courts of this state. *Fowler v. Aetna Cas. & Sur. Co.*, 159 Ga. App. 190, 283 S.E.2d 69 (1981).

O.C.G.A. § 34-9-105 allows a superior court not only to exercise its appellate power to review board decisions, but in cases of alleged fraud it grants the superior court the power to consider evidence of such fraud which may be presented to the superior court for the first time on appeal. This

procedure, establishing a dual role for the superior court as both a trial court and an appellate court in workers' compensation appeals, promotes judicial economy and the prevention of abuses in this governmentally administered program. *Dennington v. Rockdale Package Stores, Inc.*, 161 Ga. App. 450, 288 S.E.2d 709 (1982).

Amendment of subsection (b). — Where an award of the appellate division was affirmed by operation of law because of the failure to hold a hearing within 60 days after the notice of appeal was filed, the 1997 amendment of O.C.G.A. § 34-9-105(b), giving the court 60 days from the docketing of the appeal, could not be applied retroactively to change an award that had become final almost a year before the effective date of the amendment. *Truckstops of Am., Inc. v. Ingram*, 229 Ga. App. 616, 494 S.E.2d 709 (1998).

Failure to hear case within 60 days jurisdictional. — Where almost six months elapsed after notice of appeal was filed but before the record was transmitted to the superior court, and the record contained no indication that the superior court heard the case at any time within the 60-day statutory limit, the court lost jurisdiction of the case 60 days after the notice of appeal was filed. The superior court having lost jurisdiction by operation of law, any order entered was a nullity and could not serve as a basis for appeal. *Synthetic Indus. v. Camp*, 196 Ga. App. 637, 396 S.E.2d 518 (1990).

Where the appeal from the full board to the superior court was not timely heard in accordance with O.C.G.A. § 34-9-105(b), the decision of the full board was affirmed by operation of law and the trial court had no jurisdiction to review the merits of the case or remand the case to the board. *Lanier v. Jim Brown Dev. Corp.*, 199 Ga. App. 255, 404 S.E.2d 626 (1991).

Despite both parties agreement to waive oral argument and submit the case on briefs, where no hearing was held or order entered within 60 days after the notice of appeal was filed, the superior court lost jurisdiction of the case by operation of law and its order was a nullity. *Borden, Inc. v. Holland*, 212 Ga. App. 820, 442 S.E.2d 916 (1994).

An award of attorney fees under O.C.G.A. § 9-15-14 that was not completed within the time limitations of O.C.G.A. § 34-9-105(b)

was a nullity because, once the time limitation had run, the court was without subject matter jurisdiction. *Taylor Timber Co. v. Baker*, 226 Ga. App. 211, 485 S.E.2d 819 (1997).

Automatic affirmance. — O.C.G.A. § 34-9-105(b) does not require that the superior court enter a written order within the 60-day limit to avoid automatic affirmance. *Travelers Ins. Co. v. McNabb*, 201 Ga. App. 297, 410 S.E.2d 788, cert. denied, 201 Ga. App. 904, 410 S.E.2d 788 (1991), overruled on other grounds, *Yoho v. Ringier of Am., Inc.*, 263 Ga. 338, 434 S.E.2d 57 (1993).

Effect of continuing hearing beyond 60-day limit. — The policy promoting speedy resolution of workers' compensation cases was not violated by allowing the trial court to continue the hearing to a date certain outside the 60-day period from the date the notice of appeal was filed in order to allow the parties 10 days' notice. *Felton Pearson Co. v. Nelson*, 260 Ga. 513, 397 S.E.2d 431 (1990).

Continuance of case to a date certain. — In the case of an appeal from a decision of the state board of workers' compensation, an order of the court providing that the hearing would "be continued for an additional 90 days, through and including 18 December 1993, to allow for another judge to be assigned to the case" clearly continued the case to a "date certain" within the meaning of O.C.G.A. § 34-9-105(b). *Fulton County Bd. of Workers' Comp. v. Robinson*, 215 Ga. App. 378, 450 S.E.2d 850 (1994).

Order not entered in time deemed nullity. — Where a superior court order affirming an award of the board was not entered within 20 days from the date of the hearing on the appeal, the order was a nullity and could not serve as a basis for appeal to the Court of Appeals. *Coronet Carpets v. Reynolds*, 199 Ga. App. 383, 405 S.E.2d 103, cert. denied, 199 Ga. App. 905, 405 S.E.2d 103 (1991).

Court order must dispose of issues. — A superior court's order which merely announced the court's intention to issue an order in the future which would be dispositive of the issues and which, although providing the award, was reversed in part and affirmed in part, did not state the parts of the award affirmed or reversed, the prevailing party, nor the disposition of the ap-

General Consideration (Cont'd)

peal, was not dispositive of the issues in the case and, therefore, in accordance with the terms of O.C.G.A. § 34-9-105(b), the decision of the full board was affirmed by operation of law. *Miller v. Merck & Co.*, 199 Ga. App. 722, 405 S.E.2d 761 (1991).

Resetting time of hearing after continuance. — There was no violation of the letter or the spirit of the statute, where the original hearing date was set within the prescribed 60 days, as was an initial continuance, and a second resetting within the initially extended time frame was made in order to attempt to satisfy the ten-day notice requirement to the party responding to the appeal below, precipitated by the responding party's mistake of fact that statutory notice had not been given. *Action Staffing v. Spalding Ford-Lincoln-Mercury*, 198 Ga. App. 764, 403 S.E.2d 61, cert. denied, 198 Ga. App. 897, 403 S.E.2d 61 (1991).

O.C.G.A. § 34-9-105 does not make scheduling a hearing mandatory upon the superior court. *West Marietta Hdwe. v. Chandler*, 227 Ga. App. 436, 489 S.E.2d 584 (1997).

This section established procedure whereby an appeal may be taken from the decision in a workers' compensation award. *Aetna Cas. & Sur. Co. v. Allstate Ins. Co.*, 150 Ga. App. 345, 258 S.E.2d 31 (1979) (see O.C.G.A. § 34-9-105).

Judicial review restricted to method prescribed by statute. — The right to have an award by the board reviewed by the superior court is restricted by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) to the method herein prescribed, which is by appeal to the superior court of the county in which the injury occurred. *Porter v. Employers Liab. Ins. Co.*, 85 Ga. App. 497, 69 S.E.2d 384 (1952).

Right to judicial review of an award of the commission (now board) is restricted to the method prescribed by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Dudley v. Sears, Roebuck & Co.*, 115 Ga. App. 411, 154 S.E.2d 699 (1967).

Board cannot remit case without appeal by party. — Board has no authority to remit a case to the superior court without appeal by a party. *McDevitt & Street Co. v. Trammell*, 193 Ga. App. 646, 389 S.E.2d 3 (1989).

For information on the effect of Ga. L. 1965, p. 18, § 19 (see O.C.G.A. § 5-6-50) on procedure for appealing workers' compensation claims, see *Peters v. Liberty Mut. Ins. Co.*, 113 Ga. App. 41, 147 S.E.2d 26 (1966).

Form of appeal. — Application for appeal must be in writing, must state generally the grounds on which the appeal is sought, and must be signed by the applicant, or the applicant's attorney, or some other authorized person, in order to give it validity and effect. *Scott v. Minor*, 55 Ga. App. 714, 191 S.E. 263 (1937).

It was not essential to valid appeal that exact language of former Code 1933, § 114-710 (see O.C.G.A. § 34-9-105) be embodied in the assignment of error; it was sufficient if the appeal can reasonably be construed as assigning error on one of the grounds provided for by that section. *Thompson v. Walker*, 99 Ga. App. 748, 109 S.E.2d 833 (1959); *Truckstops of Am., Inc. v. Ingram*, 220 Ga. App. 289, 469 S.E.2d 425 (1996).

Appeal as exclusive remedy for erroneous finding. — Where all allegations of fact were introduced before the board, and its finding was erroneous as a matter of law, the remedy was to appeal from the ruling of the board and have it corrected as provided by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), and an aggrieved party could not, by failure to appeal from such decision, bring suit in another forum and rely on such erroneous decision to confer jurisdiction in the superior court in contravention of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) which confers exclusive jurisdiction in the board. *Minchew v. Huston*, 66 Ga. App. 856, 19 S.E.2d 422 (1942).

Essential element of appeal is finality; this is shown in use of the phrases "final award," "final order or judgment," and "any other final decision." *Garner v. Owens-Illinois Glass Container*, 134 Ga. App. 917, 216 S.E.2d 709 (1975).

Award denying compensation was an appealable order, and it became final when no timely appeal was filed. *McDevitt & Street Co. v. Trammell*, 193 Ga. App. 646, 389 S.E.2d 3 (1989).

Res judicata and estoppel by judgment are applicable to awards of the board of workers' compensation on all questions of fact in

matters in which it has jurisdiction. *Woods v. Delta Air Lines*, 237 Ga. 332, 227 S.E.2d 376 (1976); *Mimms v. Sisk Decorating Co.*, 156 Ga. App. 572, 275 S.E.2d 148 (1980).

O.C.G.A. § 34-9-105(b) is designed to expedite the disposition of workers' compensation claims that have been appealed to the courts of this state. *Felton Pearson Co. v. Nelson*, 260 Ga. 513, 397 S.E.2d 431 (1990).

Time for appeal to superior court. — Appellants should be afforded 20 days from the date of certification and transmittal of the record by the board to the clerk of the superior court in which to request a hearing before the superior court and to file briefs therein. *Southeastern Aluminum Recycling, Inc. v. Rayburn*, 251 Ga. 365, 306 S.E.2d 240 (1983).

Appeal period commences when award is issued. — The date when the 30-day (now 20-day) period for appeal in O.C.G.A. § 34-9-105(b) commences is not the date of the full board's vote but the date that the award is issued by the full board. *Aetna Cas. & Sur. Co. v. Barden*, 179 Ga. App. 442, 346 S.E.2d 588 (1986).

Award final where no exception taken. — Where no exception is taken to an award denying compensation, such award becomes final, unless it is shown that an alleged change in condition resulted from the accident which caused the first injury. *Swift & Co. v. Ware*, 53 Ga. App. 500, 186 S.E. 452 (1936).

Failure to appeal makes award final. — Failure to appeal within the time specified makes award of single commissioner (now administrative law judge) final. *American Mut. Liab. Ins. Co. v. Lindsey*, 63 Ga. App. 658, 11 S.E.2d 512 (1940).

Award not timely appealed is res judicata. — If an award is not supported by sufficient competent evidence and is contrary to law because it was without evidence to support it, but was not appealed on these grounds within the time provided by law, such award is res judicata. *Lavender v. Zurich Ins. Co.*, 110 Ga. App. 196, 138 S.E.2d 118 (1964).

The superior court erred in determining that the original award of attorney's fees should be reversed for a lack of sufficient evidence to support it where no appeal was taken before the time for appeal had passed. The only issue that the superior court was authorized to consider was whether the sub-

sequent construction of the original award as evidencing an award of add-on attorney's fees was correct. *Dawson v. Atlanta Processing Co.*, 190 Ga. App. 293, 378 S.E.2d 695 (1989).

Appeal may be made from board member's award. — An appeal to the superior court may be made from award of a single director (now member or administrative law judge) in workers' compensation proceedings. *American Mut. Liab. Ins. Co. v. Williams*, 75 Ga. App. 129, 42 S.E.2d 578 (1947).

Appeal to full board as waiver of direct appeal to superior court. — Appeal from the award of a single director (now member or administrative law judge) to the full board within 30 (now 20) days from the date of the award would be a waiver of the right of the appellant to appeal from such award directly to the superior court. *Rose City Foods, Inc. v. Usry*, 86 Ga. App. 307, 71 S.E.2d 649 (1952).

Timely application may reopen case as de novo proceeding. — Award of director (now member or administrative law judge) is final and conclusive only when no application for review is timely filed with the full board; when timely application for review is made by any party, the case is reopened as a de novo proceeding to all parties concerned. *Thornberg v. Richmond County Bd. of Educ.*, 110 Ga. App. 676, 139 S.E.2d 454 (1964).

Termination of compensation on change in condition as final award. — Determination of the board as to a change in condition, resulting in termination of right to compensation, unless appealed from, is a final award and is binding and conclusive as to all questions of fact and entitled to res judicata effect in subsequent actions in the superior court to recover for overpayment of benefits. *Seaboard Fire & Marine Ins. Co. v. Smith*, 146 Ga. App. 893, 247 S.E.2d 607 (1978).

Approved agreement res judicata. — Agreement fixing compensation between employer and employee, approved by the board and not appealed from, is res judicata as to matters therein determined, and the parties are precluded from thereafter contradicting or challenging matters thus agreed upon. *Travelers Ins. Co. v. Hammond*, 90 Ga. App. 595, 83 S.E.2d 576 (1954).

General Consideration (Cont'd)

Finality absent appeal by claimant of award favorable to one of two employers. — Where an employee filed a claim against two employers and the board made an award against one of them but not against the other, and the employee did not appeal, within the time prescribed, from the award insofar as it was favorable to one of the employers, the award became final as to this employer; and when the employer against whom the award was made appealed and obtained a reversal in the superior court, the employer on appeal from the judgment of the superior court was not entitled to review by the Court of Appeals of the question of the other employer's liability. *Bryant v. J.C. Distributions, Inc.*, 108 Ga. App. 401, 133 S.E.2d 109 (1963).

Distinction between finality of awards granting and denying compensation is that case is kept pending where compensation is awarded, while judgment denying compensation in the first instance is a final judgment, ending the entire case for all purposes, in which case the only remedy is an appeal within the time prescribed. *United States Fid. & Guar. Co. v. Garner*, 76 Ga. App. 87, 45 S.E.2d 109 (1947); *Travelers Ins. Co. v. Haney*, 92 Ga. App. 319, 88 S.E.2d 492 (1955).

Right of appeal from unfavorable award. — Award finding that claimant was entitled to any benefits provided by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), whether medical expenses, weekly payments, or other payments, would constitute an award favorable to claimant, from which adverse party would have the right of appeal; likewise, if claimant thinks an award inadequate, appeal would lie in claimants behalf. *Chevrolet Div., GMC v. Dempsey*, 212 Ga. 560, 93 S.E.2d 703 (1956).

General Assembly contemplated only that final awards be appealed from the board to the superior courts. *Garner v. Owens-Illinois Glass Container*, 134 Ga. App. 917, 216 S.E.2d 709 (1975).

The workers' compensation act, O.C.G.A. § 34-9-1 et seq., makes no provision for an appeal to the superior court from a decision by the full board other than one which grants or denies compensation. *Conwood Corp. v. Guinn*, 190 Ga. App. 595, 379 S.E.2d 621 (1989).

Nowhere in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is there provision for an interlocutory appeal, and undoubtedly this is by design, since its goal is to provide a speedy disposition of claims of injured employees. *Garner v. Owens-Illinois Glass Container*, 134 Ga. App. 917, 216 S.E.2d 709 (1975).

Award final despite failure to address potential item covered by Act. — Fact that there was no final disposition of a potential item covered by the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., that of current or future medical expenses not addressed by an award of an administrative law judge, did not nullify the finality of the board's award and preclude appeal to the superior court. *K-Mart Corp. v. Anderson*, 163 Ga. App. 493, 295 S.E.2d 186 (1982).

Finality of award where attorney fees not finally determined. — Where pursuant to award under O.C.G.A. § 34-9-108, the issue of attorney fees has not been finally determined, the board's ruling is not final, and the superior court lacks jurisdiction to hear an appeal from the ruling. *Farist v. Blue Ridge Carpet Mills*, 162 Ga. App. 586, 291 S.E.2d 741 (1982).

Order of board overruling motion to dismiss not appealable. — Order of the full board overruling a motion to dismiss left the claim pending before the board for hearing, just as though such motion had not been filed, and settled nothing so far as the right to or amount of compensation was concerned; it was accordingly not an appealable order under this section. *Milledgeville State Hosp. v. Clodfelter*, 99 Ga. App. 49, 107 S.E.2d 289 (1959); *State Hwy. Dep't v. Cooper*, 104 Ga. App. 130, 121 S.E.2d 258 (1961) (see O.C.G.A. § 34-9-105).

Grant of request for change of physicians not appealable. — There was no provision in this section for a hearing on the question of whether claimant shall be authorized to change physicians, and the board's order granting claimant's request for a change of physicians was not appealable under that section. *Travelers Ins. Co. v. Sams*, 116 Ga. App. 531, 157 S.E.2d 823 (1967) (see O.C.G.A. § 34-9-105).

Only direct appeal to superior court from report of medical board is one which is taken from the award of the full board pursuant to O.C.G.A. § 34-9-105 and which

enumerates the grounds stated in § 34-9-312(e) [repealed]. *Seitzingers, Inc. v. Barnes*, 161 Ga. App. 855, 289 S.E.2d 315 (1982).

Order on a discovery dispute covered an interlocutory matter and was not a final order or award granting or denying compensation; thus, the issues involved could not be reviewed upon the entry thereof. *Cartwright v. Midtown Hosp.*, 243 Ga. App. 828, 534 S.E.2d 504 (2000).

Illegal admission or exclusion of evidence not new ground of appeal. — Although former Code 1933, § 114-707 (see O.C.G.A. § 34-9-102) provided an opportunity for opposing counsel to object to medical reports, it did not provide a new ground of appeal based on the contention that evidence was illegally admitted or excluded. *Nationwide Mut. Ins. Co. v. Porter*, 150 Ga. App. 513, 258 S.E.2d 135 (1979).

Appealability of superior court judgment recommitting case to board. — When court deferred judgment on appeal and recommitting the case to the board, it lost jurisdiction thereof and deprived claimant of the benefit of an award in claimant's favor; such judgment was tantamount to a judgment setting the award aside, and so was subject to a direct bill of exceptions (now appeal) to the Court of Appeals. *Butler v. Fidelity & Cas. Co.*, 88 Ga. App. 620, 76 S.E.2d 813 (1953).

Frivolous appeals provision inapplicable. — The provisions of O.C.G.A. § 5-3-31 providing for the award of attorney's fees against a party bringing a frivolous appeal do not apply to appeals to the superior court of decisions of the Workers' Compensation Board pursuant to O.C.G.A. § 34-9-105. *Butlerhouse Maintenance Co. v. Greeson*, 174 Ga. App. 637, 331 S.E.2d 46 (1985).

Waiver of questions not raised below. — Where defendant failed to raise question of venue before the director (now member), and made no appeal to the full board, defendant waived this defense, and could not raise it for the first time on appeal to the superior court. *Great Atl. & Pac. Tea Co. v. Wilson*, 48 Ga. App. 34, 171 S.E. 827 (1933).

Where an application for an award of damages is made to the commission (now board), questions not raised when the case is heard by one of the commissioners (now administrative law judges), or on appeal to the full commission (now board), cannot be

raised for the first time on appeal to the superior court. *Integrity Mut. Cas. Co. v. Hankins*, 33 Ga. App. 339, 126 S.E. 554 (1925); *Martin v. United States Fid. & Guar. Co.*, 58 Ga. App. 59, 197 S.E. 660 (1938).

If claimant does not seek review by the full board or the superior court of an issue within the time prescribed, the award becomes final as to that issue, and claimant will not be entitled to review by the Court of Appeals of the issue that was not appealed in time. *Bryant v. J.C. Distribs., Inc.*, 108 Ga. App. 401, 133 S.E.2d 109 (1963).

Constitutional challenges must be raised first in the workers' compensation tribunal in order to be considered on appeal to the superior court. *Harrison v. Southern Tale Co.*, 245 Ga. 212, 264 S.E.2d 2 (1980).

Judgment to be based on record as transmitted. — There is no provision for the introduction of evidence in the superior court in a case where compensation is sought for an injury and the case is on appeal to that court from an award of the board; the judgment of the superior court must be based on the record as transmitted to it by the board. *Burdett v. Aetna Life Ins. Co.*, 40 Ga. App. 92, 149 S.E. 55 (1929).

Facts upon which the superior court is authorized to exercise jurisdiction in an appeal from the board are those, and only those, contained in the record transmitted to it by the board. *Turner v. American Mut. Liab. Ins. Co.*, 109 Ga. App. 721, 137 S.E.2d 385 (1964).

Record, as presented to superior court, must authorize findings of the board; if such findings are not so authorized, such award must be reversed. *Clay v. Aetna Cas. & Sur. Co.*, 102 Ga. App. 498, 116 S.E.2d 686 (1960); *Turner v. American Mut. Liab. Ins. Co.*, 109 Ga. App. 721, 137 S.E.2d 385 (1964).

No authority of courts to consider deposition not considered by board. — Superior court and Court of Appeals were without authority to consider the deposition of a physician included in the record but not offered at a change of condition hearing and not considered by the hearing officer or the full board, even though it might have afforded some basis for comparison with the evidence actually adduced to show a change of condition. *Hartford Accident & Indem. Co. v. Dutton*, 116 Ga. App. 535, 158 S.E.2d 272 (1967).

General Consideration (Cont'd)

Sole fact-finding body under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is the board. *Bituminous Cas. Co. v. Dyer*, 62 Ga. App. 279, 7 S.E.2d 415 (1940).

Exclusive authority to make findings of fact in claims under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is vested in Board of Workers' Compensation. *General Accident, Fire & Life Assurance Corp. v. Titus*, 104 Ga. App. 85, 121 S.E.2d 196 (1961).

Exclusive authority to make findings of fact in claims under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is vested in Board of Workers' Compensation, and neither the superior court nor the Court of Appeals has authority to substitute itself as a fact-finding body in lieu of the board. *Employees Ins. Co. v. Amerson*, 109 Ga. App. 275, 136 S.E.2d 12 (1964).

Awards not predicated on facts meaningless. — Award of the board, which is not predicated upon findings of fact made by the board but rather upon findings made by the superior court, which is without power and authority to make an award, is like a verdict which is wholly unsupported by any competent evidence and is contrary to law. *Employees Ins. Co. v. Amerson*, 109 Ga. App. 275, 136 S.E.2d 12 (1964).

Acceptance of untimely brief. — Permitting the claimant's untimely brief to be accepted without also permitting the employer to respond to that brief denied the employer its rights under the rules and thus was in excess of the board's power. *Times-Georgian v. Thompson*, 201 Ga. App. 854, 412 S.E.2d 871 (1991).

Courts do not have authority to substitute themselves as fact-finding bodies in lieu of the board. *Mission Ins. Co. v. Ware*, 143 Ga. App. 550, 239 S.E.2d 162 (1977).

Courts are not fact finders. — On appeal from an award of the board to the superior court, superior court is not vested with any fact-finding power. *Callaway Mills Co. v. Hurley*, 104 Ga. App. 811, 123 S.E.2d 7 (1961); *Employees Mut. Liab. Ins. Co. v. Young*, 134 Ga. App. 369, 214 S.E.2d 381 (1975).

Trial court erred in determining that future medical expenses related to a heart condition were not compensable after af-

firming an award of workers' compensation to an injured employee for expenses arising out of the heart attack, which was found to have been occasioned by a fall from a ladder; the trial court exceeded the scope of its authority under O.C.G.A. § 34-9-105(c), as that issue had not been considered by the workers' compensation administrative law judge or on administrative appeal, and the trial court had no authority to make findings of fact. *Sears v. Macon Water Auth.*, 276 Ga. App. 194, 622 S.E.2d 867 (2005).

Board is presumed, absent showing to the contrary, to have based award only on legal evidence having probative value. *Zurich Ins. Co. v. Hightower*, 113 Ga. App. 503, 148 S.E.2d 464 (1966).

Court of Appeals must examine record. — It is mandatory upon the Court of Appeals to examine record to see if there is sufficient competent evidence therein to support the award. *Chevrolet-Atlanta Div., GMC v. Nash*, 81 Ga. App. 671, 59 S.E.2d 681 (1950).

Effect, on standard of review, of affirmance by operation of law. — The Court of Appeals will apply the same principles of review to an affirmance of the board's award by operation of law that it would apply had such an affirmance been by order of a superior court. *Travelers Ins. Co. v. Adkins*, 200 Ga. App. 278, 407 S.E.2d 775 (1991).

Effect on motion to vacate and re-enter judgment. — In a workers' compensation case, when the trial court did not send the parties its judgment as required by O.C.G.A. § 15-6-21(c), it erred in denying the employer's motion under O.C.G.A. § 9-11-60(g) to vacate and re-enter the judgment so that the employer could file a timely appeal; O.C.G.A. § 34-9-105(b) did not prevent granting of the motion because the trial court complied with its time limitations, and it was improper for the trial court to decide the motion based upon its determination that the employer knew or should have known that a judgment had been entered. *Wal-Mart Stores, Inc. v. Parker*, 283 Ga. App. 708, 642 S.E.2d 387 (2007).

Courts cannot weigh evidence. — Where there is any evidence to support an award of the board, neither the superior court nor the Court of Appeals has any authority to review the evidence and decide that the weight of the evidence is contrary to such award; if such award is authorized it must be

affirmed, even though the single director and the full board based the award on an erroneous finding and conclusion of fact. *Ford v. Liberty Mut. Ins. Co.*, 99 Ga. App. 257, 108 S.E.2d 311 (1959).

Neither the superior court nor any other reviewing court has any authority to decide that the weight of the evidence is contrary to an award; competent supporting evidence is all that is required. *Fox v. Liberty Mut. Ins. Co.*, 125 Ga. App. 285, 187 S.E.2d 305 (1972).

Court of Appeals does not weigh evidence, but looks only to see if there is any evidence to support a finding supporting adjudication. *American Motorist Ins. Co. v. Ward*, 151 Ga. App. 402, 260 S.E.2d 372 (1979).

Neither the superior court nor the Court of Appeals has any authority to substitute itself as the factfinding body in lieu of the Board of Workers' Compensation. *Spalding County Comm'rs v. Tarver*, 167 Ga. App. 661, 307 S.E.2d 58 (1983).

Testimony of nonexperts as competent evidence. — Competent evidence to support a finding of the board may be supplied by the testimony of a nonexpert and lay witnesses, as well as by that of experts. *Travelers Ins. Co. v. Childers*, 110 Ga. App. 466, 138 S.E.2d 923 (1964).

Evidence which is conflicting and not altogether complete and satisfactory may be sufficient to sustain an award by the board. *Zurich Ins. Co. v. Robinson*, 127 Ga. App. 113, 192 S.E.2d 533 (1972).

"Any evidence" test applied by court. — Questions concerning credibility and preponderance address themselves to the trier of fact, whereas the appellate tribunal utilizes the "any evidence" test in workers' compensation cases. *Dixie-Cole Transf. Trucking Co. v. Fudge*, 147 Ga. App. 306, 248 S.E.2d 694 (1978).

State Board of Workers' Compensation is the factfinder in compensation cases, and its findings are reviewed under the "any evidence" rule. *Carroll v. Mission Ins. Co.*, 147 Ga. App. 262, 248 S.E.2d 542 (1978).

The issue on appeal to the superior court is whether there is "any evidence" to authorize a finding in accordance with the contentions of the prevailing party before the full board. *Cobb Gen. Hosp. v. Burrell*, 174 Ga. App. 631, 331 S.E.2d 23 (1985).

The 1994 amendment to O.C.G.A.

§ 34-9-103(a) did not change the standard of review to be applied by the superior court in reviewing the findings of the appellate division, i.e., the court may not substitute its findings for the division's findings of fact. The court is bound by the "any evidence" standard of review and is not authorized to substitute its judgment as to the weight of the evidence or credibility of the witnesses. *Owens Brockway Packaging, Inc. v. Hathorn*, 227 Ga. App. 110, 488 S.E.2d 495 (1997).

Courts should construe the evidence in the light most favorable to the prevailing party. *Davis v. Bibb Mfg. Co.*, 75 Ga. App. 515, 43 S.E.2d 780 (1947); *Lockhart v. Liberty Mut. Ins. Co.*, 141 Ga. App. 476, 233 S.E.2d 810 (1977); *Home Indem. Co. v. Swindle*, 146 Ga. App. 520, 246 S.E.2d 507 (1978).

Court, in reviewing an award by the full board denying compensation, must accept that evidence most favorable to the employer; and if, so viewed, it authorizes an award denying compensation, it must be affirmed. *Austin v. General Accident, Fire & Life Assurance Corp.*, 56 Ga. App. 481, 193 S.E. 86 (1937); *Merry Bros. Brick & Tile Co. v. Holmes*, 57 Ga. App. 281, 195 S.E. 223 (1938); *Stapleton v. American Mut. Liab. Ins. Co.*, 74 Ga. App. 86, 38 S.E.2d 848 (1946); *Malcom v. Sudderth*, 98 Ga. App. 674, 106 S.E.2d 367 (1958); *Garrett v. Employers Mut. Liab. Ins. Co.*, 105 Ga. App. 308, 124 S.E.2d 450 (1962).

Appellate court must accept that evidence most favorable to sustain the award. *Continental Cas. Co. v. Bennett*, 69 Ga. App. 683, 26 S.E.2d 682 (1943).

Decision not set aside upon assertion of newly-discovered evidence. — While the superior court does have the authority to set aside the board's decision and remand, it can do so only for one of the five statutory grounds. They do not encompass an assertion of newly-discovered evidence as such. *Action Staffing v. Spalding Ford-Lincoln-Mercury*, 198 Ga. App. 764, 403 S.E.2d 61, cert. denied, 198 Ga. App. 897, 403 S.E.2d 61 (1991).

Appeal from award cannot be converted into an original suit, either in law or equity, nor can new parties be added on appeal to the superior court from such award. *Martin v. United States Fid. & Guar. Co.*, 58 Ga. App. 59, 197 S.E. 660 (1938).

General Consideration (Cont'd)

No power to amend award so as to make defendant rather than business personally liable. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) provides for an appeal from the award itself as rendered by the commission (now board), but since the commission (now board) has no power or authority to reopen a case for the purpose of amending its award, by making it operative against one of the defendants personally instead of against the tradename under which that defendant conducted defendant's business, the superior court would also be without jurisdiction for that purpose, on appeal. *Bishop v. Bussey*, 164 Ga. 642, 139 S.E. 212 (1927).

Alleged dependent held necessary party to appeal filed by common-law wife. — Where single director (now member or administrative law judge) made an award in favor of alleged common-law wife of deceased as against alleged dependent, and this decision was appealed by the alleged dependent to the full board, who asked the board to reopen the case for additional testimony and thereby joined with the employer and insurance carrier on their appeal to the full board, the dependent was a necessary party to a bill of exceptions (appeal) subsequently filed by the alleged common-law wife after judgment of the superior court. *Grooms v. Globe Indem. Co.*, 90 Ga. App. 68, 81 S.E.2d 851 (1954).

Applicability of "in writing" requirement to superior court orders continuing hearings. — Although O.C.G.A. § 34-9-105(b) does require that the appeal filed with the board and the ten-day notice given to the opposing party be "in writing", nothing in the statute suggests that this requirement applies to superior court orders continuing hearings. *Travelers Ins. Co. v. McNabb*, 201 Ga. App. 297, 410 S.E.2d 788, cert. denied, 201 Ga. App. 904, 410 S.E.2d 748 (1991), overruled on other grounds, *Yoho v. Ringier of Am., Inc.*, 263 Ga. 338, 434 S.E.2d 57 (1993).

Cited in *Travelers Ins. Co. v. Bacon*, 30 Ga. App. 728, 119 S.E. 458 (1923); *London Guarantee & Accident Co. v. Shockley*, 31 Ga. App. 762, 122 S.E. 99 (1924); *Georgia Cas. Co. v. Martin*, 157 Ga. 909, 122 S.E. 881 (1924); *Gravitt v. Georgia Cas. Co.*, 158 Ga.

613, 123 S.E. 897 (1924); *American Mut. Liab. Ins. Co. v. Adams*, 32 Ga. App. 759, 124 S.E. 801 (1924); *Maryland Cas. Co. v. England*, 160 Ga. 810, 129 S.E. 75 (1925); *United States Fid. & Guar. Co. v. Hall*, 34 Ga. App. 307, 129 S.E. 305 (1925); *Travelers Ins. Co. v. Hamilton*, 35 Ga. App. 182, 132 S.E. 240 (1926); *United States Fid. & Guar. Co. v. Christian*, 35 Ga. App. 326, 133 S.E. 639 (1926); *Ocean Accident & Guarantee Corp. v. Martin*, 35 Ga. App. 504, 134 S.E. 174 (1926); *United States Fid. & Guar. Co. v. Bohannon*, 36 Ga. App. 34, 134 S.E. 319 (1926); *Maryland Cas. Co. v. Wells*, 35 Ga. App. 759, 134 S.E. 788 (1926); *Maryland Cas. Co. v. Miller*, 36 Ga. App. 631, 137 S.E. 788 (1927); *United States Fid. & Guar. Co. v. Washington*, 37 Ga. App. 140, 139 S.E. 359 (1927); *Savannah River Lumber Co. v. Bush*, 37 Ga. App. 539, 140 S.E. 899 (1927); *Robertson v. Aetna Life Ins. Co.*, 37 Ga. App. 703, 141 S.E. 504 (1928); *Lattimore v. Lumbermen's Mut. Cas. Co.*, 37 Ga. App. 688, 141 S.E. 669 (1928); *Metropolitan Cas. Ins. Co. v. Huhn*, 165 Ga. 667, 142 S.E. 121, 59 A.L.R. 719 (1928); *Maryland Cas. Co. v. Bartlett*, 37 Ga. App. 777, 142 S.E. 189 (1928); *Hartford Accident & Indem. Co. v. Durden*, 38 Ga. App. 182, 143 S.E. 511 (1928); *United States Fid. & Guar. Co. v. Price*, 38 Ga. App. 346, 144 S.E. 146 (1928); *Brown v. United States Fid. & Guar. Co.*, 38 Ga. App. 461, 144 S.E. 343 (1928); *Metropolitan Cas. Ins. Co. v. Dallas*, 39 Ga. App. 38, 146 S.E. 37 (1928); *Standard Accident Ins. Co. v. Pardue*, 39 Ga. App. 87, 146 S.E. 638 (1928); *Washington v. United States Fid. & Guar. Co.*, 39 Ga. App. 481, 147 S.E. 533 (1929); *Southern Sur. Co. v. Byck*, 39 Ga. App. 699, 148 S.E. 294 (1929); *Blanchard v. Savannah River Lumber Co.*, 40 Ga. App. 416, 149 S.E. 793 (1929); *City of Macon v. Whittington*, 170 Ga. 612, 154 S.E. 139 (1930); *Homes Accident Ins. Co. v. Daniels*, 42 Ga. App. 648, 157 S.E. 245 (1931); *McBrayer v. Columbia Cas. Co.*, 44 Ga. App. 59, 160 S.E. 556 (1931); *Swift & Co. v. Ware*, 53 Ga. App. 500, 186 S.E. 452 (1936); *King v. Western Union Tel. Co.*, 54 Ga. App. 388, 187 S.E. 888 (1936); *City of Hapeville v. Preston*, 54 Ga. App. 418, 188 S.E. 264 (1936); *London Guarantee & Accident Co. v. Boynton*, 54 Ga. App. 419, 188 S.E. 265 (1936); *White Provision Co. v. Culbreath*, 58 Ga. App. 628, 199 S.E. 318 (1938); *Ware v.*

Swift & Co., 59 Ga. App. 836, 2 S.E.2d 128 (1939); Whisenant v. Bostick, 61 Ga. App. 447, 6 S.E.2d 146 (1939); City of Hapeville v. Preston, 67 Ga. App. 350, 20 S.E.2d 202 (1942); Lumbermens Mut. Cas. Co. v. McIntyre, 67 Ga. App. 666, 21 S.E.2d 446 (1942); Kirkland v. Employers Liab. Assurance Corp., 195 Ga. 402, 24 S.E.2d 676 (1943); Kirkland v. Employers Liab. Assurance Corp., 69 Ga. App. 433, 25 S.E.2d 723 (1943); American Mut. Liab. Ins. Co. v. Kent, 197 Ga. 733, 30 S.E.2d 599 (1944); Patillo v. City of Atlanta, 72 Ga. App. 198, 33 S.E.2d 527 (1945); Bituminous Cas. Corp. v. Wilkes, 77 Ga. App. 764, 49 S.E.2d 916 (1948); Free v. Associated Indem. Corp., 78 Ga. App. 839, 52 S.E.2d 325 (1949); General Accident, Fire & Life Assurance Corp. v. Prescott, 80 Ga. App. 421, 56 S.E.2d 137 (1949); Hartford Accident & Indem. Co. v. Garland, 81 Ga. App. 667, 59 S.E.2d 560 (1950); Liberty Mut. Ins. Co. v. Fricks, 81 Ga. App. 727, 59 S.E.2d 671 (1950); Shealy v. Benton, 82 Ga. App. 514, 61 S.E.2d 582 (1950); American Mut. Liab. Ins. Co. v. Ellison, 82 Ga. App. 712, 62 S.E.2d 656 (1950); Liberty Mut. Ins. Co. v. Harden, 85 Ga. App. 830, 70 S.E.2d 89 (1952); Standard Accident Ins. Co. v. Gulledge, 86 Ga. App. 493, 71 S.E.2d 571 (1952); Utica Mut. Ins. Co. v. Rolax, 87 Ga. App. 733, 75 S.E.2d 205 (1953); American Mut. Liab. Ins. Co. v. King, 88 Ga. App. 176, 76 S.E.2d 81 (1953); Taylor v. Smith, 91 Ga. App. 125, 85 S.E.2d 52 (1954); American Employer's Ins. Co. v. Hardeman, 91 Ga. App. 462, 85 S.E.2d 805 (1955); Fortson v. American Sur. Co., 92 Ga. App. 625, 89 S.E.2d 671 (1955); Woodum v. American Mut. Liab. Ins. Co., 212 Ga. 386, 93 S.E.2d 12 (1956); Arnold v. Indemnity Ins. Co., 94 Ga. App. 493, 95 S.E.2d 29 (1956); Smith v. United States Fid. & Guar. Co., 94 Ga. App. 507, 95 S.E.2d 35 (1956); Weathers v. American Cas. Co., 94 Ga. App. 530, 95 S.E.2d 436 (1956); Royal Indem. Co. v. Coulter, 213 Ga. 277, 98 S.E.2d 899 (1957); Rittenhouse v. United States Fid. & Guar. Co., 96 Ga. App. 407, 100 S.E.2d 145 (1957); Sweatman v. Hartford Accident & Indem. Co., 100 Ga. App. 734, 112 S.E.2d 440 (1959); United States Fid. & Guar. Co. v. Motes, 101 Ga. App. 628, 114 S.E.2d 795 (1960); Rhodes v. Liberty Mut. Ins. Co., 101 Ga. App. 642, 115 S.E.2d 363 (1960); Royal Indem. Co. v. Warren, 102 Ga. App. 501, 116 S.E.2d 757

(1960); United States Fid. & Guar. Co. v. Gammage, 103 Ga. App. 457, 119 S.E.2d 601 (1961); American Hdwe. Mut. Ins. Co. v. Burt, 103 Ga. App. 811, 120 S.E.2d 797 (1961); Owensby v. Riegel Textile Corp., 104 Ga. App. 800, 123 S.E.2d 147 (1961); Moore v. Atlanta Transit Sys., 105 Ga. App. 70, 123 S.E.2d 693 (1961); Continental Cas. Co. v. Bump, 106 Ga. App. 826, 128 S.E.2d 525 (1962); Surgener v. American Ins. Co., 107 Ga. App. 573, 130 S.E.2d 810 (1963); Baggett Transp. Co. v. Barnes, 108 Ga. App. 68, 132 S.E.2d 229 (1963); Employers Mut. Liab. Ins. Co. v. Shipman, 108 Ga. App. 184, 132 S.E.2d 568 (1963); Travelers Ins. Co. v. Williams, 108 Ga. App. 354, 133 S.E.2d 59 (1963); American Legion Post 69 v. Undercofler, 108 Ga. App. 521, 133 S.E.2d 418 (1963); McArthur v. Roadway Express, Inc., 109 Ga. App. 30, 135 S.E.2d 67 (1964); Cofield v. Liberty Mut. Ins. Co., 110 Ga. App. 225, 138 S.E.2d 115 (1964); Petteway v. Continental Cas. Co., 112 Ga. App. 496, 145 S.E.2d 635 (1965); Proctor v. Dixie Bell Mills, Inc., 113 Ga. App. 787, 149 S.E.2d 550 (1966); Griffith v. Coggins Granite Indus., Inc., 114 Ga. App. 537, 152 S.E.2d 15 (1966); Mallory v. American Cas. Co., 114 Ga. App. 641, 152 S.E.2d 592 (1966); Fidelity & Cas. Co. v. Whitehead, 114 Ga. App. 630, 152 S.E.2d 706 (1966); Bryant v. Fidelity & Cas. Co., 114 Ga. App. 853, 152 S.E.2d 759 (1966); Commonwealth Ins. Co. v. Arnold, 114 Ga. App. 835, 152 S.E.2d 896 (1966); Blackburn v. Hall, 115 Ga. App. 235, 154 S.E.2d 392 (1967); Hartford Accident & Indem. Co. v. Ledford, 116 Ga. App. 402, 157 S.E.2d 318 (1967); National Engine Rebuilding, Inc. v. Noles, 116 Ga. App. 762, 159 S.E.2d 178 (1967); Zurich Ins. Co. v. McDuffie, 117 Ga. App. 90, 159 S.E.2d 423 (1968); Georgia Cas. & Sur. Co. v. Conner, 117 Ga. App. 233, 160 S.E.2d 436 (1968); Anderson v. GMC, 118 Ga. App. 4, 162 S.E.2d 464 (1968); Gusler v. Aetna Cas. & Sur. Co., 118 Ga. App. 846, 165 S.E.2d 877 (1968); Snider v. Liberty Mut. Ins. Co., 119 Ga. App. 118, 166 S.E.2d 379 (1969); Williams v. Bituminous Cas. Co., 121 Ga. App. 175, 173 S.E.2d 250 (1970); Cline v. Lever Bros. Co., 124 Ga. App. 22, 183 S.E.2d 63 (1971); Travelers Ins. Co. v. Merritt, 124 Ga. App. 42, 183 S.E.2d 73 (1971); Security Ins. Group v. Gillespie, 125 Ga. App. 163, 186 S.E.2d 575 (1971); Chambers v. Powell, 126 Ga. App. 393, 190 S.E.2d 823 (1972); Fox v.

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- Hartford Accident & Indem. Co., 130 Ga. App. 104, 202 S.E.2d 568 (1973); City of Atlanta v. Madaris, 130 Ga. App. 783, 204 S.E.2d 439 (1974); Fleming v. Phoenix of Hartford Ins. Co., 130 Ga. App. 771, 204 S.E.2d 460 (1974); Frost v. Morone, 130 Ga. App. 878, 204 S.E.2d 796 (1974); Employers Mut. Liab. Ins. Co. v. Miller, 131 Ga. App. 681, 206 S.E.2d 574 (1974); Greyhound Van Lines v. Collins, 132 Ga. App. 806, 209 S.E.2d 250 (1974); Hall v. West Point Pepperell, Inc., 133 Ga. App. 24, 209 S.E.2d 659 (1974); International Ins. Co. v. Whitfield, 135 Ga. App. 216, 217 S.E.2d 192 (1975); Miller v. Argonaut Ins. Co., 136 Ga. App. 101, 220 S.E.2d 89 (1975); Brown v. Lithonia Lighting Prods. Co., 138 Ga. App. 600, 226 S.E.2d 607 (1976); Cotton States Ins. Co. v. Bates, 140 Ga. App. 428, 231 S.E.2d 445 (1976); Sprayberry v. Commercial Union Ins. Co., 140 Ga. App. 758, 232 S.E.2d 111 (1976); Pike v. Greyhound Bus Lines, 140 Ga. App. 863, 232 S.E.2d 143 (1977); Carriers Ins. Co. v. McConnell, 141 Ga. App. 44, 232 S.E.2d 606 (1977); McElhannon v. St. Paul Fire & Marine Ins. Co., 141 Ga. App. 169, 233 S.E.2d 28 (1977); Smith v. Firemen's Fund Ins. Co., 141 Ga. App. 578, 234 S.E.2d 156 (1977); Hartford Ins. Co. v. White, 142 Ga. App. 307, 235 S.E.2d 740 (1977); Wills v. St. Paul Fire & Marine Ins. Co., 143 Ga. App. 562, 239 S.E.2d 219 (1977); Jones v. Utica Mut. Ins. Co., 144 Ga. App. 460, 241 S.E.2d 578 (1978); Phinazee v. Boston Old Colony Ins. Co., 146 Ga. App. 175, 245 S.E.2d 857 (1978); Liberty Mut. Ins. Co. v. Walthall, 151 Ga. App. 372, 259 S.E.2d 647 (1979); Fireman's Fund Ins. Co. v. Smith, 151 Ga. App. 270, 259 S.E.2d 675 (1979); DeKalb County Merit Sys. v. Johnson, 151 Ga. App. 405, 260 S.E.2d 506 (1979); Employers Fire Ins. Co. v. Heath, 152 Ga. App. 185, 262 S.E.2d 474 (1979); Willis v. Holloway, 154 Ga. App. 3, 267 S.E.2d 795 (1980); Village Ctrs., Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981); Roadway Express, Inc. v. Warren, 163 Ga. App. 759, 295 S.E.2d 743 (1982); Russell v. Fast Framers, Inc., 164 Ga. App. 771, 298 S.E.2d 303 (1982); City of Atlanta v. Walker, 169 Ga. App. 34, 311 S.E.2d 479 (1983); Dycol, Inc. v. Crump, 169 Ga. App. 930, 315 S.E.2d 460 (1984); Watkins Mem. Hosp. v. Chadwick, 171 Ga. App. 446, 319 S.E.2d 876 (1984); St. Regis Flexible Packaging Corp. v. Helm, 172 Ga. App. 251, 322 S.E.2d 549 (1984); C & G Clothing Co. v. Rowell, 173 Ga. App. 296, 325 S.E.2d 906 (1985); Keenan v. Jackson & Keenan Constr. Co., 175 Ga. App. 730, 334 S.E.2d 329 (1985); Clark v. Georgia Kraft Co., 178 Ga. App. 884, 345 S.E.2d 61 (1986); Wilson v. Manville Bldg. Materials Prods., Inc., 179 Ga. App. 408, 346 S.E.2d 851 (1986); McLean Trucking Co. v. Florence, 179 Ga. App. 514, 347 S.E.2d 333 (1986); Howard v. Superior Contractors, 180 Ga. App. 68, 348 S.E.2d 563 (1986); Fidelity & Cas. Ins. Co. v. Cigna/Pacific Employers Ins. Co., 180 Ga. App. 159, 348 S.E.2d 702 (1986); Ledbetter v. Pine Knoll Nursing Home, 180 Ga. App. 654, 350 S.E.2d 299 (1986); Galmon v. Seabreeze Mfg. Co., 181 Ga. App. 132, 351 S.E.2d 521 (1986); N.G. Gilbert Corp. v. Cash, 181 Ga. App. 775, 353 S.E.2d 840 (1987); Carrollton Coca-Cola Bottling Co. v. Brown, 185 Ga. App. 588, 365 S.E.2d 143 (1988); American Centennial Ins. Co. v. Flowery Branch Nursing Center, 258 Ga. 222, 367 S.E.2d 788 (1988); Levco Wood, Inc. v. Hudson, 186 Ga. App. 508, 367 S.E.2d 823 (1988); Sears, Roebuck & Co. v. Spell, 191 Ga. App. 851, 383 S.E.2d 207 (1989); AT & T Technologies v. Barrett, 195 Ga. App. 675, 395 S.E.2d 22 (1990); Coastal Transp. & Trading Co. v. Carpenter, 195 Ga. App. 789, 395 S.E.2d 266 (1990); Brown v. Transamerica IMS, 200 Ga. App. 272, 407 S.E.2d 430 (1991); Hall & Sosebee Trucking Co. v. Smith, 201 Ga. App. 282, 410 S.E.2d 784 (1991); Claxton Mfg. Co. v. Hodges, 201 Ga. App. 371, 411 S.E.2d 109 (1991); Mintz v. Norton Co., 209 Ga. App. 109, 432 S.E.2d 583 (1993); Contract Harvesters v. Clark, 211 Ga. App. 297, 439 S.E.2d 30 (1993); Gaddis v. Georgia Mt. Contractors, 213 Ga. App. 126, 443 S.E.2d 710 (1994); Pitts v. Gofer Courier Serv., 216 Ga. App. 219, 453 S.E.2d 505 (1995); Crider's Furs, Inc. v. Atkinson, 221 Ga. App. 681, 472 S.E.2d 507 (1996); Georgia-Pacific Corp. v. Arline, 225 Ga. App. 800, 484 S.E.2d 678 (1997); Logan v. St. Joseph Hosp., 227 Ga. App. 853, 490 S.E.2d 483 (1997); O'Kelley v. Hall County Bd. of Educ., 243 Ga. App. 522, 532 S.E.2d 427 (2000); AFLAC, Inc. v. Hardy, 250 Ga. App. 570, 552 S.E.2d 505 (2001); Atlas Constr. Co. v. Pena, 268 Ga. App. 566, 602 S.E.2d 151 (2004); Martines v. Worley & Sons Constr., 278 Ga. App. 26, 628 S.E.2d 113 (2006);

Goswick v. Murray County Bd. of Educ., 281 Ga. App. 442, 636 S.E.2d 133 (2006).

Transmittal of Record

Provision as to transmittal of papers directory. — Provision in this section that in the event an appeal was filed from the award of the department (now board) to the superior court the department (now board) shall, within 30 days of filing of the appeal, transmit all papers and documents then on file in their office in the matter, was directory. *Aetna Cas. & Sur. Co. v. Nuckolls*, 69 Ga. App. 649, 26 S.E.2d 473 (1943) (see O.C.G.A. § 34-9-105).

Appellant not charged with delay not caused by appellant or attorney. — Where neither appellant nor appellant's attorney was in any way connected with the delay in transmittal, so as to prevent the board from transmitting the appeal, the court should not make appellant or appellant's counsel suffer for such delay. *Aetna Cas. & Sur. Co. v. Nuckolls*, 69 Ga. App. 649, 26 S.E.2d 473 (1943).

All papers on file properly transmitted. — By virtue of this section, it was proper for the board to transmit certified copies of all papers on file in its department to the clerk of the superior court, even though such papers were not physically in the presence of the director at the hearing and were not formally introduced in evidence. *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939) (see O.C.G.A. § 34-9-105).

Findings and Awards, Generally

Board vested with exclusive authority to make findings. — While a finding by the board of a beginning point for temporary total disability benefits might have been an oversight or a typographical error, the Court of Appeals could not substitute a finding of a date inasmuch as the exclusive authority to make findings of fact in claims under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., is vested in the board. *Holt's Bakery v. Hutchinson*, 177 Ga. App. 154, 338 S.E.2d 742 (1985).

Court erred by substituting its own finding. — Since the record contained some evidence to support the Board's finding, the court erred by substituting its own finding that the employee's left knee problems were

first manifested on a much later date than determined by the Workers' Compensation Board. *Baugh-Carroll v. Hospital Authority of Randolph County*, 248 Ga. App. 591, 545 S.E.2d 690 (2001).

Findings need to refer to all evidence. — Superior court may remand a case to the board based upon uncertainty that all the evidence had been considered. Nevertheless, the mere failure to refer to all the evidence in the findings of fact does not establish that the board did not consider the evidence in its review of the matter. *Henderson v. Mrs. Smith's Frozen Foods*, 182 Ga. App. 829, 357 S.E.2d 271 (1987).

Conclusive if supported by any evidence. — The trial court erred as a matter of law in reversing the award of the State Board of Workers' Compensation because there was some evidence to support the award of the Board. *Harris v. Seaboard Farms*, 207 Ga. App. 147, 427 S.E.2d 524 (1993).

Superior court's discretion not equivalent to that exercised on petitions for certiorari or motions for new trial. — In considering an appeal from an award of the commission (now board), the judge of the superior court does not have that discretion to set aside an order or decree which the judge exercises in passing upon petitions for certiorari and motions for new trial. *Macon v. United States Fid. & Guar. Co.*, 41 Ga. App. 774, 154 S.E. 702 (1930).

Discretion of the judge of the superior court on appeal from or award of the department (now board) is not the same as on a motion for new trial of a case tried before the judge. *Sears, Roebuck & Co. v. Griggs*, 48 Ga. App. 585, 173 S.E. 194 (1934).

Judge of the superior court cannot legally set aside an order or decree of the department (now board) where there is any competent evidence to sustain it; the judge does not have that discretion which the judge may exercise in passing upon a motion for a first new trial or a petition for certiorari where the evidence would have authorized a finding or judgment for either party. *Peninsular Life Ins. Co. v. Brand*, 57 Ga. App. 526, 196 S.E. 264 (1938).

Rule as to affirmance of first grant of new trial inapplicable. — Where finding of facts by the commission (now board) is not demanded as a matter of law, though being within its power, free from fraud and sup-

Findings and Awards, Generally (Cont'd)

ported by evidence, holding of the superior court erroneously setting aside the finding, upon one of the grounds enumerated in Ga. L. 1920, p. 167, § 59 (see O.C.G.A. § 34-9-105), should not be sustained by the Court of Appeals on the theory that it was the first grant of a new trial. *Maryland Cas. Co. v. England*, 160 Ga. 810, 129 S.E. 75 (1925).

Rule of the appellate courts, as to affirmance of the first grant of a new trial, is not to be applied to a judgment of the superior court setting aside an award of the department (now board). *Sears, Roebuck & Co. v. Griggs*, 48 Ga. App. 585, 173 S.E. 194 (1934).

Discretion of judge of the superior court on appeal from an award of the board is not the same as on a motion for new trial of a case tried before the judge, and rule of the appellate courts as to affirmance of the first grant of a new trial is not to be applied to a judgment of the superior court setting aside such an award. *Davis v. Bibb Mfg. Co.*, 75 Ga. App. 515, 43 S.E.2d 780 (1947). See also *Macon v. United States Fid. & Guar. Co.*, 41 Ga. App. 774, 154 S.E. 702 (1930).

Power of the superior court to set aside an award of the board is not analogous to the power of the court to grant new trials, and an order of the court setting aside such an award should not be affirmed on the theory that it is the first grant of a new trial where the finding of the board was not demanded as a matter of law. *Travelers Ins. Co. v. Wofford*, 81 Ga. App. 421, 58 S.E.2d 853 (1950).

Newly discovered evidence is not a ground for setting aside an award, and where there is evidence in the record supporting the findings of fact and award as made, such findings and award may not be set aside merely to enable losing party to introduce additional evidence at another hearing. *Travelers Ins. Co. v. Wofford*, 81 Ga. App. 421, 58 S.E.2d 853 (1950).

Effect of newly discovered evidence. — There is no provision of law authorizing judge of superior court to set aside award of the board on the ground of newly discovered evidence. *Liberty Mut. Ins. Co. v. Ragan*, 191 Ga. 811, 14 S.E.2d 88 (1941).

In exercising appellate power granted to judges of the superior courts in regard to

workers' compensation cases, such judges are not authorized to hear evidence, but must consider only the record on appeal; newly discovered evidence is not a statutory ground for reversal, for which reason it may not be considered. *Insurance Co. of N. Am. v. Dimaio*, 120 Ga. App. 214, 170 S.E.2d 258 (1969).

If there is any evidence in the record to support them, findings and award must be affirmed. *Hardware Mut. Cas. Co. v. Mullis*, 75 Ga. App. 233, 43 S.E.2d 122 (1947); *McKerley v. United States Fid. & Guar. Co.*, 96 Ga. App. 723, 101 S.E.2d 103 (1957); *Hudgens v. Meeks & Hammond Lumber Co.*, 97 Ga. App. 95, 102 S.E.2d 71 (1958); *Troup County v. Henderson*, 104 Ga. App. 29, 121 S.E.2d 65 (1961); *Continental Cas. Co. v. Weise*, 136 Ga. App. 353, 221 S.E.2d 461 (1975); *Speight v. Container Corp. of Am.*, 138 Ga. App. 45, 225 S.E.2d 496 (1976); *International Ins. Co. v. Bachelor*, 143 Ga. App. 852, 240 S.E.2d 222 (1977).

If there is competent evidence in the record to sustain a general award denying compensation, not based on any particular unauthorized findings of fact, the reviewing court is without authority to set it aside; this is true even if some findings of fact by the board are unauthorized, whether based on findings not logically tenable or whether based on illegally admitted testimony or other evidence. *Hayslip v. Liberty Mut. Ins. Co.*, 72 Ga. App. 509, 34 S.E.2d 319 (1945).

Where an award is in favor of the employer, the claimant cannot have it set aside if there is any evidence to support it; before claimant can reverse and set aside this award, a finding for compensation must be demanded by the evidence. *Whitener v. Baly Tire Co.*, 98 Ga. App. 257, 105 S.E.2d 775 (1958).

Where there is competent evidence to support a particular finding of fact, even though the board predicates its finding on an erroneous theory, the award will not be set aside. *Skinner Poultry Co. v. Mapp*, 98 Ga. App. 772, 106 S.E.2d 825 (1958).

Where there is any evidence to sustain the findings of fact of a deputy director, a director (now member or administrative law judge), or the board, such findings and the award based thereon will not be disturbed by the courts. *Samples v. Liberty Mut. Ins. Co.*, 99 Ga. App. 41, 107 S.E.2d 574 (1959);

Crawford W. Long Hosp. v. Mitchell, 100 Ga. App. 276, 111 S.E.2d 120 (1959).

Where there is any evidence to support the award of the board, neither the superior court nor the Court of Appeals have any authority to review the evidence and decide that the weight of the evidence is contrary to the award; if authorized, the award must be affirmed, even though it was based on an erroneous finding and conclusion of fact. Liberty Mut. Ins. Co. v. Thomas, 99 Ga. App. 124, 108 S.E.2d 180 (1959).

If an award of the board is authorized by any competent evidence, it must be affirmed even if the board or hearing director (now member or administrative law judge) considered illegal evidence or assigned erroneous reasons for the award, provided that the award was not based on an erroneous legal theory which precluded consideration by the board or hearing director of evidence which, if the evidence had been considered, would have authorized a contrary result. Miller v. Travelers Ins. Co., 111 Ga. App. 245, 141 S.E.2d 223 (1965).

Any competent supporting evidence is all that is required to sustain findings of fact and an award of the full board. Rosser v. Meriwether County, 125 Ga. App. 239, 186 S.E.2d 788 (1971).

Findings and award on same footing as jury verdict. — With respect to the sufficiency of the evidence to support it, an award made by the commission (now board) stands in the Court of Appeals upon the same footing as the verdict of a jury approved by the trial judge in other cases. London Guarantee & Accident Co. v. Shockley, 31 Ga. App. 762, 122 S.E. 99 (1924); Jackson v. Lumberman's Mut. Cas. Co., 33 Ga. App. 35, 125 S.E. 515 (1924); Davis v. Bibb Mfg. Co., 75 Ga. App. 515, 43 S.E.2d 780 (1947).

Findings of fact made by the department (now board) within its powers are, in the absence of fraud, conclusive, provided there is any supporting evidence, and with respect to the sufficiency of the evidence to sustain an award, such award stands in the Court of Appeals upon the same footing as the verdict of a jury approved by a trial judge. Burdett v. Aetna Life Ins. Co., 40 Ga. App. 92, 149 S.E. 55 (1929); Liberty Lumber Co. v. Silas, 49 Ga. App. 262, 175 S.E. 265 (1934); Butler v. Mitchell, 49 Ga. App. 315, 175 S.E. 271 (1934).

With respect to the sufficiency of the evidence to support it, an award made by a single commissioner (now administrative law judge) of the commission (now board), approved by the superior court, stands in the Court of Appeals as the verdict of a jury approved by the trial judge does in other cases. Campbell Coal Co. v. Render, 48 Ga. App. 547, 173 S.E. 245 (1934).

Findings of fact of a single director of the department (now board), where approved on review by the full department (now board), stand in the Court of Appeals on the same footing as the verdict of a jury, and where supported by some competent evidence will not be disturbed. United States Fid. & Guar. Co. v. Maddox, 52 Ga. App. 416, 183 S.E. 570 (1935).

On appeal to the superior court, an award of the board stands on the same footing as the verdict of a jury which is supported by some evidence and which has been approved by the trial judge. Bituminous Cas. Corp. v. Jackson, 68 Ga. App. 447, 23 S.E.2d 191 (1942).

Where the evidence was conflicting on the material issues involved in a workers' compensation action, and there was some competent evidence to support the findings and award of the board, the award could not be set aside by the Court of Appeals; such findings and award stand on the same footing as the verdict of a jury which is authorized by the evidence and approved by the court. Davis v. American Mut. Liab. Ins. Co., 72 Ga. App. 783, 35 S.E.2d 203 (1945).

Conclusive Effect of Findings or Award

Purpose of making findings of the commission (now board) upon facts conclusive was to avoid delay, which is often the subject of the complaint. Continental Cas. Co. v. Caldwell, 55 Ga. App. 17, 189 S.E. 408 (1936).

Neither superior court nor Court of Appeals may substitute itself as factfinder in lieu of the board. Atkinson v. Home Indem. Co., 141 Ga. App. 687, 234 S.E.2d 359 (1977).

The board, not the courts, constitutes the factfinding body and its findings of fact are not to be set aside because the reviewing court disagrees with the conclusions drawn therefrom. St. Paul Ins. Co. v. Henley, 141 Ga. App. 581, 234 S.E.2d 159 (1977).

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Where there is conflicting evidence the resolution of discrepancies and the determination of witnesses' credibility is ordinarily for the administrative law judge or the board as finders of fact. Only where there is plain error of fact or an error purely of law is an appellate court authorized to reverse the board's award. *Carroll v. Dan River Mills, Inc.*, 169 Ga. App. 558, 313 S.E.2d 741 (1984).

Findings of fact are conclusive if supported by any evidence. — Findings of the commission (now board) on questions of fact, if supported by any evidence, are conclusive. *New Amsterdam Cas. Co. v. Sumrell*, 30 Ga. App. 682, 118 S.E. 786 (1923); *Independence Indem. Co. v. Sprayberry*, 171 Ga. 565, 156 S.E. 230 (1930); *Continental Cas. Co. v. Caldwell*, 55 Ga. App. 17, 189 S.E. 408 (1936); *Shivers v. Liberty Mut. Ins. Co.*, 75 Ga. App. 409, 43 S.E.2d 429 (1947); *Hamner v. White*, 80 Ga. App. 648, 56 S.E.2d 653 (1949); *Adams v. Johnson*, 88 Ga. App. 94, 76 S.E.2d 135 (1953); *Employees Mut. Liab. Ins. Co. v. Young*, 134 Ga. App. 369, 214 S.E.2d 381 (1975); *Iso-Graphics, Inc. v. Evans*, 205 Ga. App. 880, 424 S.E.2d 24 (1992); *Smith v. Brown Steel*, 232 Ga. App. 698, 503 S.E.2d 592 (1998).

Findings of facts by the board, in the absence of fraud, where supported by any evidence, are conclusive and cannot be reviewed by any court. *New Amsterdam Cas. Co. v. Sumrell*, 30 Ga. App. 682, 118 S.E. 786 (1923); *London Guarantee & Accident Co. v. Shockley*, 31 Ga. App. 762, 122 S.E. 99 (1924); *American Mut. Liab. Ins. Co. v. Adams*, 32 Ga. App. 759, 124 S.E. 801 (1924); *Jackson v. Lumberman's Mut. Cas. Co.*, 33 Ga. App. 35, 125 S.E. 515 (1924); *Integrity Mut. Cas. Co. v. Hankins*, 33 Ga. App. 339, 126 S.E. 554 (1925); *Maryland Cas. Co. v. England*, 160 Ga. 810, 129 S.E. 75 (1925); *United States Fid. & Guar. Co. v. Hall*, 34 Ga. App. 307, 129 S.E. 305 (1925); *Macon v. United States Fid. & Guar. Co.*, 41 Ga. App. 774, 154 S.E. 702 (1930); *Great Atl. & Pac. Tea Co. v. Wilson*, 48 Ga. App. 34, 171 S.E. 827 (1933); *Brown v. Lumbermen's Mut. Cas. Co.*, 49 Ga. App. 99, 174 S.E. 359 (1934); *Scott v. Travelers' Ins. Co.*, 49 Ga. App. 157, 174 S.E. 629 (1934); *Continental*

Cas. Co. v. Caldwell, 55 Ga. App. 17, 189 S.E. 408 (1936); *Continental Cas. Co. v. Bennett*, 69 Ga. App. 683, 26 S.E.2d 682 (1943); *Young v. Demos*, 70 Ga. App. 577, 28 S.E.2d 891 (1944); *Maryland Cas. Co. v. Hopkins*, 71 Ga. App. 175, 30 S.E.2d 357 (1944); *Davis v. American Mut. Liab. Ins. Co.*, 72 Ga. App. 783, 35 S.E.2d 203 (1945); *Stapleton v. American Mut. Liab. Ins. Co.*, 74 Ga. App. 86, 38 S.E.2d 848 (1946); *Glens Falls Indem. Co. v. Clark*, 75 Ga. App. 453, 43 S.E.2d 752 (1947); *Hughes v. Hartford Accident & Indem. Co.*, 76 Ga. App. 785, 47 S.E.2d 143 (1948); *Johnson v. Fireman's Fund Indem. Co.*, 79 Ga. App. 187, 53 S.E.2d 204 (1949); *Hartford Accident & Indem. Co. v. Braswell*, 85 Ga. App. 487, 69 S.E.2d 385 (1952); *Daniel v. Ford Motor Co.*, 88 Ga. App. 58, 76 S.E.2d 66 (1953); *Travelers Ins. Co. v. Hammond*, 90 Ga. App. 595, 83 S.E.2d 576 (1954); *Dill v. Ocean Accident & Guarantee Co.*, 95 Ga. App. 60, 96 S.E.2d 638 (1957); *Wiley v. Aetna Cas. & Sur. Co.*, 98 Ga. App. 241, 105 S.E.2d 377 (1958); *Atlantic Co. v. Moseley*, 99 Ga. App. 534, 109 S.E.2d 74, rev'd on other grounds, 215 Ga. 530, 111 S.E.2d 239 (1959); *Wilkins v. Employers Mut. Liability Ins. Co.*, 101 Ga. App. 467, 114 S.E.2d 216 (1960); *Hartford Accident & Indem. Co. v. Cox*, 101 Ga. App. 789, 115 S.E.2d 452 (1960); *Pan Am. Fire & Cas. Co. v. Cothran*, 109 Ga. App. 332, 136 S.E.2d 163 (1964); *Travelers Ins. Co. v. Childers*, 110 Ga. App. 466, 138 S.E.2d 923 (1964); *Jeffers v. Liberty Mut. Ins. Co.*, 115 Ga. App. 528, 154 S.E.2d 801 (1967); *Travelers Ins. Co. v. Hall*, 128 Ga. App. 71, 195 S.E.2d 679 (1973); *Dollar v. Hunt's Supermarket*, 132 Ga. App. 5, 207 S.E.2d 208 (1974); *Roberts v. L.B. Foster Co.*, 143 Ga. App. 880, 240 S.E.2d 235 (1977).

Findings of fact by the board within its power are, in the absence of fraud, binding and conclusive upon all the courts, if there is any evidence to support such findings. *Home Indem. Co. v. Googe*, 45 Ga. App. 302, 164 S.E. 479 (1932); *Ballard v. Butler*, 45 Ga. App. 837, 166 S.E. 220 (1932); *Fralish v. Royal Indem. Co.*, 53 Ga. App. 557, 186 S.E. 567 (1936); *Liberty Mut. Ins. Co. v. Holloway*, 58 Ga. App. 542, 199 S.E. 334 (1938); *McDonald-Haynes v. Minyard*, 69 Ga. App. 479, 26 S.E.2d 138 (1943); *Liberty Mut. Ins. Co. v. Blackshear*, 197 Ga. 334, 28 S.E.2d 860 (1944); *Givens v. Travelers Ins.*

Co., 71 Ga. App. 50, 30 S.E.2d 115 (1944); McClain v. Travelers Ins. Co., 71 Ga. App. 659, 31 S.E.2d 830 (1944); Redd v. United States Cas. Co., 83 Ga. App. 838, 65 S.E.2d 255 (1951); Borden Foods Co. v. Dorsey, 112 Ga. App. 838, 146 S.E.2d 532 (1965); Davidson v. Employers Ins., 139 Ga. App. 621, 229 S.E.2d 97 (1976).

Findings of fact made by the board, when authorized by any evidence, are binding upon the courts. Standard Accident Ins. Co. v. Kiker, 45 Ga. App. 706, 165 S.E. 850 (1932); Great Am. Indem. Co. v. Mitchell, 49 Ga. App. 378, 175 S.E. 400 (1934); Fox v. Liberty Mut. Ins. Co., 125 Ga. App. 285, 187 S.E.2d 305 (1972); Travelers Ins. Co. v. Purcell, 152 Ga. App. 279, 262 S.E.2d 566 (1979).

Findings on questions of fact by the department (now board) are conclusive where supported by the evidence, and the superior court is without authority to set aside those findings. Small v. Nu Grape Co. of Am., 46 Ga. App. 306, 167 S.E. 607 (1933).

Where findings of facts by a single commissioner (now administrative law judge) were affirmed by the full commission (now board) with one dissent, and the matter was appealed to the superior court, where the findings of the commission (now board) were approved and the appeal overruled, there being evidence upon which to base such findings, they were, in the absence of fraud, binding upon the Court of Appeals, and would not be disturbed. Campbell Coal Co. v. Render, 48 Ga. App. 547, 173 S.E. 245 (1934).

Finding of single director (now member or administrative law judge) that there had been no change in condition of claimant is conclusive upon the superior court on appeal. Ingram v. Liberty Mut. Ins. Co., 62 Ga. App. 789, 10 S.E.2d 99 (1940).

Where there is evidence to support the findings of the board, the Court of Appeals is without authority to interfere with such findings. Smith v. Fidelity & Cas. Co., 63 Ga. App. 898, 12 S.E.2d 366 (1940).

Where findings of fact by the board are supported by any evidence, they are conclusive and must be affirmed by the court on appeal. American Mut. Liab. Ins. Co. v. Sisson, 198 Ga. 623, 32 S.E.2d 295 (1944); Royal Indem. Co. v. Coulter, 213 Ga. 277, 98 S.E.2d 899 (1957), rev'd on other grounds

sub nom. Schwartz v. Greenbaum, 236 Ga. 476, 224 S.E.2d 38 (1976); Hartford Accident & Indem. Co. v. Gore, 153 Ga. App. 448, 265 S.E.2d 370 (1980).

If the findings of fact by the board are supported by some competent evidence, and, there is no fraud involved and the finding is not contrary to law, it is conclusive on the Court of Appeals. Hardware Mut. Cas. Co. v. Mullis, 75 Ga. App. 233, 43 S.E.2d 122 (1947).

Where, after considering the whole record, the Court of Appeals is convinced that there is sufficient competent evidence to sustain the award of the hearing director and of the full board, that court is without authority to disturb the findings. Watkins v. Hartford Accident & Indem. Co., 75 Ga. App. 462, 43 S.E.2d 549 (1947).

In the absence of fraud, findings of fact made by the director (now member or administrative law judge) and approved on appeal by the full board are binding on the courts if there is any evidence to support them, and where no error of law appears such findings will not be disturbed. United States Cas. Co. v. Kelly, 78 Ga. App. 112, 50 S.E.2d 238 (1948).

Where there is evidence to sustain the ultimate finding of fact, the finding of the board should be affirmed. Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Gilliam, 88 Ga. App. 451, 76 S.E.2d 834 (1953).

Findings of fact by a director of the board, approved by the full board, are conclusive on appeal if supported by any competent evidence. Atlantic Co. v. Moseley, 215 Ga. 530, 111 S.E.2d 239 (1959).

Under this section, findings of fact made by the board should not be disturbed where they are supported by competent evidence. Johnson v. Great S. Trucking Co., 101 Ga. App. 472, 114 S.E.2d 209 (1960) (see O.C.G.A. § 34-9-105).

If there is any competent evidence in the record to support the findings of fact of the board in matters properly before it, the findings are conclusive on the courts on appeal. Holcombe v. Fireman's Fund Ins. Co., 102 Ga. App. 587, 116 S.E.2d 891 (1960); McElreath v. McElreath, 155 Ga. App. 826, 273 S.E.2d 205 (1980).

Courts are bound by the findings of the board if there is any competent evidence to

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support them. *Lyons v. Employers Mut. Liab. Ins. Co.*, 127 Ga. App. 268, 193 S.E.2d 244 (1972); *Employees Mut. Liab. Ins. Co. v. Young*, 134 Ga. App. 369, 214 S.E.2d 381 (1975).

Findings of fact by a director (now member or administrative law judge) of the board, when supported by any evidence, are conclusive and binding upon the courts, and the judge of the superior court has no authority to set aside an award based on such findings merely because the judge disagrees with the conclusions reached therein. *Lockhart v. Liberty Mut. Ins. Co.*, 141 Ga. App. 476, 233 S.E.2d 810 (1977).

An award of the State Board of Workers' Compensation should be affirmed if there is any evidence to sustain it, even though the evidence is not altogether complete and satisfactory. *Atkinson v. Home Indem. Co.*, 141 Ga. App. 687, 234 S.E.2d 359 (1977).

Finding of fact by an administrative law judge or the State Board of Workers' Compensation, when supported by any evidence, is conclusive and binding on a reviewing court. *Home Indem. Co. v. Swindle*, 146 Ga. App. 520, 246 S.E.2d 507 (1978).

Finding of fact by the board, when supported by any evidence, is conclusive and binding upon the court, and a judge of the superior court does not have authority to set aside an award based on those findings of fact. *Banks v. Royal Globe Ins. Co.*, 160 Ga. App. 18, 286 S.E.2d 309 (1981).

Where the testimony of the claimant provided "any evidence" in support of the administrative law judge's and board's findings, the superior court erred in substituting its judgment for that of the board in weighing the credibility of the claimant's testimony, and finding no competent evidence in support of the board's award. *Maddox v. Elbert County Chamber of Commerce, Inc.*, 191 Ga. App. 478, 382 S.E.2d 150, cert. denied, 191 Ga. App. 922, 382 S.E.2d 150 (1989).

In the absence of fraud, the findings of the board are conclusive and shall not be set aside unless it is found that there is not sufficient competent evidence in the record to warrant the board's decision. *Elbert County Bd. of Comm'rs v. Burnett*, 200 Ga. App. 379, 408 S.E.2d 168 (1991).

Where the superior court could not conclude that evidence of claimant's prior neck/back injury had not been considered at all by the board, it was without authority to remand the case for a new analysis thereof. *Porter v. Ingles Mkt., Inc.*, 219 Ga. App. 145, 464 S.E.2d 212 (1995).

When a workers' compensation claimant testified that a work-related injury occurred on a date prior to the date the claimant stopped working, this provided "any evidence" in support of the factual findings of an administrative law judge and the State Board of Workers' Compensation (board) that the injury occurred on the date to which the claimant testified; therefore, a trial court reviewing the board's decision was obligated to accept that finding and could not substitute its own judgment for that of the board, even though an expert witness testified that the claimant's compensable injury occurred on a later date. *Oconee Area Home Care Servs. v. Burton*, 275 Ga. App. 784, 621 S.E.2d 859 (2005).

Finding is binding notwithstanding erroneous rulings on other matters. — Fact that one or more of the facts found by the board are erroneously found does not necessarily mean that the finding as to the ultimate fact is harmful error. *American Mut. Liab. Ins. Co. v. Sisson*, 198 Ga. 623, 32 S.E.2d 295 (1944).

Hearing director (now administrative law judge) acts in lieu of and for the board, and the director's findings of fact are conclusive unless set aside; hence, where the board does not set the findings aside but approves them and bases an improper ruling of law thereon, the superior court, in holding that the board made an erroneous ruling of law, is bound by the facts as found by the single director and adopted by the board. *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952).

Where the board makes a finding of fact which is supported by the evidence, such finding is conclusive and will not be reversed, even though the board has made other findings of fact not essential to the judgment of the case and not authorized by the evidence. *Barbree v. Shelby Mut. Ins. Co.*, 105 Ga. App. 186, 123 S.E.2d 905 (1962).

Unauthorized finding may be set aside. — Finding of the director (now member or

administrative law judge), if authorized by the evidence, is final and will not be set aside, but if the finding is not authorized by the evidence, or a different finding is demanded by the evidence, it may be set aside by the courts. *American Mut. Liab. Ins. Co. v. Curry*, 187 Ga. 342, 200 S.E. 150 (1938).

Review by court of application of law to facts authorized. — Department (now board), hearing claims under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), acts as a jury; however, assuming its findings of fact to be true, application of the law to these facts may be reviewed by the Court of Appeals. *Scott v. Travelers' Ins. Co.*, 49 Ga. App. 157, 174 S.E. 629 (1934).

Legal precision and nicety are not to be insisted upon in findings of fact of the board, and that construction of the findings which would render the judgment valid should be adopted in preference to a construction which would render the judgment invalid, where the construction is reasonable and can fairly be applied. *Employees Mut. Liab. Ins. Co. v. Young*, 134 Ga. App. 369, 214 S.E.2d 381 (1975).

When findings are demanded as matter of law. — In order to render any finding of fact demanded as a matter of law, not only must there be no controversy in the evidence material to the issue involved, but the implications and inferences which logically and properly arise from the evidence must necessarily lead to only the one conclusion. *Stapleton v. American Mut. Liab. Ins. Co.*, 74 Ga. App. 86, 38 S.E.2d 848 (1946); *Coulter v. Royal Indem. Co.*, 95 Ga. App. 124, 97 S.E.2d 358, rev'd on other grounds, 213 Ga. 277, 98 S.E.2d 899 (1957).

Credibility and conflicts for determination by board. — Weight and credit to be given to the testimony of witnesses and also the conflicts in the evidence are matters for determination by the board. *B.F. Goodrich Co. v. Arnold*, 88 Ga. App. 64, 76 S.E.2d 20 (1953); *Wiley v. Aetna Cas. & Sur. Co.*, 98 Ga. App. 241, 105 S.E.2d 377 (1958).

Court of Appeals could not reverse finding by the board crediting testimony of a witness to the effect that claimant was not engaged in helping a fellow employee move a platform in connection with the moving of which claimant contended claimant was injured, even though there was testimony to the contrary. *Hayslip v. Liberty Mut. Ins. Co.*, 72 Ga. App. 509, 34 S.E.2d 319 (1945).

In awarding temporary disability benefits, an administrative law judge was permitted to rely on the claimant's testimony that the claimant was unable to perform the claimant's work for the employer due to the claimant's work-related injury in operating the employer's equipment and the appellate court lacked the authority to resolve the questions of credibility and conflicts in the evidence identified by the employer. *Milliken & Co. v. Poythress*, 257 Ga. App. 586, 571 S.E.2d 509 (2002).

Court of Appeals powerless to reverse findings based on opinion evidence. — In a hearing before the board to determine whether there had been a change in condition of the claimant, where the only evidence as to the change was opinion evidence, the Court of Appeals was powerless to reverse findings of fact of the board when there was any legal evidence in the record to support its finding, in the absence of fraud. *Evans v. New Amsterdam Cas. Co.*, 62 Ga. App. 666, 9 S.E.2d 706 (1940).

Province of board to resolve conflicts in medical testimony. — In workers' compensation proceeding, it was within the province of the fact-finding board to pass upon those issues of fact which arose by reason of conflicts in the testimony of doctors who testified for the opposing parties. *Chevrolet-Atlanta Div., GMC v. Nash*, 81 Ga. App. 671, 59 S.E.2d 681 (1950).

Medical testimony that given event could have precipitated injury is sufficient to authorize finding that it did so, and will support an award of compensation even though the evidence shows that the injury could have had a different cause. *Travelers Ins. Co. v. Hogue*, 130 Ga. App. 844, 204 S.E.2d 760 (1974).

Award upheld where no evidence work caused heart attack. — The "any evidence" rule precluded the superior court's reversal of the board's award, where there was ample evidence to support a finding that the deceased employee died of a heart attack and that the evidence did not show the work the employee did on the date of death was a precipitating or aggravating cause. *G & H Loggins, Inc. v. Burch*, 178 Ga. App. 28, 341 S.E.2d 868 (1986).

Award supported by doctors' testimony regarding heart stroke. — Even though the preponderance of the medical evidence may

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have contradicted any causative relationship between the heat stroke suffered by the claimant while employed as a deputy sheriff and claimant's subsequent incapacitating mental/emotional condition, the opinions of two doctors, one of whom felt that there was a connection between the stroke and claimant's depression, and the other of whom noted the claimant's history of hypertension and recent strokes and concluded that the claimant was suffering from severe depression and anxiety secondary to medical problems, constituted the requisite "any evidence" to support the award. *Walton County Bd. of Comm'rs v. Williams*, 171 Ga. App. 779, 320 S.E.2d 846 (1984).

Finding as to adequate notice conclusive. — Where a finding of fact by the board on the question of adequate notice is supported by any evidence, though the evidence is in conflict, the finding is conclusive and on appeal must be affirmed by the court. *Bryant v. J.C. Distribs., Inc.*, 108 Ga. App. 401, 133 S.E.2d 109 (1963).

Whether failure to give notice falls within exception as question of fact. — Whether or not failure to give notice of accident comes within one of the exceptions set forth by former Code 1933, § 114-303 (see O.C.G.A. § 34-9-80), so as to prevent such failure from operating as a bar to an award of compensation, was a question of fact to be determined by the board, and its finding upon that question of fact, if supported by the evidence, was, in the absence of fraud, conclusive. *Kresge v. Holley*, 104 Ga. App. 144, 121 S.E.2d 182 (1961).

Conclusive finding that employment contract was for service outside state. — Finding of fact by deputy director (now member or administrative judge) and by the full board on appeal that plaintiff's contract of employment was expressly for service exclusively outside of this state and hence that the board did not have jurisdiction of the case was conclusive on the superior court and Court of Appeals. *Fenster v. Liberty Mut. Ins. Co.*, 107 Ga. App. 821, 131 S.E.2d 564 (1963).

Conclusive effect of findings that claimant is employee entitled to compensation. — Where evidence authorizes an inference that

a person is an employee entitled to compensation, a finding to that effect by the commission (now board) is conclusive and will not be set aside. *Travelers Ins. Co. v. Bacon*, 30 Ga. App. 728, 119 S.E. 458 (1923).

Finding of commission (now board) that beneficiary was an employee entitled to compensation is conclusive where authorized by the evidence. *Travelers Ins. Co. v. Bacon*, 30 Ga. App. 728, 119 S.E. 458 (1923).

If there is competent evidence in the record from which the board could have entered an award predicated on finding the fact that claimants were in fact employees then the award must stand. *Malcom v. Sudderth*, 98 Ga. App. 674, 106 S.E.2d 367 (1958).

Whether accident resulted in injury and arose out of and in course of employment are fact questions. *Davidson v. Employers Ins.*, 139 Ga. App. 621, 229 S.E.2d 97 (1976).

Where there is a conflict in the evidence, one view tending to establish that the accident was within the employment and the other negating it, and the commission (now board) accepts one view rather than the other, its finding is conclusive. *Southeastern Express Co. v. Edmondson*, 30 Ga. App. 697, 119 S.E. 39 (1923).

There being some evidence in the case to substantiate the finding of fact of a single director (now member) of the department (now board), which was approved by the whole department (now board) and affirmed by the superior court, that claimant sustained an accident which arose out of and in the course of employment and was disabled from doing any kind of manual labor, then the Court of Appeals would not disturb those findings. *Maryland Cas. Co. v. Brown*, 48 Ga. App. 822, 173 S.E. 925 (1934).

Where employee is injured in the scope of employment and the evidence before the board reflects that such was the case, the appellate court will not reverse that finding on appeal. *Fulton County Civil Court v. Elzey*, 101 Ga. App. 520, 114 S.E.2d 314 (1960).

Once a determination of the administrative law judge and the full board as to whether a person was acting in the course of the person's employment is made, it becomes conclusive and binding as to all questions of fact, so long as there is any evidence to support it. *Lewis v. Maryland Cas. Co.*, 137 Ga. App. 842, 225 S.E.2d 91 (1976).

Where the facts in a workers' compensation case are undisputed, question of whether the injury arose out of and in the course of employment is a question of law. *Parker v. Travelers Ins. Co.*, 142 Ga. App. 711, 236 S.E.2d 915 (1977); *McElreath v. McElreath*, 155 Ga. App. 826, 273 S.E.2d 205 (1980).

Court will not disturb finding of board that injury occurred from "horseplay" on the job, where there was evidence to support such finding. *Kight v. Liberty Mut. Ins. Co.*, 141 Ga. App. 409, 233 S.E.2d 453 (1977).

In a workers' compensation case, after the hearing director (now administrative law judge) found that employee was injured when engaging in sport or "horseplay", and this finding was amply supported by the uncontradicted and uncontroverted testimony of the witness, under the "any evidence" rule this finding could not be set aside. *Fidelity & Cas. Co. v. Scott*, 215 Ga. 491, 111 S.E.2d 223 (1959).

Where evidence authorized finding that there was no causal connection between death of claimant and employment, that finding was conclusive and would not be reversed, even though the board made other findings of fact not essential to the judgment in the case and not authorized by the evidence. *Samples v. Roadway Express Ins.*, 113 Ga. App. 391, 148 S.E.2d 198 (1966).

Willful misconduct or failure to use safety appliances as questions of fact. — Whether an employee was guilty of willful misconduct or was guilty of willful failure or refusal to use safety appliances are questions of fact for the board, and the findings of the board upon these questions are final and will not be disturbed where supported by evidence. *Herman v. Aetna Cas. & Sur. Co.*, 71 Ga. App. 464, 31 S.E.2d 100 (1944).

Where full board has found that stated circumstances amounted to willful misconduct constituting the proximate cause of claimant's injuries, and have entered an award which was supported by some evidence, the Court of Appeals would not disturb such award. *Goddard v. Jackson-Atlantic, Inc.*, 129 Ga. App. 68, 198 S.E.2d 699 (1973).

Whether particular job is within claimant's capacity is a factual determination within the province of the director (now administrative law judge) who has before the director tes-

timony concerning the nature of the work, a complete medical report on the claimant, and the physical presence of claimant personally. *Argonaut Ins. Co. v. Allen*, 123 Ga. App. 741, 182 S.E.2d 508 (1971).

Finding of change of condition and increase in disability binding. — Finding of the board that claimant's condition had changed and claimant's disability had increased was supported by the testimony of the physician designated by the board to examine claimant and by an observation of claimant's injury and disability by the director (now administrative law judge) on the hearing, and was binding on the Court of Appeals. *London Guarantee & Accident Co. v. Pittman*, 69 Ga. App. 146, 25 S.E.2d 60 (1943).

Where it is an open question under the evidence whether disability is attributable to a change in condition or is the result of another accident, and the board finds only a change in condition, and no error of law appears, neither the appellate court nor the lower court has any authority to disturb the action of the board. *Maryland Cas. Co. v. Gattis*, 119 Ga. App. 16, 165 S.E.2d 875 (1969).

Finding as to propriety of lump-sum award. — Where the evidence, although contradictory, is sufficient to authorize the essential finding of fact that a lump-sum award will be in the best interest of the employee or the employee's dependents, the lump-sum award will not be reversed by the courts, as the findings of fact made by the board within its power, in the absence of fraud, are conclusive. *Travelers Ins. Co. v. Williams*, 109 Ga. App. 719, 137 S.E.2d 391 (1964), overruled on other grounds, *Johnson v. Atlanta Dairies Coop.*, 172 Ga. App. 403, 323 S.E.2d 185 (1984).

Findings of board that claimant has or has not carried burden of proof are binding on the courts if there is any evidence to sustain them. *General Accident, Fire & Life Assurance Corp. v. Titus*, 104 Ga. App. 85, 121 S.E.2d 196 (1961).

Burden of proof is on claimant to establish the fact the claimant has sustained an accidental injury such as is contemplated by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), and where the board finds as a fact that this burden has not been carried by claimant, this finding is

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binding on all courts when there is evidence in the record to support it. *American Mut. Liab. Ins. Co. v. Harden*, 64 Ga. App. 593, 13 S.E.2d 685 (1941).

Although burden of proof is on claimant to show that the injury arose both out of and in the course of employment, finding by the board that claimant has carried such burden of proof is conclusive upon the courts if there is any evidence to support such finding. *American Mut. Liab. Ins. Co. v. Casey*, 91 Ga. App. 694, 86 S.E.2d 697 (1955).

While burden of proof is on claimant to establish that employee sustained an accidental injury such as is contemplated by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), a finding of fact by a director (now member or administrative law judge) of the board that claimant has carried such burden is conclusive upon the courts if there is any evidence to support it. *Truelove v. Hulette*, 103 Ga. App. 641, 120 S.E.2d 342 (1961).

Board without authority to determine cessation of disability in advance. — Superior court did not err in recommitting case to the board for the purpose of taking additional testimony on appeal of compensation award by employee, where employee had, subsequent to the board hearing, undergone a needed operation, for the reason that the board was without authority to determine in advance whether the operation would be successful or that disability would cease by a certain date. *St. Paul Fire & Marine Ins. Co. v. Horton*, 103 Ga. App. 171, 118 S.E.2d 597 (1961).

Board's award, when supported by any evidence, is conclusive and binding. *Mansfield Enters., Inc. v. Warren*, 154 Ga. App. 863, 270 S.E.2d 72 (1980).

Affirmation of award required where evidence exists. — Judgment of superior court approving award must be affirmed where appellate court cannot say that there is no evidence to support the finding of the commission (now board). *Maryland Cas. Co. v. Turk*, 36 Ga. App. 199, 136 S.E. 87 (1926).

It is error for court to set aside award where there is sufficient competent evidence to sustain it. *Sears, Roebuck & Co. v. Griggs*, 48 Ga. App. 585, 173 S.E. 194 (1934); *Milam*

v. Ford Motor Co., 61 Ga. App. 614, 7 S.E.2d 37 (1940); *Frost v. Morone*, 130 Ga. App. 878, 204 S.E.2d 796 (1974).

Award of the board based on any evidence is beyond the authority of the appellate court to disturb, except where fraud in its procurement is shown. *Continental Cas. Co. v. Bennett*, 69 Ga. App. 683, 26 S.E.2d 682 (1943).

Award made upon review by all the directors (now members) of the board, affirming an award by a single director upon issues of fact, is conclusive as to those issues if there is any evidence to sustain it; and, in the absence of fraud, such award cannot be set aside. *Reeves v. Royal Indem. Co.*, 73 Ga. App. 2, 35 S.E.2d 473 (1945).

Where there is any competent evidence to support an award of the board, in the absence of fraud, the superior court and Court of Appeals are without authority to set it aside. *Watkins v. Hartford Accident & Indem. Co.*, 75 Ga. App. 462, 43 S.E.2d 549 (1947).

Award made by the board, in the absence of fraud, is binding on all courts if there is any evidence to sustain it. *Davis v. Bibb Mfg. Co.*, 75 Ga. App. 515, 43 S.E.2d 780 (1947).

In reviewing an award by the board denying compensation, the courts must affirm the award of the board if there is evidence favorable to the employer authorizing the award. *Johnson v. Fireman's Fund Indem. Co.*, 79 Ga. App. 187, 53 S.E.2d 204 (1949).

Award made upon review by all the directors (now members) of the board, affirming an award by a single director upon issues of fact, is conclusive as to those issues, if there is any evidence to sustain it, and in the absence of fraud, such award cannot be set aside. *Employers Ins. Co. v. Bass*, 81 Ga. App. 306, 58 S.E.2d 516 (1950).

Where appeal is based on ground that there is not sufficient competent evidence in the record to warrant directors in making award complained of, the Court of Appeals will look to the record to see whether the award is supported by any competent evidence, and, when so supported, must affirm the order. *Pacific Employers Ins. Co. v. Hall*, 85 Ga. App. 574, 69 S.E.2d 802 (1952).

Award by a single director (now member), affirmed by the full board, is conclusive as to all issues of fact where there is any evidence to support the findings with respect thereto,

and the Court of Appeals is without authority to interfere with such an award. *Atlanta Newspapers, Inc. v. Clements*, 88 Ga. App. 648, 76 S.E.2d 830 (1953).

Where evidence authorized award of compensation by the full board to claimant, and no error of law appeared, trial court erred in reversing and setting aside such award of the full board, which affirmed the award of compensation by the single director. *Thomas v. Fulton Bag & Cotton Mills*, 89 Ga. App. 844, 81 S.E.2d 511 (1954).

Where question is one of fact, award will be affirmed if there is any competent evidence to sustain it, or if the evidence, construed in the light most favorable to the employer, would authorize the award. *Coulter v. Royal Indem. Co.*, 95 Ga. App. 124, 97 S.E.2d 358, rev'd on other grounds, 213 Ga. 277, 98 S.E.2d 899 (1957).

Where there is any evidence to support an award of the full board, that award cannot, in the absence of some error of law, be reversed by the superior court or the appellate court on appeal. *Short v. Glendale Mills, Inc.*, 95 Ga. App. 238, 97 S.E.2d 541 (1957).

Where there is any evidence to support an award of the board, it will not be disturbed on review. *Padgett v. American Mut. Liab. Ins. Co.*, 96 Ga. App. 463, 100 S.E.2d 150 (1957); *Independent Life & Accident Ins. Co. v. Craton*, 102 Ga. App. 78, 115 S.E.2d 636 (1960); *Bituminous Cas. Co. v. Sharpe*, 128 Ga. App. 695, 197 S.E.2d 741 (1973); *Pearce v. Pacific Employers Ins. Group*, 131 Ga. App. 792, 207 S.E.2d 207 (1974).

Award of the board which is supported by any competent evidence must, in the absence of fraud or a mistake of law, be affirmed by the reviewing court. *Hall v. St. Paul-Mercury Indem. Co.*, 96 Ga. App. 567, 101 S.E.2d 94 (1957).

Where award did not show that it was based on any evidence which should not have been considered, and was based on some evidence, although such award may not have been demanded, neither the superior court nor the Court of Appeals was authorized to disturb it. *United States Fid. & Guar. Co. v. Doyle*, 96 Ga. App. 745, 101 S.E.2d 600 (1957).

Award made on finding of facts, supported by any evidence, must be affirmed by the appellate court. *Coulter v. Royal Indem. Co.*, 95 Ga. App. 124, 97 S.E.2d 358, rev'd on

other grounds, 213 Ga. 277, 98 S.E.2d 899 (1957).

Where award of the board is supported by any evidence, no error of law appearing, it must be affirmed on appeal. *Milledgeville State Hosp. v. Norris*, 101 Ga. App. 502, 114 S.E.2d 298 (1960).

Finding of fact by a director or deputy director (now member) of the board, when supported by any evidence and in the absence of fraud, is conclusive and binding upon the courts, and the judge of the superior court does not have any authority to set aside an award based on those findings of fact merely because the judge disagrees with the conclusions reached therein. *Department of Revenue v. Graham*, 102 Ga. App. 756, 117 S.E.2d 902 (1960).

Where award of the board denying compensation is authorized by the evidence, and no error of law appears, judge of the superior court does not err in affirming such award on appeal. *Dudley v. Sears, Roebuck & Co.*, 115 Ga. App. 411, 154 S.E.2d 699 (1967).

Where there is some evidence of probative value to show disability from an injury and to support an award, and no error of law appears, the Court of Appeals must affirm the order of the lower court. *J.D. Jewell, Inc. v. Marchbanks*, 119 Ga. App. 669, 168 S.E.2d 206 (1969).

In a workers' compensation case, the award of the board has the same effect as the verdict of a jury, and it must be upheld if there is "any evidence" to support it. *Adams v. United States Fid. & Guar. Co.*, 125 Ga. App. 232, 186 S.E.2d 784 (1971); *Lyons v. Employers Mut. Liab. Ins. Co.*, 127 Ga. App. 268, 193 S.E.2d 244 (1972).

Award of the board should and will be affirmed if there is any evidence to sustain it, even though the evidence is not altogether complete and satisfactory. *Jackson v. Armstrong*, 149 Ga. App. 617, 257 S.E.2d 46 (1979).

Board's award final where testimony would have supported finding either way. — Where testimony in a compensation hearing would have supported a verdict either way, the finding of the commission (now board) is final. *Liberty Mut. Ins. Co. v. Reed*, 56 Ga. App. 68, 192 S.E. 325 (1937).

Award, where possible, should be given construction which will uphold and validate

Conclusive Effect of Findings or Award (Cont'd)

it, rather than one which would defeat and invalidate it. *Dixie-Cole Transf. Trucking Co. v. Fudge*, 147 Ga. App. 306, 248 S.E.2d 694 (1978).

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Superior court's authority limited. — On appeal in a workers' compensation case, superior court has authority and jurisdiction only to affirm or reverse as a matter of law and sometimes to give directions. *American Cas. Co. v. Harris*, 96 Ga. App. 720, 101 S.E.2d 618 (1957).

Superior court may not vacate and set aside a corrected award of the Workers' Compensation Board as being null and void and of no effect whatsoever. *Denton v. U.S. Fid. & Guar. Co.*, 158 Ga. App. 849, 282 S.E.2d 350 (1981).

A trial court acted outside the scope of its authority, as set forth in O.C.G.A. § 34-9-105, by vacating a decision of the state board of workers' compensation that had denied benefits to a claimant, as there was evidence to support the decision in that none of the claimant's treating doctors had diagnosed the claimant with a work-related injury. *YKK (USA), Inc. v. Patterson*, 287 Ga. App. 537, 652 S.E.2d 187 (2007).

A trial court followed an improper procedure when it remanded a workers' compensation case to the original ALJ who had decided the case and bypassing the state board of workers' compensation as O.C.G.A. § 34-9-105(c) set forth when the trial court was authorized to set aside an award, based on specific grounds, and its authority to recommit the controversy to the board only for further hearing or proceedings. *YKK (USA), Inc. v. Patterson*, 287 Ga. App. 537, 652 S.E.2d 187 (2007).

Definite determination of jurisdiction required. — Superior court committed error when in considering whether it had jurisdiction over an appeal to determine the propriety of the Workers' Compensation Board's inaction, it merely ordered that if one alternative analysis was correct the board was to commence review of the appeal, but if the second alternative analysis was correct, the order was of no force and effect; the court

must make a determination as to its jurisdiction and if jurisdiction is established it must either affirm, reverse, or remand the claim to the board. *Forsyth County Bd. of Educ. v. Trusty*, 184 Ga. App. 193, 361 S.E.2d 55 (1987).

Correction of record to reflect timely remand order. — Superior court's remand order was not null and void, even though it was not entered within 20 days of the hearing as required by O.C.G.A. § 34-9-105(b), where the court corrected the record to reflect that the order was filed the day it was rendered, which was within the 20-day statutory period. *Sunbelt Specialties v. Keith*, 201 Ga. App. 167, 410 S.E.2d 364 (1991).

This section required the court to affirm an award if not set aside on one or more statutory grounds. *Butler v. Fidelity & Cas. Co.*, 88 Ga. App. 620, 76 S.E.2d 813 (1953) (see O.C.G.A. § 34-9-105).

If there was any evidence to sustain the findings of fact of the board, the appellate courts will not set the award aside in the absence of one or more of the grounds enumerated in this section. *Fulmer v. Aetna Cas. & Sur. Co.*, 85 Ga. App. 102, 68 S.E.2d 180 (1951) (see O.C.G.A. § 34-9-105).

Superior court may set aside an award and remand case with instructions to the board, but it can do so only upon one or more of the grounds specified in former Code 1933, § 114-710 (see O.C.G.A. § 34-9-105). *Butler v. Fidelity & Cas. Co.*, 88 Ga. App. 620, 76 S.E.2d 813 (1953).

Where findings of the board were authorized by the evidence and the award was not erroneous for any of the reasons set out in this section, it was error for the superior court, on appeal, to remand the case for the taking of further testimony and, in effect, to set the award aside. *Butler v. Fidelity & Cas. Co.*, 88 Ga. App. 620, 76 S.E.2d 813 (1953) (see O.C.G.A. § 34-9-105).

Court of Appeals will not upset findings of fact or conclusions of the full board except upon the clear statutory grounds set forth in this section. *Independent Life & Accident Ins. Co. v. Craton*, 102 Ga. App. 78, 115 S.E.2d 636 (1960) (see O.C.G.A. § 34-9-105).

While the findings of fact of the board are conclusive and binding if supported by any competent evidence, courts are authorized to set aside an award in five enumerated

situations. *Holcombe v. Fireman's Fund Ins. Co.*, 102 Ga. App. 587, 116 S.E.2d 891 (1960).

On review of an award by the board, the superior court can only reverse the award for one of the reasons provided by this section. *Callaway Mills Co. v. Hurley*, 104 Ga. App. 811, 123 S.E.2d 7 (1961) (see O.C.G.A. § 34-9-105).

Upon appeal from an order of the board granting or denying compensation, the decision of the board cannot be set aside if there was any evidence to support it, unless one or more of the grounds of reversal authorized in this section was present. *American Fire & Cas. Co. v. Gay*, 104 Ga. App. 840, 123 S.E.2d 287 (1961) (see O.C.G.A. § 34-9-105).

Under this section, the court must affirm the award unless it was set aside on one or more of the statutory grounds stated therein; the order of the court remanding the case to the board, in the absence of setting aside the award on one of the statutory grounds, was therefore unauthorized. *Maczko v. Employers Mut. Liab. Ins. Co.*, 116 Ga. App. 247, 157 S.E.2d 44 (1967) (see O.C.G.A. § 34-9-105).

Findings of fact by the board, supported by any evidence, were conclusive and binding on the courts on appeal, and in the absence of any error in the record for any of the reasons stated in this section, the superior court had no authority to sustain an appeal and remand the controversy to the board for further proceedings. *Haney v. Pacific Employers Ins. Co.*, 117 Ga. App. 221, 160 S.E.2d 211 (1968) (see O.C.G.A. § 34-9-105).

This section provided that the finding of fact made by the members of the board within their power shall, in the absence of fraud, be conclusive, but that, upon appeal, the superior court shall set aside the order or decree of the members of the board if any one or more of five listed conditions appeared in the record of the case. *Roper Corp. v. Reynolds*, 142 Ga. App. 402, 236 S.E.2d 103 (1977) (see O.C.G.A. § 34-9-105).

Grounds for setting aside award. — Where the facts found by the director do not support the order or decree or where there is not sufficient competent evidence to warrant them in making the award complained

of, or where the directors acted without or in excess of their powers, or where the award was procured by fraud, the superior court should set such award aside on appeal, and the appellate court will affirm that judgment. *United States Fid. & Guar. Co. v. Maddox*, 52 Ga. App. 416, 183 S.E. 570 (1935).

Judge of the superior court may reverse the award on the ground that the facts found do not support the order or decree; the judge may also, in such case, enter up a proper judgment upon the findings of fact as made. *Employers Liab. Assurance Corp. v. Hollifield*, 93 Ga. App. 51, 90 S.E.2d 681 (1955).

Court of Appeals may set aside an order of the board if there is no sufficient competent evidence in the record to warrant the order or decree, or if the order or decree is contrary to law. *Parks v. American Fid. & Cas. Co.*, 97 Ga. App. 833, 104 S.E.2d 624 (1958).

Recommitment to board is proper where award has not been filed and a copy thereof has not been sent to the parties at dispute. *Free v. Associated Indem. Corp.*, 78 Ga. App. 839, 52 S.E.2d 325 (1949).

Recommitment where board has failed to weigh all evidence. — Whenever the courts feel that in making findings of facts the board has failed to weigh all the evidence, the practice has been generally to recommit the case to the board for further consideration. *Travelers Ins. Co. v. Merritt*, 124 Ga. App. 42, 183 S.E.2d 73 (1971).

Where there was doubt as to whether certain medical testimony was considered, the case would be reversed with direction that it be remanded to the board for further consideration. *West Point Pepperell, Inc. v. Payne*, 151 Ga. App. 541, 260 S.E.2d 412 (1979).

No authority to remand for further medical evidence where evidence supports award. — Where award of the board is supported by any evidence, the superior court is without authority to set it aside and remand to the board for the taking of further medical evidence. *Travelers Ins. Co. v. Hogue*, 130 Ga. App. 844, 204 S.E.2d 760 (1974).

Trial court erred in remanding the case to the appellate division on grounds that newly discovered medical evidence existed since the record contained sufficient evidence to support the award made. *Moffitt Constr.*,

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Inc. v. Barnes, 263 Ga. App. 175, 587 S.E.2d 293 (2003).

Remand for correction of undisputed misstatement of fact. — Where there is an undisputed misstatement of fact in award, which court cannot say is immaterial as a matter of law, the case should be remanded to the board to correct its finding and make an award with the correct finding taken into consideration. *Assurance Co. of Am. v. Shepherd*, 155 Ga. App. 36, 270 S.E.2d 268 (1989).

A remand is not proper when there is some evidence in the record supporting the findings of fact by the administrative law judge or the board. *Ansa Mufflers Corp. v. Law*, 192 Ga. App. 45, 383 S.E.2d 574, cert. denied, 192 Ga. App. 901, 383 S.E.2d 574 (1989).

Remand for further findings where award based on erroneous legal theory. — Where it affirmatively appears from the award in a workers' compensation proceeding that the award is based upon an erroneous legal theory, and that for that reason the board or hearing director has not considered all of the evidence in light of correct and applicable legal principles, the case should be remanded to the board for further findings. *Barbree v. Shelby Mut. Ins. Co.*, 105 Ga. App. 186, 123 S.E.2d 905 (1962); *Miller v. Travelers Ins. Co.*, 111 Ga. App. 245, 141 S.E.2d 223 (1965); *Commonwealth Ins. Co. v. Arnold*, 112 Ga. App. 140, 144 S.E.2d 194 (1965); *GMC v. Hargis*, 114 Ga. App. 143, 150 S.E.2d 303 (1966); *Clark v. Fireman's Fund Ins. Co.*, 131 Ga. App. 809, 207 S.E.2d 222 (1974); *Mansfield Enters., Inc. v. Warren*, 154 Ga. App. 863, 270 S.E.2d 72 (1980).

Where workers' compensation case was decided on an erroneous legal theory, the board acted in excess of its powers, and judgment of the superior court reversing the board and remanding must be affirmed. *Zurich Ins. Co. v. Robinson*, 123 Ga. App. 582, 181 S.E.2d 923 (1971), later appeal, 127 Ga. App. 113, 192 S.E.2d 533 (1972).

Reversal of award based on erroneous conclusion from law and facts. — Finding of facts of the board is controlling in the superior court and on the Court of Appeals in the absence of fraud, where such finding is

supported by any competent evidence, but where the board arrives at an award by basing such findings on an erroneous conclusion drawn from the facts and the law applicable thereto, that award may be reversed by the superior court. *Parks v. American Fid. & Cas. Co.*, 97 Ga. App. 833, 104 S.E.2d 624 (1958).

Where an award of the board is supported by competent evidence, neither the superior court nor the Court of Appeals may disturb the award, but an award of that board based on an erroneous conclusion of law must be reversed. *Shore v. Pacific Employers Ins. Co.*, 102 Ga. App. 431, 116 S.E.2d 526 (1960).

Award affirmed by operation of law. — Award of State Board of Workers' Compensation was affirmed by operation of law when signed order of superior court reversing the award was not entered within the 20-day time limit of O.C.G.A. § 34-9-105. *Buschel v. Kysor/Warren*, 213 Ga. App. 91, 444 S.E.2d 105 (1994); *MacKenzie v. Sav-A-Lot Food Store*, 226 Ga. App. 32, 485 S.E.2d 559 (1997); *Pine Timber Trucking Co. v. Teal*, 230 Ga. App. 362, 496 S.E.2d 270 (1998).

Motion seeking recommitment on ground of newly discovered evidence properly dismissed. — Motion seeking to have case recommitted to the department (now board) for further hearing because of alleged newly discovered evidence, purpose of which was evidently to procure another hearing or trial before the department (now board), would be declined. *Continental Cas. Co. v. Caldwell*, 55 Ga. App. 17, 189 S.E. 408 (1936).

Remand for taking of additional evidence as to whether injury arose in course of employment. — Where award of the board was set aside by the superior court on the ground that the evidence did not authorize the finding that injury to the employee arose out of and in the course of employment, it was within the power of the court to recommit the controversy, under this section, for the sole purpose of the hearing of additional evidence on whether the injury arose out of and in the course of employment, even when additional evidence could have been discovered and presented at the first trial before the board in the exercise of ordinary diligence by claimant. *Hartford Accident & Indem. Co. v. Cox*, 191 Ga. 143, 11 S.E.2d 661, answer conformed to, 63 Ga. App. 763,

12 S.E.2d 110 (1940) (see O.C.G.A. § 34-9-105).

Setting aside of award where only one legal conclusion possible. — Where there is no conflict in the evidence, and but one legal conclusion can be reached therefrom, namely, that the accident causing injury to claimant did not arise out of and in course of employment, award by the board granting compensation must be set aside by the court on proper appeal. *Aetna Cas. & Sur. Co. v. Fulmer*, 81 Ga. App. 97, 57 S.E.2d 865 (1950), later appeal, 85 Ga. App. 102, 68 S.E.2d 180 (1951).

Error to refer case back for additional findings where findings supported by competent evidence. — Judge of superior court erred in referring case back to the full board with authority to find facts different from those findings made by the single director (now member or administrative law judge) where the only findings of facts were those of the single director, which were, in effect, approved by the full board; it is the duty of the superior court and appellate court to sustain the findings of facts by the single director if there is any competent evidence to support such findings. *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952).

If there are no findings upon which award may be made, judge should remand the case to the board with direction that it hear evidence on the matter. *General Accident, Fire & Life Assurance Corp. v. Titus*, 104 Ga. App. 85, 121 S.E.2d 196 (1961).

Superior court was without authority to remand award to board for additional findings where there was evidence to support the award. *Randall & Lewis Lumber Co. v. Randall*, 177 Ga. App. 665, 340 S.E.2d 644 (1986).

Superior court, in reversing an award of the board, may in a proper case enter final judgment upon the findings of fact as made by the board; however, if there are no findings of fact upon which an award may be made, the superior court must remand the case to the board for the purpose of making findings of fact and, where necessary, to hear new evidence. *Employees Ins. Co. v. Amerson*, 109 Ga. App. 275, 136 S.E.2d 12 (1964).

Courts may not substitute own judgments on facts. — It is improper for the judge of

the superior court and the judges of the Court of Appeals to presume to substitute their judgments for the judgment of the deputy director or directors (now members) of the board on the facts of the case, and no ruling can be made by a court on what that judgment should or should not be. *Department of Revenue v. Graham*, 102 Ga. App. 756, 117 S.E.2d 902 (1960).

However strongly the judge of the superior court and judges of the Court of Appeals might feel constrained to disagree with the award of the deputy director (now member or administrative law judge) no power resides in the courts to substitute their judgment for that of the deputy director; the weight and credit to be given to expert testimony is a question exclusively for decision by the fact-finding tribunal. *Department of Revenue v. Graham*, 102 Ga. App. 756, 117 S.E.2d 902 (1960).

Judge of the superior court may reverse the decision of the board on the grounds stated in this section, but may not make findings of fact and enter an award thereon. *General Accident, Fire & Life Assurance Corp. v. Titus*, 104 Ga. App. 85, 121 S.E.2d 196 (1961) (see O.C.G.A. § 34-9-105).

Nothing for judge to base judgment on absent findings by board. — On appeal from decision of the board to the superior court, judge thereof is not vested with any fact-finding power, and hence where the board on its de novo trial of claim for compensation neither adopted deputy director's (now member's or administrative law judge's) findings of fact as its own nor made its own independent findings of fact as it was authorized to do, there was nothing on which judge could base a final judgment awarding compensation to claimant. *Pacific Employers Ins. Co. v. West*, 213 Ga. 296, 99 S.E.2d 89 (1957).

Reversal where award demanded by evidence. — Even though the board held that injury to claimant was not compensable, the superior court judge did not err in reversing that finding on the ground that the evidence demanded a finding that the employee was entitled to compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Columbia Cas. Co. v. Parham*, 69 Ga. App. 258, 25 S.E.2d 147 (1943).

Judge of the superior court did not err in setting aside award denying compensation

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where claimant was entitled to compensation as a matter of law under the record. *Manufacturers Cas. Ins. Co. v. Mansfield*, 78 Ga. App. 248, 50 S.E.2d 370 (1948).

Recommitment or remand not necessary where findings require denial. — Where the findings made require denial of compensation, the case need not be recommitment or remanded to the board, because the findings made eliminate the necessity of considering any further findings. *GMC v. Martin*, 119 Ga. App. 279, 167 S.E.2d 211 (1969).

Authority to render final judgment where question is one of law. — Superior court has jurisdiction and authority on appeal to render final judgment on findings of fact by the board, sustained by evidence, and it is not required that the case be remanded to the board for further action in accordance with the opinion and judgment of that court, where the question is purely one of law and there are no further facts to be determined by the board. *Georgia Ins. Serv. v. Lord*, 83 Ga. App. 28, 62 S.E.2d 402 (1950).

Entry of judgment on reversal of award based on erroneous conclusion. — On appeal of claimant from an award made on an erroneous basis, superior court is authorized to enter proper final judgment upon the findings as made. *American Mut. Liab. Ins. Co. v. Brock*, 35 Ga. App. 772, 135 S.E. 103 (1926), rev'd on other grounds, 165 Ga. 771, 142 S.E. 101 (1928).

Where award of the board is based on an erroneous conclusion drawn from the facts and the law applicable thereto, it is proper for judge of the superior court to reverse such award and enter such judgment in the case as is proper under the law and the facts as disclosed by the record in the case. *Glens Falls Indem. Co. v. Clark*, 75 Ga. App. 453, 43 S.E.2d 752 (1947); *Automatic Sprinkler Corp. of Am. v. Rucker*, 87 Ga. App. 375, 73 S.E.2d 609 (1952); *Coulter v. Royal Indem. Co.*, 95 Ga. App. 124, 97 S.E.2d 358, rev'd on other grounds, 213 Ga. 277, 98 S.E.2d 899 (1957); *Crawford W. Long Hosp. v. Mitchell*, 100 Ga. App. 276, 111 S.E.2d 120 (1959).

Court without authority to render judgment pursuant to lump-sum agreement not approved by board. — Where the department (now board) makes an award in favor

of claimant for compensation payable in a certain amount weekly during disability, the superior court has no authority or jurisdiction, on appeal, to render final judgment for a lump sum in favor of claimant in full and final settlement of the claim, pursuant to agreement of the parties not approved by the department (now board). *Department of Indus. Relations v. Travelers' Ins. Co.*, 177 Ga. 669, 170 S.E. 883, answer conformed to, 47 Ga. App. 553, 171 S.E. 169 (1933); *Wilkins v. Travelers Ins. Co.*, 52 Ga. App. 142, 182 S.E. 628 (1935).

Superior court has no power to reverse an award of the board based upon sufficient competent evidence, nor to render an award by consent of the parties after they enter into a lump sum settlement without authority from the board. *King v. Fulton Bag & Cotton Mills*, 99 Ga. App. 340, 108 S.E.2d 765 (1959).

Award may not be set aside because of introduction of hearsay testimony. *Sears, Roebuck & Co. v. Griggs*, 48 Ga. App. 585, 173 S.E. 194 (1934).

Admission of hearsay over a party's objection would not justify setting aside a finding of the commission (now board) that work was not being done through an independent contractor. *Davis v. Menefee*, 34 Ga. App. 813, 131 S.E. 527 (1926).

Precise deficiencies to be pointed out in recommitting case. — Where superior court, in reviewing the findings of the commission (now board), recommitts the controversy to the commission (now board) for further hearing or proceedings, it is essential that the judgment be accompanied by an opinion directing the attention of the commission (now board) to the precise errors to be cured or the precise deficiencies to be supplied upon reconsideration of the case. *Austin Bros. Bridge Co. v. Whitmire*, 31 Ga. App. 560, 121 S.E. 345 (1924).

Judgment recommitting case sufficiently indicated question for determination on another hearing before commission (now board) where it recited that the evidence was insufficient to establish dependency for a period of three months prior to the injury and was not sufficiently definite and clear as to expense of last illness and funeral bills and directed the commission (now board) to receive testimony as to these amounts. *Maryland Cas. Co. v. Bartlett*, 37 Ga. App. 777, 142 S.E. 189 (1928).

Board confined by specific instructions of court on recommitment. — Where, on appeal, superior court recommitts a case to the department (now board) for a further hearing, with specific instructions as to the scope and character of the new hearing, this judgment confines the department (now board), upon another hearing of the case, to a determination of the questions directed by the court. *Woodruff v. Miller*, 48 Ga. App. 305, 172 S.E. 738 (1934).

Award properly upheld. — Where order of the commission (now board) denying compensation was not erroneous upon a given ground and was not affected by an erroneous finding as to lack of notice, it would be sustained irrespective of any error affecting a finding that there was a lack of notice. *Maryland Cas. Co. v. England*, 34 Ga. App. 354, 129 S.E. 446 (1925).

Where findings of fact by the board were not inconsistent, supported the award, and were themselves supported by evidence, superior court did not err in denying an appeal from the board's award of death benefits to claimant. *American Mut. Liab. Ins. Co. v. King*, 88 Ga. App. 176, 76 S.E.2d 81 (1953).

Remand or reversal held improper. — Where there was evidence authorizing finding by the board that there had been no change in claimant's physical condition since a previous award of compensation, and there were facts and circumstances which authorized the board to determine that claimant was justified in refusing to submit oneself to another examination by a physician, the superior court erred in setting aside the finding and award of the board and remanding the case to the board with instructions that payments of compensation to claimant be suspended until claimant complied with the employer's request to submit to examination. *Daniel v. Ford Motor Co.*, 88 Ga. App. 58, 76 S.E.2d 66 (1953).

Where there is some evidence to support determination of the board that condition of claimant has improved to the extent that claimant is no longer entitled to compensation, the action of the superior court on appeal in reversing the award of the board is unauthorized. *Sinclair Oil Corp. v. Hendrix*, 119 Ga. App. 770, 168 S.E.2d 862 (1969).

Denial of compensation properly set aside. — Denial of compensation for the

death of an employee, where the evidence was that death resulted from tuberculosis which the employee had in a latent stage, but which flared into activity as a result of an injury arising out of and in the course of employment, was properly set aside by the superior court. *United States Fid. & Guar. Co. v. Maddox*, 52 Ga. App. 416, 183 S.E. 570 (1935).

Reversal of judgment where not supported by evidence. — Judgment of the superior court affirming award of the commission (now board) in a case where the evidence failed to show that death of deceased arose out of and in course of employment would be reversed upon appeal to the Court of Appeals. *Georgia Cas. Co. v. Kilburn*, 36 Ga. App. 761, 138 S.E. 257 (1927).

Remand for further consideration held proper. — Where hearing director (now administrative law judge) applied strict rules covering compensation for hernia cases, whereas deceased died of coronary occlusion, and did not show relation between accident and operation on one hand and operation and coronary occlusion on the other, hearing director made a mistake in considering the facts, and it was within the jurisdiction of the appellate court to remand the case to the board for further consideration. *Parks v. American Fid. & Cas. Co.*, 97 Ga. App. 833, 104 S.E.2d 624 (1958).

Remand for proper findings required. — Where finding of a single director (now member or administrative law judge) that the director did not know what blinded claimant but that it had its beginning in an accident and injury sustained in the course of employment and resulting in total loss of an eye was not supported by other findings of facts, the superior court erred in failing to sustain appeal of insurance carrier on ground that the facts found did not support the award, and in failing to remand the case to the full board to make proper findings of fact based on the evidence. *Fireman's Fund Indem. Co. v. Peebles*, 97 Ga. App. 896, 104 S.E.2d 664 (1958).

Remand for introduction of new evidence improper absent motion. — The superior court did not err in failing to remand an appeal to the full board for introduction of new evidence by the employer where it did not appear on the record that any motion to

Recommitment, Remand, or Entry of Judgment (Cont'd)

that effect had been made. *Insurance Co. of N. Am. v. Nix*, 141 Ga. App. 342, 233 S.E.2d 468 (1977).

Case was remanded for further proceedings where the superior court erred in substituting its findings of fact for those of the full board so as to mandate an ultimate award in favor of the employee. *Department of Pub. Safety v. Boatright*, 188 Ga. App. 612, 373 S.E.2d 770 (1988).

Remand not warranted by insignificant factual misstatements. — Factual misstatements contained in the award regarding the results of an electromyogram (EMG) study and the date when surgery was performed were not of such significance as to warrant a remand. *Chevrolet-Pontiac-Canada Group, GMC v. Millar*, 182 Ga. App. 889, 357 S.E.2d 598 (1987).

Award of attorney's fees held unsupported by evidence. — It is error for the board to treat an award for temporary total disability as though it were for permanent total disability and to award as attorney's fees in a lump sum the final one-third of the maximum benefits which could possibly accrue, as it is possible that compensation awarded as attorney's fees might never become due; hence, the court would hold that the award of attorney's fees in the lump sum was without evidence to support it. *Hartford Accident & Indem. Co. v. Fuller*, 102 Ga. App. 384, 116 S.E.2d 628 (1960).

Supersedeas

Only effect of supersedeas under this section was to divest the board of jurisdiction with respect to enforcement of the judgment appealed from, so that pending adjudication in the Court of Appeals of the issue, any attempted exercise of jurisdiction affecting the rights of the parties as determined by the judgment appealed from is coram non jure and void. *Ingram v. Liberty Mut. Ins. Co.*, 63 Ga. App. 493, 11 S.E.2d 499 (1940) (see O.C.G.A. § 34-9-105).

With respect to particular issue determined. — Pending appeal, supersedeas provided by this section related only to suspension of jurisdiction with respect to the particular issue determined by the judgment appealed from. *Ingram v. Liberty Mut. Ins. Co.*, 63 Ga. App. 493, 11 S.E.2d 499 (1940) (see O.C.G.A. § 34-9-105).

Application based on change in condition since hearing not precluded by pendency of appeal. — Pendency in the Court of Appeals of appeal from judgment of the superior court affirming the board in denying an increase in compensation on account of an alleged change in condition since original award does not deprive the board of jurisdiction to entertain another application from claimant for additional compensation on account of a change in condition arising since the hearing upon which the award appealed from was based. *Ingram v. Liberty Mut. Ins. Co.*, 63 Ga. App. 493, 11 S.E.2d 499 (1940).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 632 et seq.

C.J.S. — 100A C.J.S., Workers' Compensation, §§ 1205, 1206.

ALR. — Denial of review of facts on appeal from commission or other body established under Workmen's Compensation Act as denial of due process of law, 39 ALR 1064.

Constitutionality, construction, application, and effect of provisions of Workmen's Compensation Acts in relation to costs or expenses on appeal or review, 79 ALR 678.

Disregard of rules of evidence or rules for examination of witnesses which obtain in court trials as affecting conclusiveness of

decision of commissioner or arbitrator under Workmen's Compensation Law, 87 ALR 777.

Res judicata as regards decisions or awards under Workmen's Compensation Acts, 122 ALR 550.

Right of one who is excluded or ignored by bureau's award of compensation to another to appeal therefrom, 128 ALR 1490.

Workmen's compensation: character or status of right or claim within provision of act requiring or authorizing approval by the court or commission of settlement or compromise, 153 ALR 285.

Workmen's compensation: time and jurisdiction for review, reopening, modification,

or reinstatement of award or agreement, 165 ALR 9.

Attorneys' fee awards under 5 USCS § 7701(g), which allows award of attorneys'

fees to prevailing employee for appeal to merit systems protection board from adverse employment decision, 143 ALR Fed. 145.

34-9-106. Entry and execution of judgment on settlement agreement, final order or decision, or award; modification and revocation of orders and decrees.

Any party in interest may file in the superior court of the county in which the injury occurred or, if the injury occurred outside this state, in the county in which the original hearing was had, a certified copy of a settlement agreement approved by the board or of a final order or decision of the members or of an award of the members unappealed from or of an award of the members affirmed upon appeal, whereupon the court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though the judgment had been rendered in an action duly heard and determined by such court; provided, however, that where the payment of compensation is insured or provided for in accordance with this chapter, no such judgment shall be entered nor execution thereon issued except upon application to the court and for good cause shown. Upon presentation to the court of the certified copy of a decision of the board ending, diminishing, or increasing a weekly payment under the provisions of this chapter, particularly of Code Section 34-9-104, the court shall revoke or modify the order or decree to conform to such decision of the board. (Ga. L. 1920, p. 167, § 60; Code 1933, § 114-711; Ga. L. 1998, p. 128, § 34.)

Cross references. — Settlement agreements generally, § 34-9-15.

Law reviews. — For article surveying developments in Georgia workers' compensa-

tion law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981). For annual survey article discussing workers' compensation law, see 52 Mercer L. Rev. 505 (2000).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- PARTIES IN INTEREST
- ENFORCEMENT
- DEFENSES
- APPLICATION

General Consideration

Constitutionality. — This section provided for judgment in superior court on memorandum from the board was not violative of the due process clauses of the state and

federal Constitutions. Taylor v. Woodall, 183 Ga. 122, 187 S.E. 697 (1936) (see O.C.G.A. § 34-9-106).

The summary procedure authorized by this section enabled a superior court to render judgment based on an award of the

General Consideration (Cont'd)

board without notice to or a hearing on behalf of the employer and insurer, and its provisions in this respect did not violate constitutional due process. *Hartford Accident & Indem. Co. v. Hale*, 119 Ga. App. 565, 168 S.E.2d 204 (1969); *West Point Pepperell, Inc. v. Springfield*, 140 Ga. App. 530, 231 S.E.2d 811 (1976) (see O.C.G.A. § 34-9-106).

The entry of a judgment and the issuance of an execution under this section were administrative only and the equivalent of a determination of an amount due under a former final periodic payment judgment. The entry of the judgment and issuance of an execution under that statute did not amount to a "taking" or deprivation of property. *West Point Pepperell, Inc. v. Springfield*, 238 Ga. 655, 235 S.E.2d 24 (1977) (see O.C.G.A. § 34-9-106).

Board's power and effect of its award. — The administration of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is vested in an administrative board. It is expressly empowered to hear and determine claims arising under the provisions of that law, and, as between the parties, its award has the same effect as a judgment rendered by a court of competent jurisdiction. *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939).

Board determination of employer's credits. — The determination as to what credits the employer may be entitled to is one to be made by the board. *Taylor v. Sunnyland Packing Co.*, 112 Ga. App. 544, 145 S.E.2d 587 (1965).

Remedy of appeal and effect of award. — Where a hearing is had and an award made in favor of the claimant, if the claimant was dissatisfied with the amount of the award, claimant's remedy was by way of appeal as provided in former Code 1933, § 114-708 (see O.C.G.A. § 34-9-103). Where no appeal was taken, the award is conclusive and binding, and in the absence of fraud, accident, or mistake, the claimant may not thereafter have the award increased, except upon a change in condition. *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939).

Final judgment under O.C.G.A. § 34-9-106 establishes noncontingent, liquidated, unsecured debt owed by debtor. In re

Perry, 56 Bankr. 663 (Bankr. M.D. Ga. 1986).

Purpose of proceeding under this section was to obtain an adjudication in the superior court that the plaintiff was entitled to recover the sum awarded by the board and thus to have a judgment upon which an execution may issue. *Durham Iron Co. v. Durham*, 62 Ga. App. 361, 7 S.E.2d 804 (1940) (see O.C.G.A. § 34-9-106).

Enforcement of award. — In case of an award against an employer, where the employer fails to comply with the terms of the award, the award may be enforced by suit and judgment in a superior court. *Savannah Lumber Co. v. Burch*, 165 Ga. 706, 142 S.E. 83 (1928); *Fireman's Fund Indem. Co. v. Wade*, 97 Ga. App. 125, 102 S.E.2d 640 (1958).

Constructive agreement to be bound by law. — Every employer and every employee who fails to exempt oneself from the provisions of the compensation law thereby constructively agrees to be bound by all of the provisions of that law. One of the provisions of the law, to which the parties thus agree, is that, in an appropriate case, an award by the board may be reduced to a judgment without summons or any other prior notice from the court. *Continental Cas. Co. v. Bump*, 218 Ga. 187, 126 S.E.2d 783 (1962).

Lump sum as final settlement without board approval unauthorized. — Where the department (now board), on hearing a claim for compensation under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) made an award in favor of the claimant for compensation payable in a certain amount weekly during disability, the judge of the superior court, in considering the case on appeal from the award of the department (now board), had no authority or jurisdiction to render a judgment against the insurance carrier and in favor of the claimant for a lump sum, in full and final settlement of the claim, in pursuance of an agreement of the insurance carrier and the claimant, not approved by the department (now board). *Department of Indus. Relations v. Travelers' Ins. Co.*, 177 Ga. 669, 170 S.E. 883, answer conformed to, 47 Ga. App. 553, 171 S.E. 169 (1933).

Penalty included in judgment. — A penalty for late payment of benefits under O.C.G.A. § 34-9-221(f) was not required to be authorized by an award of the board in order to be included in a judgment of the

superior court rendered under O.C.G.A. § 34-9-106. *Ayers v. Rembert*, 241 Ga. App. 698, 527 S.E.2d 290 (1999).

Effect of judgment. — A judgment rendered by the superior court in accordance with this section shall have the same effect as though rendered in a suit duly heard and determined by that court. *Camp v. United States Fid. & Guar. Co.*, 42 Ga. App. 653, 157 S.E. 209 (1931) (see O.C.G.A. § 34-9-106).

Effect of adjudication on appeal by employer. — Adjudication in the superior court in favor of the plaintiff on appeal of the award of the board by the employer was, for the purpose of an execution and for all purposes, as effective as if the plaintiff personally filed in that court a certified copy of the award and had a judgment entered thereon. *Durham Iron Co. v. Durham*, 62 Ga. App. 361, 7 S.E.2d 804 (1940).

Judgment entered on appeal distinguished. — Distinction between effect of judgment entered by superior court in course of appeal from award of board and judgment by superior court under this section, see *Armour & Co. v. Youngblood*, 113 Ga. App. 73, 147 S.E.2d 351 (1966) (see O.C.G.A. § 34-9-106).

When judgment may not be entered. — Under the provisions of this section, a judgment may not be entered so long as the award on which the judgment is sought to be based is subject to review by the courts. *Gentry v. Georgia Cas. & Sur. Co.*, 109 Ga. App. 294, 136 S.E.2d 26 (1964) (see O.C.G.A. § 34-9-106).

Determination that claim is compensable required before enforcement permitted. — A workers' compensation insurer was authorized to controvert and decline to pay a medical claim until such time as the board determined whether it was compensable under a settlement agreement, and seeking judicial enforcement of the agreement prior to that determination was premature. *Aetna Cas. & Sur. Co. v. Davis*, 253 Ga. 376, 320 S.E.2d 368 (1984).

Where judge can refuse to enter judgment for unpaid compensation. — Where a claimant was given an award for partial incapacity under former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262), but no finding or determination was made as to the percentage of loss of capacity to work or the average weekly wages which the claimant was able to

earn thereafter upon which to base the amount of compensation to which the claimant was entitled under the award, it was not error for the judge of the superior court to refuse to enter a judgment for unpaid compensation thereunder against the employer and insurance carrier upon application for judgment under former Code 1933, § 114-711 (see O.C.G.A. § 34-9-106). *Colbert v. Fireman's Fund Ins. Co.*, 112 Ga. App. 187, 144 S.E.2d 470 (1965).

If compensation is insured, no judgment shall be rendered nor execution issued thereon, except upon application to the court and for good cause shown. *Camp v. United States Fid. & Guar. Co.*, 42 Ga. App. 653, 157 S.E. 209 (1931).

Authorization for court to render judgment against employer. — So long as good cause was shown, such as insolvency of the insurance carrier and failure to pay the award, the court was authorized to render judgment against the employer, the employer being under the terms of this section primarily liable. *Taylor v. Woodall*, 183 Ga. 122, 187 S.E. 697 (1936) (see O.C.G.A. § 34-9-106).

If the insurance carrier becomes insolvent or for any reason the security fails to comply with the carrier's obligation, the liability for compensation which has been established by the commission (now board) may be enforced by judgment against the employer. *Savannah Lumber Co. v. Burch*, 165 Ga. 706, 142 S.E. 83 (1928).

Cited in *United States Fid. & Guar. Co. v. Hairston*, 37 Ga. App. 234, 139 S.E. 685 (1927); *Wilkins v. Travelers Ins. Co.*, 52 Ga. App. 142, 182 S.E. 628 (1935); *Harrison v. Harrison*, 208 Ga. 70, 65 S.E.2d 173 (1951); *Heath v. Standard Accident Ins. Co.*, 94 Ga. App. 548, 95 S.E.2d 726 (1956); *Fireman's Fund Indem. Co. v. Wade*, 97 Ga. App. 125, 102 S.E.2d 640 (1958); *National Sur. Corp. v. Nelson*, 99 Ga. App. 95, 107 S.E.2d 718 (1959); *Hartford Accident & Indem. Co. v. Carroll*, 106 Ga. App. 624, 127 S.E.2d 687 (1962); *Continental Cas. Co. v. Bump*, 106 Ga. App. 826, 128 S.E.2d 525 (1962); *Armour & Co. v. Youngblood*, 107 Ga. App. 505, 130 S.E.2d 786 (1963); *United States Fid. & Guar. Co. v. Davis*, 108 Ga. App. 76, 132 S.E.2d 109 (1963); *Carpenter v. Newcomb Devilbiss Co.*, 111 Ga. App. 472, 142 S.E.2d 381 (1965); *Crowe v. Quilted*

General Consideration (Cont'd)

Textile Corp., 221 Ga. 551, 145 S.E.2d 553 (1965); *Martin v. GMC*, 118 Ga. App. 43, 162 S.E.2d 742 (1968); *Travelers Ins. Co. v. Lueckert*, 118 Ga. App. 98, 162 S.E.2d 820 (1968); *Martin v. GMC, Fisher Body Div.*, 224 Ga. 677, 164 S.E.2d 107 (1968); *Martin v. GMC, Fisher Body Div.*, 226 Ga. 860, 178 S.E.2d 183 (1970); *Fidelity & Cas. Co. v. Funderburk*, 128 Ga. App. 395, 196 S.E.2d 695 (1973); *Aetna Cas. & Sur. Co. v. Williams*, 131 Ga. App. 376, 206 S.E.2d 91 (1974); *Neal v. Insurance Co. of N. Am.*, 134 Ga. App. 854, 216 S.E.2d 626 (1975); *Jax Car Wash Mfg., Inc. v. Davis*, 156 Ga. App. 729, 275 S.E.2d 685 (1980); *Crawford v. Holt*, 172 Ga. App. 326, 323 S.E.2d 245 (1984).

Parties in Interest

Term "party in interest" usually means one benefitted or aggrieved by judgment, but not necessarily a party to the action. *J.M. Tull Metals Co. v. United States*, 123 Ga. App. 76, 179 S.E.2d 543 (1970).

Doctor as party in interest. — A doctor who has rendered medical or surgical services to an injured employee entitled to compensation is a party in interest; and this pecuniary interest held by the doctor in the result of the proceedings before the commission (now board) is sufficient to bring the doctor within the class designated by the act as parties in interest. *J.M. Tull Metals Co. v. United States*, 123 Ga. App. 76, 179 S.E.2d 543 (1970).

Veterans Administration Hospital was "party in interest" within the meaning of this section and was entitled to an award for medical services rendered to a claimant. *J.M. Tull Metals Co. v. United States*, 123 Ga. App. 76, 179 S.E.2d 543 (1970) (see O.C.G.A. § 34-9-106).

Enforcement

Function of superior court to enforce, not change, awards. — The function of the superior court as provided in this section was to enforce, not to change, the awards. *City of Hapeville v. Preston*, 67 Ga. App. 350, 20 S.E.2d 202 (1942); *Jenkins v. Reliance Ins. Co.*, 113 Ga. App. 70, 147 S.E.2d 343 (1966) (see O.C.G.A. § 34-9-106).

In a hearing under this section, the supe-

rior court had no authority to hear and decide any issue of fact respecting the right of the employee to receive compensation for a period prior to termination of the award or approved agreement. *Jenkins v. Reliance Ins. Co.*, 113 Ga. App. 70, 147 S.E.2d 343 (1966) (see O.C.G.A. § 34-9-106).

The superior court exceeded its authority under O.C.G.A. § 34-9-106 when it granted a petition seeking enforcement of a judgment based on the court's earlier affirmance of the board's award, where the petition sought additional penalties for failure of prompt payment of award and also sought an additional award for temporary partial disability. *Kingery Block & Concrete Co. v. Luttrell*, 174 Ga. App. 481, 330 S.E.2d 181 (1985).

The superior court exceeded its authority in reaching behind an award sought to be enforced to make findings contrary to those made by the workers compensation board regarding the identity of the employer and the adequacy and validity of notice to it of the workers' compensation proceeding. *Wade v. Harris*, 210 Ga. App. 882, 437 S.E.2d 863 (1993).

Enforceability of award. — Under former Code 1933, § 114-711 (see O.C.G.A. § 34-9-106) where an award was rendered, either on a hearing or on an agreement between the parties, the award is enforceable in the superior courts until a new award based on a change in condition was applied for on behalf of the claimant or the employer, or until on a hearing applied for by the claimant under former Code 1933, § 114-706 (see O.C.G.A. § 34-9-100). *Complete Auto Transit, Inc. v. Davis*, 101 Ga. App. 849, 115 S.E.2d 482 (1960).

Because the board's award was for an amount certain and clearly incorporated the superior court's directions on remand, the court erred in denying the employee's amended petition for entry of judgment filed under O.C.G.A. § 34-9-106. *Hansche v. City of Atlanta Police Dep't*, 242 Ga. App. 606, 530 S.E.2d 512 (2000).

In a workers' compensation action, because an employer's motion to set aside an award in favor of its injured employee focused exclusively on issues that it could have corrected in a direct appeal to the Workers' Compensation Board, or in the hearing before the administrative law judge, the motion was properly denied. *Winnersville Roof-*

ing Co. v. Coddington, 283 Ga. App. 95, 640 S.E.2d 680 (2006).

Enforcement proceeding is continuation, not separate suit. — The proceeding to enforce an award of the board or approved agreement pursuant to this section was not a separate suit but was merely a continuation of the proceeding instituted before the board. *Camp v. United States Fid. & Guar. Co.*, 42 Ga. App. 653, 157 S.E. 209 (1931); *Simpson v. Travelers Ins. Co.*, 117 Ga. App. 43, 159 S.E.2d 294 (1967) (see O.C.G.A. § 34-9-106).

The method of enforcing an award of compensation by the board is by filing in the superior court of the proper county a certified copy of the award; the proceeding is not a separate suit, but merely a continuance of the original proceeding. *Durham Iron Co. v. Durham*, 62 Ga. App. 361, 7 S.E.2d 804 (1940).

Filing in superior court of a petition to enforce an award or a settlement agreement pursuant to O.C.G.A. § 34-9-106 is not a separate suit but rather a continuation of the board of workers' compensation proceeding and the concept of default is not applicable. *Wade v. Harris*, 210 Ga. App. 882, 437 S.E.2d 863 (1993).

Board not precluded from making non-conforming award. — The judgment of a superior court based upon the original award of the board does not preclude the board thenceforth from making any award not conforming to the superior court judgment. The proceeding in the superior court is merely a continuation of the proceeding before the board for enforcing an award of compensation. *Anglin v. St. Paul-Mercury Indem. Co.*, 106 Ga. App. 395, 126 S.E.2d 913 (1962).

Defenses

Showing of good cause. — The "good cause" required by this section was shown by appearance and pleading by the employer and insurer to the effect that they were not liable for a portion of an award pursuant to an approved agreement to pay compensation which would have accrued to claimant therefor, since that amounted to an admission of failure to pay part of the award. *Jenkins v. Reliance Ins. Co.*, 113 Ga. App. 70, 147 S.E.2d 343 (1966) (see O.C.G.A. § 34-9-106).

Defenses of employer or insurance carrier. — In the hearing upon a claimant's application for judgment upon an approved agreement or an award of the board, the employer or its insurance carrier can have no defense except by virtue of: (1) a final settlement receipt or other like agreement between the parties changing the terms of the original agreement, approved by the board; or (2) evidence that the statutory amount, or the amount called for by the agreement or award has been paid in full; or (3) an order of the board changing or allowing a discontinuance of the compensation; or (4) evidence that the employer has filed an application for a hearing upon a change of condition. *Jenkins v. Reliance Ins. Co.*, 113 Ga. App. 70, 147 S.E.2d 343 (1966).

Application

Effect of employer's application for hearing on change of condition. — When after an award or agreement for the payment of compensation approved by the board the employer files an application for hearing on a change of condition and ceases making payments, the employer's liability for payments after the date of the application will be determined upon the hearing; and the employee is not entitled before the hearing to a judgment under this section for payments due under the original award or agreement after the date of the application for hearing. *Crowe v. Quilted Textile Corp.*, 113 Ga. App. 68, 147 S.E.2d 340 (1966) (see O.C.G.A. § 34-9-106).

Purpose of reducing award of compensation to judgment enables the person in whose favor compensation has been awarded to have execution in default of payment and creates a lien on the property of the employer. *Continental Cas. Co. v. Bump*, 218 Ga. 187, 126 S.E.2d 783 (1962).

No authority to retroactively revoke or change award. — Board is without authority to revoke or change award or agreement, duly approved, for compensation and medical expenses retroactively. *Fireman's Fund Ins. Co. v. Crowder*, 123 Ga. App. 469, 181 S.E.2d 530 (1971).

The superior court, rather than the board of workers' compensation, is the proper forum for bringing a motion to set aside a workers' compensation award. *Griggs v.*

Application (Cont'd)

All-Steel Bldgs., Inc., 201 Ga. App. 111, 410 S.E.2d 309 (1991).

Effect of award or agreement as res judicata. — Agreements approved by the board, unmodified in the manner provided by law, were res judicata, and upon proper application to a superior court under the provisions of this section, it was mandatory that the court enter judgment and issue execution for the amount shown to be due and unpaid. *Bituminous Cas. Corp. v. Willingham*, 119 Ga. App. 761, 168 S.E.2d 910 (1969) (see O.C.G.A. § 34-9-106).

Award is res judicata of right of employee to receive payments thereunder until terminated in the manner provided by law, and where it appears that the employer and insurance carrier have failed or refused to pay all of the compensation due under the award the court has no discretion and it is mandatory on it to enter judgment and issue execution for the amount shown to be due. *Sanders v. American Mut. Liab. Ins. Co.*, 105 Ga. App. 472, 124 S.E.2d 923 (1962); *Hartford Accident & Indem. Co. v. Hale*, 119 Ga. App. 565, 168 S.E.2d 204 (1969); *West Point Pepperell, Inc. v. Springfield*, 140 Ga. App. 530, 231 S.E.2d 811 (1976).

Statutory right of action within prescribed time limitation. — The right of action upon an award of the board, or an agreement between the parties approved by the board, is given by statute; and the statute does not prescribe a time limitation for bringing the action. *Nation v. Pacific Employers Ins. Co.*, 112 Ga. App. 380, 145 S.E.2d 265 (1965).

Vacation or modification of judgment after expiration of term. — The last sentence of this section created an exception to the rule that a judgment may not be vacated or modified after expiration of the term of the court during which it was entered. *Brown v. Liberty Mut. Ins. Co.*, 113 Ga. App. 490, 148 S.E.2d 436 (1966) (see O.C.G.A. § 34-9-106).

A judgment entered on behalf of an employee in the superior court upon application therefor under this section can be amended or vacated at a subsequent term of court based upon a certified copy of an order from the board diminishing or terminating compensation for the period upon which the judgment was based. *Brown v.*

Liberty Mut. Ins. Co., 113 Ga. App. 490, 148 S.E.2d 436 (1966) (see O.C.G.A. § 34-9-106).

Board's approval of change in compensation. — Assuming arguendo that parties to an original compensation award or agreement can enter into a new agreement effecting a change in the compensation payable, the approval of such an agreement by the board is not authorized unless the agreement stipulates facts showing that the claimant's condition has changed since the original award or agreement. *Stone Mt. Grit Co. v. Christian*, 115 Ga. App. 102, 153 S.E.2d 569 (1967).

Superior court, on proper showing, must conform its order to modifying action by board affecting the compensation adjudged to be due and unpaid, and credits against such payments. *Bituminous Cas. Corp. v. Willingham*, 119 Ga. App. 761, 168 S.E.2d 910 (1969).

Effect of prior approved settlement. — Board cannot refuse to make finding as to change in condition merely because of prior approved settlement. *United States Fid. & Guar. Co. v. Gibby*, 118 Ga. App. 758, 165 S.E.2d 455 (1968).

Satisfaction of attorneys' fees. — The lien of an attorney at law representing a claimant attaches to a proceeding in the commission (now board) brought for the purpose of obtaining an award of compensation; and, when an award of compensation is entered in favor of the claimant, the employer and the employer's insurance carrier, having notice of the attorney's relation to the proceeding, are not at liberty to satisfy the award until the lien or claim of the attorney for attorney's fee is fully satisfied, and, if they do so, they are liable in the action to a recovery for the benefit of the attorney to the extent of the attorney's fees; and the attorney may prosecute the proceeding in the manner pointed out by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) by seeking, in superior court, a judgment upon the award entered in favor of the attorney's client, for the attorney's benefit to the extent of the attorney's fees. *Camp v. United States Fid. & Guar. Co.*, 42 Ga. App. 653, 157 S.E. 209 (1931).

The board is without authority to enforce an attorney's lien, and an award directing the employer, as the result of the employer

having settled with the claimant without consulting the employer's attorney, to pay attorney's fees directly to the claimant's at-

torney is contrary to law and unenforceable. *Dunagan v. Marell Farms, Inc.*, 95 Ga. App. 857, 99 S.E.2d 236 (1957).

RESEARCH REFERENCES

C.J.S. — 100A C.J.S., Workers' Compensation, §§ 1205, 1206. 101 C.J.S., Workers' Compensation, § 1501 et seq.

ALR. — Res judicata as regards decisions or awards under Workmen's Compensation Acts, 122 ALR 550.

Workmen's compensation: character or status of right or claim within provision of act requiring or authorizing approval by the court or commission of settlement or compromise, 153 ALR 285.

34-9-107. Interest payable on final award of board in the event of appeal.

Any final award for compensation entered by the board shall bear interest at the legal rate of 12 percent on all accrued amounts and on all amounts accruing prior to final judgment in the event of an appeal being taken from the board in the same manner in which it is now provided that interest shall run on a judgment of the superior court in the event an appeal is taken therefrom. (Code 1933, § 114-718, enacted by Ga. L. 1952, p. 271, § 1; Ga. L. 2001, p. 748, § 1.)

Law reviews. — For article, "Workers' Compensation," see 53 Mercer L. Rev. 521 (2001).

RESEARCH REFERENCES

C.J.S. — 100A C.J.S., Workers' Compensation, §§ 1205, 1206.

34-9-108. Approval of attorney's fees by board; assessment of fees against the offending party; restrictions on attorney advertisement and division of fees; payment of fees or expenses.

(a) The fee of an attorney for service to a claimant in an amount of more than \$100.00 shall be subject to the approval of the board, and no attorney shall be entitled to collect any fee or gratuity in excess of \$100.00 without the approval of the board. The board shall approve no fee of an attorney for services to a claimant in excess of 25 percent of the claimant's award of weekly benefits or settlement.

(b)(1) Upon a determination that proceedings have been brought, prosecuted, or defended in whole or in part without reasonable grounds, the administrative law judge or the board may assess the adverse attorney's fee against the offending party.

(2) If any provision of Code Section 34-9-221, without reasonable grounds, is not complied with and a claimant engages the services of an

attorney to enforce his or her rights under that Code section and the claimant prevails, the reasonable quantum meruit fee of the attorney, as determined by the board, and the costs of the proceedings may be assessed against the employer.

(3) Any assessment of attorney's fees made under this subsection shall be in addition to the compensation ordered.

(4) Upon a determination that proceedings have been brought, prosecuted, or defended in whole or in part without reasonable grounds, the administrative law judge or the board may, in addition to reasonable attorney's fees, award to the adverse party in whole or in part reasonable litigation expenses against the offending party. Reasonable litigation expenses under this subsection are limited to witness fees and mileage pursuant to Code Section 24-10-24; reasonable expert witness fees subject to the fee schedule; reasonable deposition transcript costs; and the cost of the hearing transcript.

(c) An attorney shall not advertise to render services to a potential claimant when he or she or his or her firm does not intend to render said services and shall not divide a fee for legal services with another attorney who is not a partner in or associate of his or her law firm or law office, unless:

(1) The client consents to employment of the other attorney after a full disclosure that a fee division will be made;

(2) The division is made in proportion to the services performed and the responsibility assumed by each; and

(3) The total fee of the attorneys does not clearly exceed reasonable compensation for all legal services such attorneys rendered to the client.

(d) When attorney's fees or reasonable litigation expenses are awarded under this Code section, the administrative law judge or the board shall have the authority to order payment of such fees or expenses on terms acceptable to the parties or within the discretion of the board. (Ga. L. 1920, p. 167, § 61; Code 1933, § 114-712; Ga. L. 1937, p. 528; Ga. L. 1978, p. 2220, § 14; Ga. L. 1981, p. 805, § 1; Ga. L. 1984, p. 22, § 34; Ga. L. 1988, p. 13, § 34; Ga. L. 1992, p. 1942, § 12; Ga. L. 2001, p. 748, § 2.)

Law reviews. — For article discussing attorney fees in workers' compensation claims, see 14 Ga. St. B.J. 187 (1978). For annual survey of workers' compensation, see 38 Mercer L. Rev. 431 (1986). For article, "Workers' Compensation," see 53 Mercer L. Rev. 521 (2001). For survey article on work-

ers' compensation law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For annual survey of workers' compensation law, see 57 Mercer L. Rev. 419 (2005).

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
EVIDENCE
REASONABLE GROUNDS

General Consideration

Board's discretionary power to approve contract. — The power vested in the board to approve the contract entered into between the claimant and the attorney is a discretionary power; this discretion is not an arbitrary and unlimited one, but should be based on evidence, or the facts as disclosed by the record when the facts are sufficient for this purpose, and the law applicable thereto. *Wilson v. Maryland Cas. Co.*, 71 Ga. App. 184, 30 S.E.2d 420 (1944).

In construing contract of employment between a claimant under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) and the claimant's, provision that the attorney was to receive "one-third of any sum recovered" would be held to mean any sum actually received by the claimant, not one-third of any sum awarded by the board. *Cain v. Tuten*, 82 Ga. App. 102, 60 S.E.2d 485 (1950).

Board hearing as to attorney's fees. — Where an attorney filed with the board for its approval the attorney's contract for fees for services rendered a client in a proceeding under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), as required, and petitioned the board to grant the attorney a hearing so that the attorney might introduce evidence before the board to show the time and services expended by the attorney under the contract, it was error for the board to refuse the attorney a hearing, where it only approved the contract as to a portion of the amount provided for therein. *Wilson v. Maryland Cas. Co.*, 71 Ga. App. 184, 30 S.E.2d 420 (1944).

Amount of attorney's fees as res judicata. — Where the reasonableness and amount of attorney's fees were submitted by an attorney to the department (now board), which after a hearing entered an order that the fees previously paid by the employee client constituted a reasonable amount, and that no further fee would be allowed, such a judgment, unappealed from, unless void un-

der some settled rule of law relating to the validity of judgments, is res judicata, precluding the attorney from subsequently foreclosing and collecting under the attorney's alleged lien upon an award of compensation by the department (now board) to the employee. *Thomas v. Travelers Ins. Co.*, 53 Ga. App. 404, 185 S.E. 922 (1936).

Purpose of former Code 1933, § 114-712 (see O.C.G.A. § 34-9-108) was to prevent the claimant from having to pay attorney's fees to enforce claimant's rights under former Code 1933, § 114-705 (see O.C.G.A. § 34-9-221) when the employer failed to comply with the provisions thereof without reasonable grounds. *Liberty Mut. Ins. Co. v. Kirkland*, 156 Ga. App. 576, 275 S.E.2d 152 (1980).

Failure to comply with O.C.G.A. § 34-9-221 in suspending or terminating benefits does not prevent employer/insurer from contending that no or lesser benefits are due after a certain date due to a change in condition; rather, it subjects the employer/insurer to potential liability for attorney fees if the failure was without reasonable grounds. *Sadie G. Mays Mem. Nursing Home v. Freeman*, 163 Ga. App. 557, 295 S.E.2d 340 (1982).

Application of § 34-9-363. — The language of O.C.G.A. § 34-9-363(b) does not serve to incorporate the terms of O.C.G.A. § 34-9-108(b)(1) so as to authorize an award of attorneys' fees in a proceeding against the Subsequent Injury Trust Fund; reversing *Muscogee Iron Works v. Ward*, 216 Ga. App. 636, 455 S.E.2d 363 (1995). *Georgia Subsequent Injury Trust Fund v. Muscogee Iron Works*, 265 Ga. 790, 462 S.E.2d 367 (1995).

Attorneys' fees of an employer or insurer are not recoverable from the Subsequent Injury Trust Fund; reversing *Muscogee Iron Works v. Ward*, 216 Ga. App. 636, 455 S.E.2d 363 (1995). *Georgia Subsequent Injury Trust Fund v. Muscogee Iron Works*, 265 Ga. 790, 462 S.E.2d 367 (1995).

"Compensation" under O.C.G.A. § 34-9-108(b)(3) includes penalties imposed

General Consideration (Cont'd)

for violations of O.C.G.A. § 34-9-221. *Hardee's v. Bailey*, 180 Ga. App. 332, 349 S.E.2d 211 (1986).

"Any evidence" rule. — Based on ample evidence that an employee performed work for the company and derived income therefrom while at the same time receiving temporary total disability benefits, an award of attorney's fees to the employer's insurer pursuant to O.C.G.A. § 34-9-108(b)(1), the assessment of a civil penalty against the employee pursuant to O.C.G.A. § 34-9-18(b), and the referral of the matter to the Enforcement Division of the Board pursuant to O.C.G.A. § 34-9-24 should have been affirmed by a trial court under the "any evidence" standard of review. *Trax-Fax, Inc. v. Hobba*, 277 Ga. App. 464, 627 S.E.2d 90 (2006).

Cited in *Camp v. United States Fid. & Guar. Co.*, 42 Ga. App. 653, 157 S.E. 209 (1931); *Patterson v. Curtis Publishing Co.*, 58 Ga. App. 211, 198 S.E. 102 (1938); *Dunn v. American Mut. Liab. Ins. Co.*, 64 Ga. App. 507, 13 S.E.2d 902 (1941); *Maryland Cas. Co. v. Stephens*, 76 Ga. App. 723, 47 S.E.2d 108 (1948); *New Amsterdam Cas. Co. v. Thompson*, 100 Ga. App. 677, 112 S.E.2d 273 (1959); *American Mut. Liab. Ins. Co. v. Quick*, 106 Ga. App. 59, 126 S.E.2d 431 (1962); *Employees Ins. Co. v. Amerson*, 109 Ga. App. 275, 136 S.E.2d 12 (1964); *United States Cas. Co. v. White*, 111 Ga. App. 267, 141 S.E.2d 321 (1965); *Baggett Transp. Co. v. Barnes*, 113 Ga. App. 58, 147 S.E.2d 372 (1966); *Commonwealth Ins. Co. v. Arnold*, 114 Ga. App. 835, 152 S.E.2d 896 (1966); *Magnus Metal Div. of Nat'l Lead Co. v. Stephens*, 115 Ga. App. 432, 154 S.E.2d 869 (1967); *Zurich Ins. Co. v. McDuffie*, 117 Ga. App. 90, 159 S.E.2d 423 (1968); *LaFavor v. Aetna Cas. & Sur. Co.*, 117 Ga. App. 873, 162 S.E.2d 311 (1968); *Federated Ins. Group v. Pitts*, 118 Ga. App. 356, 163 S.E.2d 841 (1968); *Phoenix Ins. v. Weaver*, 124 Ga. App. 423, 183 S.E.2d 920 (1971); *Harris v. Atlanta Coca-Cola Bottling Co.*, 128 Ga. App. 193, 196 S.E.2d 159 (1973); *Fleming v. Phoenix of Hartford Ins. Co.*, 130 Ga. App. 771, 204 S.E.2d 460 (1974); *Handley v. Travelers Ins. Co.*, 131 Ga. App. 797, 207 S.E.2d 218 (1974); *Commercial Union Ins. Co. v. Brock*, 134 Ga. App. 903, 216 S.E.2d 700 (1975);

Insurance Co. of N. Am. v. Puckett, 139 Ga. App. 772, 229 S.E.2d 550 (1976); *United States Fid. & Guar. Co. v. Murray*, 140 Ga. App. 708, 231 S.E.2d 502 (1976); *Hartford Ins. Co. v. White*, 142 Ga. App. 307, 235 S.E.2d 740 (1977); *Roper Corp. v. Reynolds*, 142 Ga. App. 402, 236 S.E.2d 103 (1977); *State v. Purmort*, 143 Ga. App. 269, 238 S.E.2d 268 (1977); *S.S. Kresge Co. v. Black*, 144 Ga. App. 58, 240 S.E.2d 554 (1977); *Rucker v. Universal Mem. Co.*, 145 Ga. App. 724, 244 S.E.2d 584 (1978); *S.S. Kresge Co. v. Driver*, 147 Ga. App. 531, 249 S.E.2d 340 (1978); *Employer's Ins. Co. v. Brown*, 147 Ga. App. 866, 250 S.E.2d 575 (1978); *McGhee v. Kroger Co.*, 150 Ga. App. 291, 257 S.E.2d 361 (1979); *Insurance Co. of N. Am. v. Henson*, 150 Ga. App. 788, 258 S.E.2d 706 (1979); *Union Carbide Corp. v. Coffman*, 158 Ga. App. 360, 280 S.E.2d 140 (1981); *Sunbelt Airlines v. Hunt*, 158 Ga. App. 429, 280 S.E.2d 435 (1981); *Seitzingers, Inc. v. Barnes*, 161 Ga. App. 855, 289 S.E.2d 315 (1982); *Raines & Milam v. Milam*, 161 Ga. App. 860, 289 S.E.2d 785 (1982); *Farist v. Blue Ridge Carpet Mills*, 162 Ga. App. 586, 291 S.E.2d 741 (1982); *West Point Pepperell v. Gordon*, 163 Ga. App. 837, 296 S.E.2d 155 (1982); *State v. Head*, 163 Ga. App. 842, 296 S.E.2d 157 (1982); *Kelley v. West Point Pepperell, Inc.*, 164 Ga. App. 187, 296 S.E.2d 191 (1982); *Carroll v. Dan River Mills, Inc.*, 169 Ga. App. 558, 313 S.E.2d 741 (1984); *Dycol, Inc. v. Crump*, 169 Ga. App. 930, 315 S.E.2d 460 (1984); *Southeastern Aluminum Recycling, Inc. v. Rayburn*, 172 Ga. App. 648, 324 S.E.2d 194 (1984); *Motor Convoy, Inc. v. Maddox*, 172 Ga. App. 430, 323 S.E.2d 235 (1984); *Cagle's, Inc. v. Kitchens*, 172 Ga. App. 698, 324 S.E.2d 550 (1984); *Brazier v. Travelers Ins. Co.*, 602 F. Supp. 541 (N.D. Ga. 1984); *Copelan v. Burrell*, 174 Ga. App. 63, 329 S.E.2d 174 (1985); *State v. Mitchell*, 177 Ga. App. 333, 339 S.E.2d 384 (1985); *Dykes v. Superior Elec. Contractors*, 179 Ga. App. 793, 348 S.E.2d 120 (1986); *Brigmond v. Springhill Homes*, 180 Ga. App. 875, 350 S.E.2d 846 (1986); *Desoto Falls, Inc. v. Brown*, 187 Ga. App. 830, 371 S.E.2d 462 (1988); *Scott v. Tremco, Inc.*, 199 Ga. App. 606, 405 S.E.2d 347 (1991); *Capital Atlanta, Inc. v. Carroll*, 213 Ga. App. 214, 444 S.E.2d 592 (1994); *Doss v. Food Lion, Inc.*, 267 Ga. 312, 477 S.E.2d 577 (1996); *Stewart v. Auto-Owners Ins. Co.*, 230 Ga. App. 265, 495 S.E.2d 882 (1998).

Evidence

Board may and should consider all evidence. — In making the determination of whether the matter has been defended without reasonable grounds the board may, consider the whole of the evidence, and should do so. *Pacific Employers Ins. Co. v. Peck*, 129 Ga. App. 439, 200 S.E.2d 151 (1973).

Evidentiary support is required for award of fees. — The discretion of the board in allowing attorney's fees under this section was as to the allowance of any amount whatsoever, and in order to authorize the award of a particular amount some evidence must be introduced in support thereof. *United States Cas. Co. v. White*, 108 Ga. App. 539, 133 S.E.2d 439 (1963) (see O.C.G.A. § 34-9-108).

Where claimant sought an award of attorney's fees because the claim was defended without reasonable grounds, but introduced no evidence as to the amount of reasonable attorney's fees, an award of attorney's fees in the amount of \$1,000.00 was not authorized. *United States Cas. Co. v. White*, 108 Ga. App. 539, 133 S.E.2d 439 (1963).

Cases prior to the 1978 amendment of this section still apply in that there must be supporting evidence introduced before an award of attorney's fees can be entered. *Liberty Mut. Ins. Co. v. Kirkland*, 156 Ga. App. 576, 275 S.E.2d 152 (1980) (see O.C.G.A. § 34-9-108).

To authorize an award of attorney's fees there must be evidence presented as to what is a reasonable value of the services which have been rendered by the attorney. *Liberty Mut. Ins. Co. v. Kirkland*, 156 Ga. App. 576, 275 S.E.2d 152 (1980).

Specific findings of fact. — A conclusion that an employer and its insurer acted "in whole or in part without reasonable grounds" must be supported by specific findings of fact. *Ledbetter v. Pine Knoll Nursing Home*, 180 Ga. App. 654, 350 S.E.2d 299 (1986).

Where the finding relating to the assessment of attorney's fees is silent as to whether or not the noncompliance with O.C.G.A. § 34-9-221 was without reasonable grounds, the findings do not support an award of attorney's fees under O.C.G.A. § 34-9-108. *Binswanger Glass Co. v. Brooks*, 160 Ga. App. 701, 288 S.E.2d 61 (1981).

Where employee injured the employee's

wrist during employment by employer, and employer discharged employee on March 13, 1987, but paid the employee no temporary total disability benefits until June 1987, nearly three months after the employee engaged an attorney to recover the benefits, the record established that there was some evidence to support the board's award of attorney fees and since the appellate court and the superior court are bound to affirm the board if there is any evidence to support the award, the superior court's order awarding attorney fees in favor of the employee was proper. *Southwire Co. v. Crapse*, 190 Ga. App. 383, 378 S.E.2d 742 (1989).

There was no error in the refusal to award attorney fees to an employee pursuant to O.C.G.A. § 34-9-108(b)(1) in a request for an increase in the weekly wage payments arising from a temporary total disability, as well as a request for reinstatement of benefits, as the employer reasonably defended on the issue of the wage increase because the employee's claim regarding overtime payments was disputed and not clearly supported by the records, and the reinstatement was based on a claim of cooperation with continuing medical treatment, which was also a matter of debate. *Dallas v. Flying J, Inc.*, 279 Ga. App. 786, 632 S.E.2d 389 (2006).

Reasonable Grounds

Noncompliance with § 34-9-221 must have been without "reasonable grounds." — Allowance of attorney's fees under O.C.G.A. § 34-9-108 must be predicated upon determination that the noncompliance with O.C.G.A. § 34-9-221 of the party against whom such fees are to be assessed was "without reasonable grounds". *Union Carbide Corp. v. Coffman*, 158 Ga. App. 360, 280 S.E.2d 140 (1981).

Where evidence presented reasonable grounds for defending the award, the insurer should not be punished with assessment of attorney's fees. *Pacific Employers Ins. Co. v. Peck*, 129 Ga. App. 439, 200 S.E.2d 151 (1973).

"Unlawfulness" is not the correct standard for awarding attorney's fees pursuant to O.C.G.A. § 34-9-108(b)(2); an award of attorney's fees pursuant to that statute requires a finding of non-compliance with O.C.G.A. § 34-9-221 which was "without rea-

Reasonable Grounds (Cont'd)

sonable grounds". Where there was affirmative evidence of a reasonable ground for the employer to believe that no payment was due, and thereby to commit a technical violation of the time-frame requirements of § 34-9-221, the court erred in affirming the board's award of attorney's fees. *Waffle House, Inc. v. Bozeman*, 194 Ga. App. 860, 392 S.E.2d 48 (1990).

Where a self-insurer temporarily ceased benefit's payments, but notified the Board and the Insurance Commissioner, and where there was no evidence in the claimant's record authorizing a finding of willfulness or the imposition of a civil penalty, there was no error of fact or of law made by the administrative law judge or the board in failing to assess a civil penalty or to award attorney's fees. *Grier v. Proctor*, 195 Ga. App. 116, 393 S.E.2d 18, cert. denied, 393 S.E.2d 18 (1990).

Where the employer filed the notice to controvert more than 21 days after knowledge of the employee's injury and made no explanation for its noncompliance with O.C.G.A. § 34-9-221(d), the appellate division's award of attorney fees to the employee was proper. *Bennett-Murray, Inc. v. Barnes*, 222 Ga. App. 137, 473 S.E.2d 166 (1996).

Because a WC-2 was sufficient to place the state board of workers' compensation and an employee on notice of the reason for terminating the employee's benefits due to a change in condition for the better, the employee was entitled to benefits for the ten days following the filing of the notice and attorney's fees pursuant to O.C.G.A. § 34-9-108 if the board determined that the employer's failure to comply with O.C.G.A. § 34-9-221 was unreasonable. *Reliance Elec. Co. v. Brightwell*, 284 Ga. App. 235, 643 S.E.2d 742 (2007), cert. denied, 2007 Ga. LEXIS 535 (Ga. 2007).

Reasonable grounds found. — See *Justice v. R.D.C., Inc.*, 187 Ga. App. 198, 369 S.E.2d 493 (1988).

Merely engaging attorney to enforce rights under O.C.G.A. § 34-9-221 does not authorize claimant to an award of attorney's fees under O.C.G.A. § 34-9-108 unless the employer's noncompliance with § 34-9-221 was "without reasonable grounds". *Union Carbide Corp. v. Coffman*, 158 Ga. App. 360, 280 S.E.2d 140 (1981).

Engaging an attorney to enforce rights under O.C.G.A. § 34-9-221 does not entitle a claimant to an award of attorney fees under O.C.G.A. § 34-9-108(b)(2) where there is no finding that the employer's noncompliance was without reasonable grounds. *Binswanger Glass Co. v. Brooks*, 160 Ga. App. 701, 288 S.E.2d 61 (1981).

Expert's opinion as to reasonable fee as supporting evidence. — Sufficient evidence to support an award of attorney's fees would not necessarily have to consist of the man hours devoted to the case but might only consist of an opinion of an expert as to what a reasonable fee would be for the services rendered. The expert's opinion as to what a reasonable fee might be could depend on a number of factors other than the actual man hours spent representing the claimant. The claimant's attorney might well qualify as an expert. *Liberty Mut. Ins. Co. v. Kirkland*, 156 Ga. App. 576, 275 S.E.2d 152 (1980).

Damages from attorney for fraud. — There is nothing in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) which would prevent an employee claimant from recovering damages of the claimant's attorney if the attorney is guilty of fraud in procuring the award before the board by fraudulently withholding evidence from the board as to the claimant's true condition which resulted in an award by agreement less than what would have resulted if the withheld evidence had been presented to the board. *Cline v. Lever Bros. Co.*, 124 Ga. App. 22, 183 S.E.2d 63 (1971).

Cases in which worker was not entitled to attorney's fees. — Where an employer prevailed in asserting that any award for a worker's occupational disease would have to be apportioned pursuant to O.C.G.A. § 34-9-285, the employer's controverting the worker's claim obviously was not without reasonable grounds, so the worker was not entitled to attorney fees under O.C.G.A. §§ 34-9-108 and 34-9-221. *Whitaker v. Fieldcrest Mills, Inc.*, 174 Ga. App. 533, 330 S.E.2d 761 (1985).

Where the evidence clearly provided a reasonable basis for the employer's contention that the worker's injury occurred while the worker was laid off and reasonable grounds for defending the matter did exist and were presented, the superior court erred in affirming the board's award of

attorney's fees. *Pet, Inc. v. Ward*, 219 Ga. App. 525, 466 S.E.2d 46 (1995).

A superior court erred in reversing the workers' compensation board's appellate division denial of attorney fees to a worker under O.C.G.A. § 34-9-108(b); although controverted, evidence presented at the compensation hearing supported the division's finding that a subcontractor's defense to the claim — that it did not employ the worker — was reasonable. *L. & S Constr. v. Lopez*, 290 Ga. App. 611, 660 S.E.2d 1 (2007).

Attempt made to rebut presumption in case of unexplained death. — The presumption applicable in the case of an unexplained death is well established, and, without an autopsy or death certificate, it may well be difficult to convince any given factfinder that this presumption has been rebutted. Where, however, a reasonable attempt has been made to convince the factfinder that the presumption has been rebutted, an award of attorney's fees would not be authorized simply because that reasonable attempt ultimately proved unsuccessful. *Goode Bros. Poultry Co. v. Kin*, 201 Ga. App. 557, 411 S.E.2d 724, cert. denied, 201 Ga. App. 903, 411 S.E.2d 724 (1991).

Right to fees not terminated by settlement agreement. — Where, based on the judge's finding that the suspension of benefits and the defense of the matter were unreasonable, the administrative law judge assessed attorney fees against the employer pursuant to O.C.G.A. § 34-9-221(i) and subsection (b) of O.C.G.A. § 34-9-101, and where, subsequently, the employee dismissed the employee's attorney and entered into settlement negotiations, which resulted in settlement of the employee's case, such a settlement agreement did not terminate the attorney's right to attorney fees, although the attorney played no part in the negotiations. *Bass v. Annandale at Suwanee, Inc.*, 187 Ga. App. 209, 369 S.E.2d 529 (1988).

A stipulated settlement agreement, negotiated without notice to or consent of claimants' former attorney who had been awarded a fee, and which made no mention of the fee, did not deprive the attorney of the attorney's right to collect the fee. *Don Mac Golf Shaping Co. v. Register*, 185 Ga. App. 159, 363 S.E.2d 583 (1987); *Yates v. Hall*, 189 Ga. App. 885, 377 S.E.2d 887 (1989).

Defense that job training participant was not employee was not unreasonable, so as to support an award of attorney fees against the employer, where the participant was given a training allowance rather than a wage. *Tommy Nobis Ctr. v. Barfield*, 187 Ga. App. 394, 370 S.E.2d 517 (1988).

Farm laborers defense not unreasonable. — Defense that an employee fell within the "farm laborers" exemption was not unreasonable. *J & C Poultry v. Reyes-Guzman*, 227 Ga. App. 731, 489 S.E.2d 853 (1997).

Award based on contingency fee contract. — An award based on a percentage in a contingency fee contract between an attorney and a claimant for an employer's belated commencement of workers' compensation payments was proper and did not constitute an abuse of discretion. *Jones v. Brown*, 188 Ga. App. 268, 372 S.E.2d 661 (1988).

A 25 percent contingency fee was reasonable based upon the time involved and services performed, and an award based thereon was properly upheld as a reasonable quantum meruit fee recoverable under O.C.G.A. § 34-9-108. *Atlas Automotive, Inc. v. Wilson*, 225 Ga. App. 631, 484 S.E.2d 669 (1997).

Attorney's fees properly awarded. — An employer's argument relating to a change in the claimant's condition based solely on the treating physician's change of opinion was not reasonable, and an award of attorney's fees to the claimant was proper. *St. Joseph's Hosp. v. Cope*, 225 Ga. App. 781, 484 S.E.2d 727 (1997).

Employer's failure to timely file a notice that the employer intended to controvert the claimant's workers' compensation claim for benefits, plus its failure to give a reasonable explanation for not doing so, meant the administrative law judge was authorized to award attorney's fees and the trial court erred in determining otherwise in a case where the employer was accused of unreasonably defending the claim. *Milliken & Co. v. Poythress*, 257 Ga. App. 586, 571 S.E.2d 509 (2002).

Administrative law judge (ALJ) and the Georgia Workers' Compensation Board properly awarded an employer its attorney fees as: (1) the claimant did not appeal the ALJ's decision to require the claimant to submit to an examination, but simply defied it; (2) the blatant defiance of an ALJ order

Reasonable Grounds (Cont'd)

was evidence that the claimant defended the proceedings in part without reasonable grounds; (3) the claimant was not required to defy the order so as to present the claimant's justification for doing so; (4) the claimant had a chance to present the claimant's justification to the ALJ, and failed to reiterate the claimant's position on an appeal to the Board; and (5) the ALJ and the Board had some evidence upon which to base a finding that when the claimant contested the sanctions motion, the claimant did so without reasonable grounds. *Goswick v. Murray County Bd. of Educ.*, 281 Ga. App. 442, 636 S.E.2d 133 (2006), cert. denied, 2007 Ga. LEXIS 102 (Ga. 2007).

A claimant was properly awarded attorney

fees under O.C.G.A. § 34-9-108(b)(2); the state board of workers' compensation found that the employer's unilateral suspension of benefits without a board order was unreasonable because the employer's overpayments were due to its own error, and the record supported this factual finding. *Renu Thrift Store, Inc. v. Figueroa*, 286 Ga. App. 455, 649 S.E.2d 528 (2007), cert. dismissed, 2007 Ga. LEXIS 812 (Ga. 2007).

Reversal of board's award of fees not authorized. — Where evidence supported the board's assessment of attorney fees because the employer appealed in part without reasonable grounds, it was error for the trial court to reverse the board as to its fee award. *Richardson v. Air Prods. & Chems. Inc.*, 217 Ga. App. 663, 458 S.E.2d 694 (1995).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 663 et seq.

C.J.S. — 101 C.J.S., Workers' Compensation, §§ 1444, 1445.

ALR. — Constitutionality of statute penalizing unsuccessful appeal to courts from action of administrative board, 39 ALR 1181.

Compensation of attorneys for services in connection with claim under Workmen's Compensation Act, 159 ALR 912.

What constitutes "trial," "final trial," or "final hearing" under statute authorizing allowance of attorneys' fees as costs on such proceeding, 100 ALR2d 397.

Workmen's compensation: attorney's fee

or other expenses of litigation incurred by employee in action against third-party tort-feasor as charge against employer's distributive share, 74 ALR3d 854.

Workers' compensation: availability, rate, or method of calculation of interest on attorney's fees or penalties, 79 ALR5th 201.

Validity and enforceability of express fee-splitting agreements between attorneys, 11 ALR6th 587.

Attorneys' fee awards under 5 USCS § 7701(g), which allows award of attorneys' fees to prevailing employee for appeal to merit systems protection board from adverse employment decision, 143 ALR Fed. 145.

ARTICLE 4**INSURANCE OF COMPENSATION LIABILITY GENERALLY****JUDICIAL DECISIONS**

Purpose of worker's compensation insurance differs from general liability insurance because it is not intended to benefit the employer who pays the premiums but to pay compensation to the injured employee. *Bituminous Cas. Co. v. Renfroe*, 130 Ga. App. 621, 204 S.E.2d 317 (1974).

Casualty insurance. — Workers' compensation insurance is but one form of casualty insurance. *Travelers Ins. Co. v. Adkins*, 200 Ga. App. 278, 407 S.E.2d 775 (1991).

Law of mutual departure, as applied to insurance policies, applies in the context of workers' compensation insurance. *Travelers Ins. Co. v. Adkins*, 200 Ga. App. 278, 407 S.E.2d 775 (1991).

Mutual departure by the parties from the terms of a workers' compensation policy required the insurer to give reasonable notice of an intent to require strict compliance, where there was some evidence that in handling disputes over the audited amounts of

premiums due, the insurer typically cancelled the policy but reinstated it once an agreement on the premium was reached and the money paid. *Travelers Ins. Co. v. Adkins*, 200 Ga. App. 278, 407 S.E.2d 775 (1991).

Effect of cancellation of policy. — Cancellation of a workers' compensation insurance policy in compliance with O.C.G.A. § 33-24-44(b) and a state board of workers'

compensation rule, regardless of other circumstances surrounding the cancellation, does not automatically entitle a workers' compensation insurer to complete relief against a claim that the cancellation was not effective or applicable. *Travelers Ins. Co. v. Adkins*, 200 Ga. App. 278, 407 S.E.2d 775 (1991).

RESEARCH REFERENCES

ALR. — Right of insurer under Workmen's Compensation Act to recover from employer, who has breached warranty, the amount it has been obliged to pay employee, 22 ALR 1481.

Workmen's compensation: findings upon claim for compensation as binding upon insurance carrier, 28 ALR 882.

Award against employer under Workmen's Compensation Act as within policy indemnifying him against liability imposed by law for "damages", 142 ALR 1423.

Preemption by Federal Longshore and Harbor Workers' Compensation Act of state law claims for bad-faith dealing by insurer or agent of insurer, 90 ALR Fed. 723.

34-9-120. Employer's duty to insure payment of compensation.

Every employer subject to the compensation provisions of this chapter shall insure the payment of compensation to his employees in the manner provided in this article; and, while such insurance remains in force, he or those conducting his business shall be liable to any employee for personal injury or death by accident only to the extent and in the manner specified in this article. (Ga. L. 1920, p. 167, § 11; Code 1933, § 114-601; Ga. L. 1972, p. 929, § 3.)

Law reviews. — For article surveying developments in Georgia workers' compensa-

tion law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981).

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Contract of insurance includes applicable provisions of Worker's Compensation Act.

— The provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) as a matter of law become a part of the contract of insurance as if expressly incorporated therein. *Walker v. Bituminous Cas. Corp.*, 74 Ga. App. 517, 40 S.E.2d 228 (1946).

Proof of negligence in failing to procure workers' compensation insurance is not required before employers can be held personally liable for payment of workers' compensation benefits. *Sheehan v. Delaney*, 238 Ga. App. 662, 521 S.E.2d 585 (1999).

Employer's obligation only to pay workers' compensation benefits to injured employee. — A person who is compelled to pay dam-

ages because of liability imputed to the person as the result of a tort committed by another may maintain an action for indemnity against the person whose wrong has thus been imputed to that person. The plaintiff-employer in this case, however, has had no wrong imputed to it, nor does it otherwise have vicarious liability to its employee for the injuries allegedly inflicted by the defendant tortfeasor; its obligation to the employee is to pay workers' compensation benefits, an obligation which arises regardless of fault and is not shared by the defendant tortfeasor. *North Ga. Elec. Membership Corp. v. Thomason & Holsomback Constr. Co.*, 157 Ga. App. 719, 278 S.E.2d 433 (1981).

Action against employer's agents for failure to procure insurance. — When an employer has failed to carry workers' compensation insurance and has become insolvent, and the employer's agents' failure to procure such insurance coverage has rendered an injured employee's compensation award uncollectible, the employee may maintain an action at law against those individual agents for an amount equal to the award of the Workers' Compensation Board.

Crawford v. Holt, 172 Ga. App. 326, 323 S.E.2d 245 (1984); *Underwood v. Dunn*, 221 Ga. App. 185, 470 S.E.2d 781 (1996).

Cited in *Seibels, Bruce & Co. v. National Sur. Corp.*, 63 Ga. App. 520, 11 S.E.2d 705 (1940); *Cotton States Mut. Ins. Co. v. Keefe*, 215 Ga. 830, 113 S.E.2d 774 (1960); *Bradshaw v. Glass*, 252 Ga. 429, 314 S.E.2d 233 (1984); *Kraemer v. Crook*, 94 Bankr. 207 (N.D. Ga. 1988); *Housing Auth. v. Jackson*, 226 Ga. App. 182, 486 S.E.2d 54 (1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 478 et seq.

C.J.S. — 100 C.J.S., Workers' Compensation, §§ 759, 762.

ALR. — Workmen's compensation insurance premiums as within coverage of contractor's bond, 102 ALR 135; 164 ALR 1468.

Cancellation or attempted cancellation of insurance under Workmen's Compensation Act, 107 ALR 1514.

Insurance under Workmen's Compensation Act as coextensive with insured's liability under act, 108 ALR 812.

Rights and obligations under Workmen's Compensation Act in respect of claims by employees of corporation during receivership or conservatorship of employer, 111 ALR 328.

Policy of workmen's compensation insurance issued to individual as covering employees of partnership of which he is a member, 114 ALR 724.

Reinsurance of self-insurer under Workmen's Compensation Acts, 153 ALR 967.

34-9-121. Duty of employer to insure in licensed company or association or to deposit security, indemnity, or bond as self-insurer; membership in mutual insurance company.

(a) Unless otherwise ordered or permitted by the board, every employer subject to the provisions of this chapter relative to the payment of compensation shall secure and maintain full insurance against such employer's liability for payment of compensation under this article, such insurance to be secured from some corporation, association, or organization licensed by law to transact the business of workers' compensation insurance in this state or from some mutual insurance association formed by a group of employers so licensed; or such employer shall furnish the board with satisfactory proof of such employer's financial ability to pay the compensation directly in the amount and manner and when due, as provided for in this chapter. In the latter case, the board may, in its discretion, require the deposit of acceptable security, indemnity, or bond to secure the payment of compensation liabilities as they are incurred; provided, however, that it shall be satisfactory proof of the employer's financial ability to pay the compensation directly in the amount and manner when due, as provided for in this chapter, and the equivalent of acceptable security, indemnity, or bond to secure the payment of compensation liabilities as they are incurred, if the employer shall show the board that such employer is a member of a mutual insurance company duly

licensed to do business in this state by the Commissioner of Insurance, as provided by the laws of this state, or of an association or group of employers so licensed and as such is exchanging contracts of insurance with the employers of this and other states through a medium specified and located in their agreements with each other, but this proviso shall in no way restrict or qualify the right of self-insurance as authorized in this Code section. Nothing in this Code section shall be construed to require an employer to place such employer's entire insurance in a single insurance carrier.

(b) The board shall have the authority to promulgate rules and regulations to set forth requirements for third-party administrators and servicing agents, including insurers acting as third-party administrators or servicing agents, with regard to their management or administration of workers' compensation claims. All Title 33 regulations shall remain in the Insurance Department.

(c) Wherever a self-insurer has been required to post bond, should it cease to be a corporation, obtain other coverage, or no longer desire to be a self-insurer, the board shall be allowed to return the bond in either instance, upon the filing of a certificate certifying to the existence of an insurance contract to take over outstanding liability resulting from any presently pending claim or any future unrepresented claims; and the board shall be relieved of any liability arising out of a case where the injuries were incurred, or liability therefor, prior to the returning of the bonds. (Ga. L. 1920, p. 167, § 66; Code 1933, § 114-602; Ga. L. 1962, p. 528, § 1; Ga. L. 1963, p. 141, § 13; Ga. L. 1972, p. 929, § 4; Ga. L. 1989, p. 14, § 34; Ga. L. 1997, p. 1367, § 5.)

Code Commission notes. — Pursuant to § 28-9-5, in 1988, "Commissioner of Insurance" was substituted for "Insurance Commissioner" near the end of subsection (a).

Pursuant to Code Section 28-9-5, in 1997, "Insurance Department" was substituted for "Department of Insurance" at the end of subsection (b).

Law reviews. — For article, "The Regulation of Group Property and Liability Insurance," see 20 J. of Pub. L. 479 (1971). For article, "Why Captives, Lord, What Have They Ever Done?: The Georgia Captive Insurance Company Act," see 26 Ga. St. B.J. 119 (1990).

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As a matter of law, this section becomes a part of the contract of insurance as if expressly incorporated therein. *Employers Liab. Assurance Corp. v. Hunter*, 184 Ga. 196, 190 S.E. 598 (1937); *Walker v. Bituminous Cas. Corp.*, 74 Ga. App. 517, 40 S.E.2d 228 (1946) (see O.C.G.A. § 34-9-121).

Costs not deductible from employee's paycheck. — Even if an employee agreed to a deduction from the employee's paycheck to cover the cost of workers' compensation insurance, the agreement would be contrary

to law and to public policy, and would, therefore, be unenforceable. *Morgan S., Inc. v. Lee*, 190 Ga. App. 410, 379 S.E.2d 219 (1989).

An employer may insure different operations of its business separately and these separate operations may be insured by different insurance companies. *Hanover Ins. Co. v. Sharpe*, 148 Ga. App. 195, 250 S.E.2d 815 (1978).

Effect of nonpayment of premium based upon wages of claimant. — Whether any

premium has been paid based upon the wages paid the claimant while employed is a matter solely between the employer and the insurance carrier. To hold that a premium based upon the wages of the employee must have been paid before the employee shall be covered by such policy would abrogate the purpose of the insurance provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Employers Liab. Assurance Corp. v. Hunter*, 184 Ga. 196, 190 S.E. 598 (1937).

Penalties for failure to conform to requirements of chapter. — The penalties which may be assessed against an employer who fails to meet the requirements of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) are the assessment of damages and attorney fees and criminal prosecution as a misdemeanor. *Fox v. Stanish*, 150 Ga. App. 537, 258 S.E.2d 190 (1979), overruled on other grounds, *Samuel v. Baitcher*, 247 Ga. 71, 274 S.E.2d 327 (1981).

Refusal or willful neglect to maintain insurance. — Where there was no suggestion that the statutory employer refused or wil-

fully neglected to maintain insurance, and nothing in the statute would render the statutory employer vicariously liable for the immediate employer's failure in this regard, the superior court erred in affirming that portion of the board's award against the statutory employer. *Franks v. Avila*, 200 Ga. App. 733, 409 S.E.2d 564 (1991).

Cited in *McCormack v. Shadburn*, 42 Ga. App. 352, 156 S.E. 277 (1930); *Moody v. Tillman*, 45 Ga. App. 84, 163 S.E. 521 (1932); *City of Macon v. Benson*, 175 Ga. 502, 166 S.E. 26 (1932); *Hunter v. Employers Liab. Assurance Corp.*, 54 Ga. App. 197, 187 S.E. 209 (1936); *Elliott Addressing Mach. Co. v. Howard*, 59 Ga. App. 62, 200 S.E. 340 (1938); *Seibels, Bruce & Co. v. National Sur. Corp.*, 63 Ga. App. 520, 11 S.E.2d 705 (1940); *Overton-Green Drive-It-Yourself Sys. v. Cook*, 65 Ga. App. 274, 16 S.E.2d 50 (1941); *Utica Mut. Ins. Co. v. Winters*, 77 Ga. App. 550, 48 S.E.2d 918 (1948); *Hartford Ins. Group v. Voyles*, 149 Ga. App. 517, 254 S.E.2d 867 (1979); *Hester v. Saturday*, 138 Bankr. 132 (Bankr. S.D. Ga. 1991).

OPINIONS OF THE ATTORNEY GENERAL

Corporation operating facilities for hospital authority may not self-insure. — A private, nonprofit corporation that is leasing and operating health care facilities on behalf of a hospital authority may not self-insure its workers' compensation liability as an "entity" of the authority. 1993 Op. Att'y Gen. No. 93-10.

Workers' compensation insurance policies containing standard deductibles are prohibited in Georgia since they do not provide for

the direct payment to covered employees of all benefits by an insurer. 1980 Op. Att'y Gen. No. 80-126.

Newspaper dealer as self-insurer. — If a newspaper dealer fails to carry workers' compensation insurance and comes within the provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), the dealer would probably be liable as a self-insurer. 1962 Op. Att'y Gen. p. 613.

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 663.

C.J.S. — 99 C.J.S., Workers' Compensation, § 134.

ALR. — Indemnity from manufacturer or vendor for liability incurred under workmen's compensation law for injury to employee by defective machine furnished employer, 37 ALR 853.

Cancellation or attempted cancellation of insurance under Workmen's Compensation Act, 107 ALR 1514.

Policy of workmen's compensation insurance issued to individual as covering employees of partnership of which he is a member, 114 ALR 724.

34-9-122. Type of insurance policy to be issued; promulgation of rules and regulations when accident prevention and safety engineering are questioned.

Any policy of insurance issued under this chapter shall be the standard workers' compensation policy of insurance containing the usual and customary provisions found in such policies and shall include a provision that the premium charge shall be promptly paid. If there is any question regarding the lack of accident prevention and safety engineering with respect to a particular risk, reasonable rules and regulations are to be promulgated, which shall be put into full force and effect when approved by the board. The requirements of this Code section and Code Sections 34-9-131 through 34-9-134 shall be in addition to anything required of insurance companies under the general laws of this state as embodied in Title 33. (Code 1933, § 114-613, enacted by Ga. L. 1935, p. 146, § 1; Ga. L. 1981, p. 1585, § 3; Ga. L. 1982, p. 644, § 5.)

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 474 et seq.

34-9-122.1. Workers' compensation health benefits pilot projects.

(a) Notwithstanding any provision of this chapter to the contrary, workers' compensation health benefits pilot projects are authorized under the provisions of this Code section.

(b) The Commissioner of Insurance shall adopt rules to enable employers and employees to enter into agreements to provide the employees with workers' compensation medical payments benefits through comprehensive health insurance that covers workplace injury and illness. The Commissioner of Insurance shall review all pilot project proposals and may approve a proposal only if it confers medical benefits upon injured employees substantially similar to benefits available under this chapter. The Commissioner shall revoke approval if the pilot project fails to deliver the intended benefits to the injured employees.

(c) The comprehensive health insurance may provide for health care by a health maintenance organization or a preferred provider organization. The premium must be paid entirely by the employer. The program may use deductibles, coinsurance, and copayment by the employees not to exceed \$5.00 per visit or \$50.00 maximum per occurrence.

(d) The Commissioner of Insurance shall report annually to the standing committees of the General Assembly having jurisdiction over insurance and labor matters by November 1 on the status of any pilot projects approved by the Commissioner. (Code 1981, § 34-9-122.1, enacted by Ga. L. 1992, p. 2424, § 1.)

34-9-123. Policy provisions regarding effect of notice or knowledge by insured employer as to occurrence of injury.

All policies insuring the payment of compensation under this chapter, including all contracts of mutual, reciprocal, or interinsurance must contain a clause to the effect that, as between the employer and the insurer or insurers, the notice to or knowledge of the occurrence of the injury on the part of the insured employer shall be deemed notice or knowledge, as the case may be, on the part of the insurer or insurers; that jurisdiction of the insured, for the purposes of this chapter, shall be jurisdiction of the insurer or insurers; and that the insurer or insurers shall in all things be bound by and subject to awards, judgments, or decrees rendered against such insured employer. (Ga. L. 1920, p. 167, § 70; Ga. L. 1933, p. 182, § 1; Code 1933, § 114-606.)

JUDICIAL DECISIONS

Proceeding under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is a **proceeding against the employer**, and the insurance carrier's only obligation is to pay any award of compensation rendered against the employer. *Patterson v. Curtis Publishing Co.*, 58 Ga. App. 211, 198 S.E. 102 (1938).

Cited in *Southern Ry. v. Overnite Transp. Co.*, 225 Ga. 291, 168 S.E.2d 166 (1969); *Employers Mut. Liab. Ins. Co. v. Miller*, 131 Ga. App. 681, 206 S.E.2d 574 (1974); *George v. Ashland-Warren, Inc.*, 254 Ga. 95, 326 S.E.2d 744 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 500 et seq.

C.J.S. — 100 C.J.S., Workers' Compensation, § 851.

ALR. — Right of insurer under Workmen's Compensation Act to recover from employer, who has breached warranty, the

amount it has been obliged to pay employee, 22 ALR 1481.

Insurance carrier's liability for part of employer's liability attributable to violation of law or other misconduct on his part, 1 ALR2d 407.

34-9-124. Policy or contract of insurance to contain agreement of insurer to pay compensation; payment of compensation when employer or employee exempt from provisions of chapter.

(a) No policy or contract of insurance shall be issued unless it contains the agreement of the insurer or insurers that it or they will promptly pay all benefits conferred by this chapter and all installments of the compensation that may be awarded or agreed upon to the person entitled to them and that the obligation shall not be affected by any default of the insured after the injury or by any default in giving notice required by such policy or otherwise. Such agreement shall be construed to be a direct promise by the insurer or insurers to the person entitled to compensation and shall be enforceable in his name.

(b) A policy of insurance issued under this chapter shall always first be construed as an agreement to pay compensation; and an insurer who issues a policy of compensation insurance to an employer not subject to this chapter shall not plead as a defense that the employer is not subject to the chapter; and an insurer who issues to an employer subject to this chapter a policy of compensation insurance covering an employee or employees ordinarily exempt from its provisions shall not plead the exemption as a defense. In either case compensation shall be paid to an injured employee or to the dependents of a deceased employee for a compensable accident as if the employer or the employee or both were subject to this chapter, the policy of compensation insurance constituting a definite contract between all parties concerned. (Ga. L. 1920, p. 167, § 71; Ga. L. 1933, p. 184, § 1; Code 1933, § 114-607.)

JUDICIAL DECISIONS

Purpose of section. — It was the clear purpose of this section to provide that coverage, once granted, shall be effectual, even in circumstances where it would not otherwise be obligatory for the employer to come under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Security Ins. Group v. Plank*, 133 Ga. App. 815, 212 S.E.2d 471 (1975) (see O.C.G.A. § 34-9-124).

This section was not a limitation or restriction on an insurer's right of subrogation to the position of its insured, but rather was an aid to the worker or the worker's dependents in receiving workers' compensation. *Liberty Mut. Ins. Co. v. AlSCO Constr., Inc.*, 144 Ga. App. 307, 240 S.E.2d 899 (1977) (see O.C.G.A. § 34-9-124).

Although the insurer is not subrogated to the rights of the injured workmen, the insurer is subrogated to the rights of its insured. *Liberty Mut. Ins. Co. v. AlSCO Constr., Inc.*, 144 Ga. App. 307, 240 S.E.2d 899 (1977).

This section did not impair the contractual relations fixed in the policy of insurance between the insurance carrier and the employer; it had the effect only of placing upon the insurance carrier an estoppel to plead as a defense that the employer was not subject to the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Maryland Cas. Co. v. Sanders*, 49 Ga. App. 600, 176 S.E. 104 (1934), rev'd on other grounds, 182 Ga. 594, 186 S.E. 693 (1936) (see O.C.G.A. § 34-9-124).

Purpose of requirement that policy con-

tain agreement that insurer will pay workers' compensation benefits to employees so entitled, regardless of any default by employer, is not to invalidate contract between insured and insurer for noncompliance, but to estop insurer from denying existence of employment relationship when policy has been issued covering claimant. *Nationwide-Penncraft, Inc. v. Royal Globe Ins. Co.*, 162 Ga. App. 555, 291 S.E.2d 760 (1982).

Section not applicable to employer. — O.C.G.A. § 34-9-124 applies only to "employees ordinarily exempt from its provisions"; thus, it could not apply to an employer. *King v. James King Cleaners & Laundry*, 199 Ga. App. 796, 405 S.E.2d 909 (1991).

Section not applicable to partnership. — A partner cannot be in the category of an employee and, therefore, this section, which applies to employees ordinarily exempt from its provisions, cannot apply. *Scoggins v. Aetna Cas. & Sur. Co.*, 139 Ga. App. 805, 229 S.E.2d 683 (1976) (see O.C.G.A. § 34-9-124).

Injury must be "compensable accident." — While this section did estop an insurer from denying the existence of the employment relationship when a policy had been issued covering the claimant, it did not obviate the requirement that in order for liability to attach, the injury sustained must be an otherwise "compensable accident." *Tindell v. Insurance Co. of N. Am.*, 151 Ga. App. 388, 259 S.E.2d 746 (1979) (see O.C.G.A. § 34-9-124).

This section did not preclude the defense that an injury was not compensable due to failure to comply with notice requirements. *Tindell v. Insurance Co. of N. Am.*, 151 Ga. App. 388, 259 S.E.2d 746 (1979) (see O.C.G.A. § 34-9-124).

Coverage applicable only to business specified in policy. — Both this section and the decisions were based on the principle that a policy of insurance issued under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) covered only the business specified in the policy and an enlargement and extension of the same business, and did not cover a subsequently acquired distinct and separate business which was not operated in connection with and as a part of the business contemplated by the terms of the policy at the time it was issued. *Hardware Mut. Cas. Co. v. Collier*, 69 Ga. App. 235, 25 S.E.2d 136 (1943) (see O.C.G.A. § 34-9-124).

Effect of nonpayment of premium by employer. — Whether any premium has been paid based upon the wages paid the claimant while employed is a matter solely between the employer and the insurance carrier. To hold that a premium based upon the wages of the employee must have been paid before the employee shall be covered by such policy would abrogate the purpose of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Employers Liab. Assurance Corp. v. Hunter*, 184 Ga. 196, 190 S.E. 598 (1937).

Insurance policy constitutes direct promise by insurer to person entitled to compensation. — An insurer is required to pay promptly all awards of compensation to the person entitled thereto and the policy is a direct promise by the insurer to the person entitled to compensation. *Southern Ry. v. Overnite Transp. Co.*, 225 Ga. 291, 168 S.E.2d 166 (1969); *Hartford Ins. Group v. Voyles*, 149 Ga. App. 517, 254 S.E.2d 867 (1979).

An insurer is not allowed to fail to recognize a claimant as one covered under its workers' compensation policy when it has collected premiums based on the claimant's work and has recognized the claimant as one covered under the policy and as an employee whose pay it has audited, and has increased its premium as a result of payments to this employee. *Georgia Cas. & Sur. Co. v. Rainwater*, 132 Ga. App. 170, 207 S.E.2d 610 (1974).

An insurer is estopped, after having extended insurance coverage to nonresident employees of a nonresident company, after an otherwise compensable accident occurs in this state, to defend on the ground that the employer is not subject to the Georgia workers' compensation law generally, or that although subject, it is exempt from its provisions because of the fact that during certain weeks it had less than the required number of employees working in Georgia. *Security Ins. Group v. Plank*, 133 Ga. App. 815, 212 S.E.2d 471 (1975).

If an employer carries workmens' compensation insurance on the claimant, the employer and the insurer are estopped to deny that claimant was an employee under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Georgia Cas. & Sur. Co. v. Brawley*, 135 Ga. App. 763, 219 S.E.2d 176 (1975).

A policy of compensation insurance issued covering certain work to be done is binding on the insurer and operates as a definite contract in favor of workmen performing the work, whether the workmen were or were not employees, so as to be insured thereby. *Walker v. Hill-Harmon Pulpwood Co.*, 138 Ga. App. 282, 226 S.E.2d 86, aff'd, 237 Ga. 736, 229 S.E.2d 607 (1976).

The equitable principle that where a party by that party's declaration leads another to act or fail to act in reliance upon those declarations that party may not later disavow them, may be applicable as well as this section where there was evidence of an employer deducting from the worker's pay a fee for workers' compensation insurance over an extended period of time, and it was implicit in the circumstances that the worker relied upon the declaration that the worker was to be covered by workers' compensation insurance. *Hartford Ins. Group v. Voyles*, 149 Ga. App. 517, 254 S.E.2d 867 (1979); *Gulf Am. Fire & Cas. Co. v. Taylor*, 150 Ga. App. 179, 257 S.E.2d 44 (1979) (see O.C.G.A. § 34-9-124).

Where an insurer receives from an employer sums designated by the employer as being for payment of workers' compensation premiums for an employee, and where such sums were deducted from the employee's earnings, the insurer and employer are estopped to deny workers' compensation insurance policy coverage regardless of

whether the employee is an independent contractor rather than an employee of the employer. *Gulf Am. Fire & Cas. Co. v. Taylor*, 150 Ga. App. 179, 257 S.E.2d 44 (1979).

Regardless of what the technical status of the claimant may have been vis-a-vis the employer/employee/independent contractor distinction, the insurer, who issued a policy covering the claimant and collected premiums reflecting such coverage, thereby causing the claimant to rely on the contract of insurance, was estopped to deny coverage on the basis of an assertion that the claimant was for some reason exempt from provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) or was otherwise ineligible for workers' compensation benefits. *Lawrence v. Atlanta Door Co.*, 171 Ga. App. 741, 320 S.E.2d 627 (1984).

Employer was entitled to insure defendant independent contractor under policy. — Employer was entitled under O.C.G.A. § 34-9-124(b) to bring an independent contractor under its workers' compensation policy so that the contractor's tort action for injuries was barred by the exclusive remedy of workers' compensation under O.C.G.A. § 34-9-1 and was also barred by res judicata and collateral estoppel because of the administrative law judge's findings in the workers' compensation adjudicative process that the employer's workers' compensation policy applied. *Apperson v. S. States Coop.*, F. Supp. 2d , 2005 U.S. Dist. LEXIS 21691 (M.D. Ga. Sept. 16, 2005).

Theory of estoppel under O.C.G.A. § 34-9-124 cannot confer liability where no jurisdiction exists. *Ramirez v. Bradley Constr. Co.*, 161 Ga. App. 753, 288 S.E.2d 742 (1982).

Construction subcontractor, who hired third party to install refrigeration equipment

for owner's travel center, was estopped from denying coverage for injuries to one of its hired contractor's employees under O.C.G.A. § 34-9-124(b), because it voluntarily undertook to ensure that its subcontractors' employees had workers' compensation coverage. *Murph v. Maynard Fixturecraft, Inc.*, 252 Ga. App. 483, 555 S.E.2d 845 (2001).

Cited in *DeKalb County v. Grice*, 51 Ga. App. 887, 181 S.E. 703 (1935); *Liberty Mut. Co. v. Henry*, 56 Ga. App. 868, 194 S.E. 430 (1937); *Maryland Cas. Co. v. Posey*, 58 Ga. App. 723, 199 S.E. 543 (1938); *Grice v. United States Fid. & Guar. Co.*, 187 Ga. 259, 200 S.E. 700 (1938); *General Accident, Fire & Life Assurance Corp. v. John P. King Mfg. Co.*, 60 Ga. App. 281, 3 S.E.2d 841 (1939); *Pasler v. Maryland Cas. Co.*, 97 Ga. App. 263, 103 S.E.2d 90 (1958); *New Amsterdam Cas. Co. v. Thompson*, 100 Ga. App. 677, 112 S.E.2d 273 (1959); *Home Indem. Co. v. Hernlen*, 100 Ga. App. 860, 112 S.E.2d 409 (1959); *American Mut. Liab. Ins. Co. v. Rozier*, 117 Ga. App. 178, 160 S.E.2d 236 (1968); *Georgia Cas. & Sur. Co. v. Cochran*, 127 Ga. App. 55, 192 S.E.2d 547 (1972); *Employers Mut. Liab. Ins. Co. v. Miller*, 131 Ga. App. 681, 206 S.E.2d 574 (1974); *Hill-Harmon Pulpwood Co. v. Walker*, 237 Ga. 736, 229 S.E.2d 607 (1976); *United States Fid. & Guar. Co. v. Murray*, 140 Ga. App. 708, 231 S.E.2d 502 (1976); *Georgia Cas. & Sur. Co. v. Moore*, 142 Ga. App. 191, 235 S.E.2d 591 (1977); *Denis Aerial Ag-Plicators, Inc. v. Swift*, 154 Ga. App. 742, 269 S.E.2d 890 (1980); *George v. Ashland-Warren, Inc.*, 254 Ga. 95, 326 S.E.2d 744 (1985); *Lott v. Ace Post Co.*, 175 Ga. App. 196, 332 S.E.2d 676 (1985); *Levco Wood, Inc. v. Hudson*, 186 Ga. App. 508, 367 S.E.2d 823 (1988).

OPINIONS OF THE ATTORNEY GENERAL

Workers' compensation insurance policies containing standard deductibles are prohibited in Georgia since they do not provide for

the direct payment to covered employees of all benefits by an insurer. 1980 Op. Att'y Gen. No. 80-126.

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 480.

C.J.S. — 100 C.J.S., Workers' Compensation, § 763.

ALR. — Right of insurer under Workmen's Compensation Act to recover from employer, who has breached warranty, the amount it has been obliged to pay employee, 22 ALR 1481.

Insurance under Workmen's Compensation Act as coextensive with insured's liability under act, 108 ALR 812.

Policy of workmen's compensation insurance issued to individual as covering employees of partnership of which he is a member, 114 ALR 724.

Refusal of workmen's compensation or employers' liability insurer to act upon claim against employer, or delay or repudiation of liability in that regard, as justifying payment or compromise by employer without complying with provisions of policy that make judgment against employer or agreement with insurer's consent a condition of its liability, 128 ALR 565.

34-9-124.1. Optional deductibles to be offered by insurers.

(a) Each insurer issuing a policy under this chapter shall offer, as a part of the policy or as an optional endorsement to the policy, deductibles optional to the policyholder for benefits payable under this chapter. Deductible amounts offered shall be fully disclosed to the prospective policyholder in writing in the amount of \$100.00, \$200.00, \$300.00, \$400.00, \$500.00, or increments of \$500.00 up to a maximum of \$2,500.00 per compensable claim. The policyholder exercising the deductible option shall choose only one deductible amount.

(b) If the policyholder exercises the option and chooses a deductible, the insured employer shall be liable for the amount of the deductible for benefits paid for each compensable claim of work injury suffered by an employee. The insurer shall pay all or part of the deductible amount, whichever is applicable to a compensable claim, to the person or provider entitled to the benefits conferred by this chapter and then seek reimbursement from the insured employer for the applicable deductible amount. The payment or nonpayment of deductible amounts by the insured employer to the insurer shall be treated under the policy insuring the liability for workers' compensation in the same manner as payment or nonpayment of premiums.

(c) Optional deductibles shall be offered in each policy insuring liability for workers' compensation which is issued, delivered, issued for delivery, or renewed under this chapter on or after July 1, 1990, unless an insured employer and insurer agree to renegotiate a workers' compensation policy in effect on July 1, 1990, so as to include a provision allowing for a deductible.

(d) Premium reduction for deductibles shall be determined before the application of any experience modification, premium surcharge, or premium discounts. To the extent that an employer's experience rating or safety record is based on benefits paid, money paid by the insured employer under a deductible as provided in this Code section shall not be included as benefits paid so as to harm the experience rating of such employer.

(e) This Code section shall not apply to employers who are approved to self-insure against liability for workers' compensation or group self-

insurance funds for workers' compensation established pursuant to Article 5 of this chapter. (Code 1981, § 34-9-124.1, enacted by Ga. L. 1990, p. 392, § 1.)

34-9-124.2. Restrictions on requirements requiring recipients of benefits to utilize out-of-state mail order pharmacy services.

(a) A policy, plan, or contract of workers' compensation insurance issued under this chapter may not be issued, delivered, issued for delivery, or renewed on or after July 1, 1990, and a certificate of authority for a group self-insurance fund under Article 5 of this chapter may not be issued or renewed on or after July 1, 1990, if such policy, plan, contract, or fund requires that recipients of benefits thereunder obtain pharmacy services, including but not limited to prescription drugs, from an out-of-state mail order pharmacy or which requires that such recipients who do not utilize an out-of-state mail order pharmacy must pay a copayment fee or have imposed any other condition for the receipt of pharmacy services when that payment or condition is not imposed upon those recipients who utilize an out-of-state mail order pharmacy for those services.

(b) An employer who provides workers' compensation benefits as a self-insurer under this chapter may not require that any recipient of benefits under that self-insurance plan who becomes an employee of that employer on or after July 1, 1990, and who obtains pharmacy services under that plan, including but not limited to prescription drugs, must obtain those services from an out-of-state mail order pharmacy or must pay a copayment fee or have imposed any other condition for the receipt of pharmacy services when that payment or condition is not imposed upon those recipients who utilize an out-of-state mail order pharmacy for those services. (Code 1981, § 34-9-124.2, enacted by Ga. L. 1990, p. 1087, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1990, this Code section, which was enacted by Ga. L. 1990, p. 1087, § 1, as Code Section 34-9-124.1 was renumbered as Code Section 34-9-124.2, since Ga. L. 1990, p. 392, § 1, also enacted a Code Section 34-9-124.1.

34-9-125. Insurance policies subject to chapter; approval of policy or contract forms by board; exceptions.

Every policy insuring the payment of compensation provided for in this article or insuring against liability for payment of such compensation, including all contracts of mutual, reciprocal, or interinsurance, shall be deemed to be made subject to this chapter. No corporation, association, or organization and no mutual, reciprocal, or interinsurers shall enter into or make any such policy or contract of insurance unless its form shall have been approved by the board. This chapter shall not apply to policies of insurance against loss from explosion of boilers or flywheels or other similar catastrophic hazards. (Ga. L. 1920, p. 167, § 72; Code 1933, § 114-608.)

Law reviews. — For survey article on workers' compensation law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003).

JUDICIAL DECISIONS

As a matter of law, this section became a part of the contract of insurance as if expressly incorporated therein. *Employers Liab. Assurance Corp. v. Hunter*, 184 Ga. 196, 190 S.E. 598 (1937); *Walker v. Bituminous Cas. Corp.*, 74 Ga. App. 517, 40 S.E.2d 228 (1946) (see O.C.G.A. § 34-9-125).

Cited in *Hunter v. Employers Liab. Assurance Corp.*, 54 Ga. App. 197, 187 S.E. 209 (1936); *Utica Mut. Ins. Co. v. Winters*, 77 Ga. App. 550, 48 S.E.2d 918 (1948); *National Council on Comp. Ins. v. Caldwell*, 154 Ga. App. 528, 268 S.E.2d 793 (1980).

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workers' Compensation, § 763.

34-9-126. Filing by employer of evidence of compliance with insurance requirements; assessment of attorney's fees and increased compensation against employer who fails to file.

(a) Every employer subject to the compensation provisions of this chapter shall file with the board in the form prescribed by the board, annually or as often as the board in its discretion may deem necessary, evidence satisfactory to the board of his compliance with Code Section 34-9-121 and all other Code sections relating thereto.

(b) Any employer subject to the compensation provisions of this chapter who refuses or willfully neglects to comply with subsection (a) of this Code section shall be guilty of a misdemeanor. In hearing any application for compensation by an injured employee of such delinquent employer, the board may assess compensation against such employer in an amount 10 percent greater than that provided for in this chapter and, in addition to the increased compensation, shall also fix a reasonable attorney's fee to be paid by the employer to the representative of the employee. The attorney's fee and the increased compensation shall be due and payable at once, and their payment shall be enforced as provided elsewhere in this chapter. (Ga. L. 1920, p. 167, § 67; Ga. L. 1923, p. 92, § 7; Code 1933, §§ 114-603, 114-9901; Ga. L. 1972, p. 929, §§ 5, 6.)

Cross references. — Punishment for misdemeanors generally, § 17-10-4.

torney fees in workers' compensation claims, see 15 Ga. St. B.J. 187 (1978).

Law reviews. — For article discussing at-

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICABILITY OF SECTION
ATTORNEY'S FEES

General Consideration

This section embodied a penalty and must be strictly construed. Therefore, the penalty provided for can be assessed only where the employer, through refusal or willful neglect, has failed to comply with the provisions of the act as expressed in that section. *Petty v. Mayor of College Park*, 63 Ga. App. 455, 11 S.E.2d 246 (1940); *Dunn v. American Mut. Liab. Ins. Co.*, 64 Ga. App. 509, 13 S.E.2d 902 (1941) (see O.C.G.A. § 34-9-126).

This section did not authorize an assessment of damages and attorney's fees on account of a refusal or willful neglect to pay the compensation provided for in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) to one entitled thereto. *Dunn v. American Mut. Liab. Ins. Co.*, 64 Ga. App. 509, 13 S.E.2d 902 (1941) (see O.C.G.A. § 34-9-126).

Employer's failure to file. — An employer's failure to secure workers' compensation coverage mandated by the state legislature may subject the employer to criminal penalties, including imprisonment, but it does not follow that the employer's discharge in bankruptcy is to be denied as an additional penalty. *Hope v. Walker*, 48 F.3d 1161 (11th Cir. 1995).

Penalty may include attorney's fees. — Subsection (b) of O.C.G.A. § 34-9-126 specifies that any employer who "refuses or wilfully neglects" to provide evidence of the employer's compliance with the provisions of O.C.G.A. § 34-9-121 shall be guilty of a misdemeanor and may be required to pay a penalty in the amount of 10 percent of the benefits awarded, plus reasonable attorney's fees. *Franks v. Avila*, 200 Ga. App. 733, 409 S.E.2d 564 (1991).

Cited in *Moody v. Tillman*, 45 Ga. App. 84, 163 S.E. 521 (1932); *Liberty Lumber Co. v. Silas*, 181 Ga. 774, 184 S.E. 286 (1936); *Durham Land Co. v. Kilgore*, 56 Ga. App. 785, 194 S.E. 49 (1937); *Elliott Addressing Mach. Co. v. Howard*, 59 Ga. App. 62, 200 S.E. 340 (1938); *Hearing v. Johnson*, 105 Ga. App. 408, 124 S.E.2d 655 (1962); *Stokes v. Peyton's, Inc.*, 526 F.2d 372 (5th Cir. 1976); *Samuel v. Baitcher*, 154 Ga. App. 602, 269 S.E.2d 96 (1980); *Hester v. Saturday*, 138 Bankr. 132 (Bankr. S.D. Ga. 1991).

Applicability of Section

Applicability of section. — This section had no application to a case in which the

employer accepted the provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) and complied with the requirements thereof as to filing with the board the necessary form prescribed, or other evidence satisfactory to the board of the employer's compliance. *Dunn v. American Mut. Liab. Ins. Co.*, 64 Ga. App. 509, 13 S.E.2d 902 (1941) (see O.C.G.A. § 34-9-126).

Section inapplicable to municipalities. — This section, providing for penalties for failure to comply with the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), did not apply to municipalities. *Petty v. Mayor of College Park*, 63 Ga. App. 455, 11 S.E.2d 246 (1940) (see O.C.G.A. § 34-9-126).

Legislature did not intend to penalize the taxpayers of a municipality for the failure of the officers thereof to comply with the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) in taking insurance and making the required reports. *Petty v. Mayor of College Park*, 63 Ga. App. 455, 11 S.E.2d 246 (1940).

Attorney's Fees

Jurisdiction and timeliness. — The jurisdiction of the Industrial Board (now Board of Workers' Compensation) to assess damages and attorney's fees against an employer for refusing or willfully neglecting to comply with the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) was as full and complete where an agreement was submitted to it for approval as it was when an application for compensation was being heard and determined. In either case, it is the duty of the board to see that this law was complied with. *Russell v. Shelton*, 59 Ga. App. 466, 1 S.E.2d 225 (1939).

Attorney award based on failure to pay compensation. — The provisions of this section did not provide for the assessment of attorney's fees against the employer and its carrier for failure to pay compensation when due or to furnish medical treatment when needed. *Wilson v. Maryland Cas. Co.*, 71 Ga. App. 184, 30 S.E.2d 420 (1944) (see O.C.G.A. § 34-9-126).

Evidence of value of service required. — When attorney fees are assessed against an employer/insurer pursuant to O.C.G.A. § 34-9-126, the award must be supported by some evidence of the value of the legal

Attorney's Fees (Cont'd)

services rendered. *Copelan v. Burrell*, 174 Ga. App. 63, 329 S.E.2d 174 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 54.

ALR. — Indemnity from manufacturer or vendor for liability incurred under workmen's compensation law for injury to employee by defective machine furnished employer, 37 ALR 853.

Validity of statutory provision for attorney's fees, 90 ALR 530.

Insurance carrier's liability for part of employer's liability attributable to violation of law or other misconduct on his part, 1 ALR2d 407.

Amount of attorney's compensation in absence of contract or statute fixing amount, 56 ALR2d 13; 86 ALR Fed. 866.

What constitutes "trial," "final trial," or "final hearing" under statute authorizing allowance of attorney's fees as costs on such proceeding, 100 ALR2d 397.

Validity of statute allowing attorney's fee to successful claimant but not to defendant, or vice-versa, 73 ALR3d 515.

Excessiveness or adequacy of attorneys' fees in matters involving real estate—modern cases, 10 ALR5th 448.

Excessiveness or adequacy of attorneys' fees in domestic relations cases, 17 ALR5th 366.

Calculations of attorneys' fees under Federal Tort Claims Act — 28 USCS § 2678, 86 ALR Fed. 866.

34-9-127. Issuance by board of certificate of self-insurance; review; revocation.

(a) Whenever an employer has complied with those provisions of Code Section 34-9-121 relating to self-insurance, the board shall issue to such employer a certificate which shall remain in force for a period fixed by the board.

(b) The board shall have the authority to review the self-insured status of an employer after a merger or acquisition involving the employer.

(c) The board may, upon at least 60 days' notice to the employer and after a hearing, revoke the certificate upon satisfactory evidence for such revocation having been presented. At any time after such revocation, the board may grant a new certificate to the employer upon his petition. (Ga. L. 1920, p. 167, § 68; Code 1933, § 114-604; Ga. L. 1999, p. 817, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, §§ 624, 627.

C.J.S. — 100 C.J.S., Workers' Compensation, § 692 et seq.

34-9-128. Inspection of place of employment and injury records; penalty for noncompliance.

The board and its authorized representatives shall have the power and authority to enter any place of employment and to inspect the same,

together with all employment, payroll, and injury records at any reasonable time for the purpose of investigating compliance with this chapter and making inspections for the proper enforcement of this chapter. The willful refusal of an employer to permit inspections and investigations pursuant to this Code section or to comply with Code Sections 34-9-120, 34-9-121, and 34-9-126 after being notified of noncompliance by the board shall subject the employer to a penalty to be assessed by the board, not exceeding \$50.00 per day so long as the refusal shall continue; provided, however, that no penalty shall be assessed except after notice of not less than ten days and a hearing thereon before the board. (Code 1933, § 114-616, enacted by Ga. L. 1975, p. 190, § 8; Ga. L. 1977, p. 771, § 1; Ga. L. 1988, p. 1679, § 21.)

RESEARCH REFERENCES

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| Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 582. | C.J.S. — 99 C.J.S., Workers' Compensation, § 215 et seq. |
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34-9-129. Furnishing of bond by insurance companies doing workers' compensation business in state; bringing of actions upon bond; posting of security in lieu of bond.

Every insurance company doing a workers' compensation business in this state shall furnish a bond payable to the state in the sum of \$50,000.00 with some surety company authorized to transact business in this state as surety, in such form as may be approved by the Commissioner of Insurance, conditioned for the payment of compensation losses on policies issued by such insurance company upon risks located in this state. An action may be brought upon said bond by the board for the use and benefit of any party or parties at interest. The annual license of such company shall not be issued or renewed until it has filed with the Commissioner of Insurance of this state the bond required by this Code section. In lieu of such bond a deposit of the same amount may be made with the Office of Treasury and Fiscal Services in the form of other security satisfactory to the Commissioner of Insurance. (Ga. L. 1920, p. 167, § 70; Ga. L. 1933, p. 182, § 1; Code 1933, § 114-606; Ga. L. 1993, p. 1402, § 18.)

Code Commission notes. — Pursuant to § 28-9-5, in 1988, "Commissioner of Insurance" was substituted for "Insurance Commissioner" throughout the Code section.

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 624.

34-9-130. Authority of Commissioner of Insurance to investigate rates; assistance by board in investigations.

In addition to the authority prescribed in Title 33, the Commissioner of Insurance shall have the power, in such manner and by such means as he may deem proper and adequate, to gather statistics and information and make investigations concerning rates for such insurance. He may take into consideration the income, earnings, and loss ratios from any and every source whatever of any such company and may call upon the directors of the State Board of Workers' Compensation to sit with him in an advisory capacity at any investigation or hearing concerning any rate or rates. (Ga. L. 1920, p. 167, § 73; Ga. L. 1929, p. 358, § 2; Code 1933, § 114-609; Ga. L. 1982, p. 644, § 6.)

Code Commission notes. — Pursuant to § 28-9-5, in 1986, "Commissioner of Insurance" was substituted for "Insurance Commissioner".

Cross references. — Use of licensed rating organizations in making filings under section, § 33-9-3.

Law reviews. — For article surveying developments in Georgia workers' compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981).

JUDICIAL DECISIONS

Commissioner has discretion to give the greatest weight to the information which the commissioner considers most valuable; this includes the discretion to consider composite filings as advisory or as "benchmark" filings against individual filings. *Caldwell v. Liberty Mut. Ins. Co.*, 248 Ga. 282, 282 S.E.2d 885 (1981).

Parties to a workers' compensation insurance contract do not have freedom of contract with respect to the rates to be charged in such contract, but they are bound by the rate approved by the Insurance Commis-

sioner for coverage of such a policy or contract. *Walker v. Bituminous Cas. Corp.*, 74 Ga. App. 517, 40 S.E.2d 228 (1946).

There was a statutory right to obtain judicial review of the order of the Insurance Commissioner determining the workers' compensation insurance rates under this section. *National Council on Comp. Ins. v. Caldwell*, 154 Ga. App. 528, 268 S.E.2d 793 (1980) (see O.C.G.A. § 34-9-130).

Cited in *Dixie Constr. Prods., Inc. v. Southeastern Council on Comp. Ins.*, 183 Ga. App. 101, 357 S.E.2d 831 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, §§ 472, 473.

C.J.S. — 100 C.J.S., Workers' Compensation, §§ 639 et seq., 668, 695.

34-9-130.1. Policies or contracts of insurance against liability for compensation under this chapter.

(a) Notwithstanding any other provision of law, all insurers issuing policies or contracts of insurance against the liability for compensation under this chapter shall comply with the following provisions. Each insurer's basic rate for policies or contracts of insurance against the liability for compensation under this chapter shall not exceed the insurer's effective

rate approved by and on file with the Commissioner of Insurance as of April 22, 1982. These rates shall remain in effect until April 1, 1983.

(b) There shall be no exception to the requirements of subsection (a) of this Code section unless the Commissioner of Insurance finds, after a hearing upon the written request of an insurer, that the use of the rates required under subsection (a) of this Code section by the insurer will result in rates which are inadequate to the extent that:

(1) Such rates do not properly reflect the insurer's loss experience in this state to the extent that its earned premiums would not equal its incurred losses or expenses; or

(2) Such rates jeopardize the solvency of the insurer required to use such rates.

(c) The insurer shall have the burden of showing that the use of the rate required under subsection (a) of this Code section will result in rates which are inadequate to the extent that they do not properly reflect the insurer's loss experience in this state or that their use would jeopardize its solvency. No insurer shall be relieved of using the required rates if its most recently available experience on such lines of business shows a net underwriting gain unless, on the basis of statistical data, pertinent judgment, and trend factors, no other reasonable conclusion would be appropriate.

(d) Upon conclusion of any hearing held pursuant to this chapter, the Commissioner of Insurance shall enter his order specifying the rates required to be used by the insurer. The Commissioner shall indicate in his order all the factors entering into a decision relieving an insurer from full compliance with this Code section. The provisions of Chapter 2 of Title 33 shall apply to hearings held under this Code section.

(e) Any insurer appealing from a final order of the Commissioner of Insurance may continue to use its rates then in effect during the pendency of the appeal, provided arrangements satisfactory to the Commissioner are made to secure the repayment to the insurer's policyholders of the difference between the rates used by the insurer and that rate which would be lower as required by this Code section. Upon final adjudication the insurer shall repay any excess premium collected from its policyholders plus interest at the rate of 12 percent per annum. (Code 1933, § 114-609.1, enacted by Ga. L. 1982, p. 2485, § 2; Code 1981, § 34-9-130.1, enacted by Ga. L. 1982, p. 2485, § 6; Ga. L. 1983, p. 3, § 25; Ga. L. 1985, p. 149, § 34.)

Code Commission notes. — Pursuant to § 28-9-5, in 1986, "Commissioner of Insurance" was substituted for "Insurance Commissioner" in four places.

34-9-131. Insurer permit requirement; claim office within state.

(a) Every insurance company and every person, firm, or corporation writing policies of insurance under this chapter or insuring the payment of

compensation to employees as provided by this chapter, before writing any such policy or entering upon any such insurance contract or continuing any such contract of force, shall obtain from the board a permit authorizing such company or such person, firm, or corporation to engage in business as an insurance carrier under this chapter and to write and enter upon such insurance contracts.

(b) The application for such permit shall set forth such facts as the board may, by regulation, require. The board is authorized to prescribe the form of the permit and to provide by regulation for a hearing upon such application. Upon the filing of such application, the board shall have such hearing thereon as may be provided for by regulation and shall grant a permit if, in its discretion, the applicant is qualified, financially and otherwise, to carry on such insurance business. Upon obtaining said permit, the insurer shall designate and maintain an office in the State of Georgia for the handling of claims or shall designate an agent located in the State of Georgia who shall be authorized to execute instruments for the payment of compensation.

(c) Any company or any person, firm, or corporation who shall write insurance under this chapter or enter upon any contract to insure the payment of compensation under this chapter or continue any such contract of force without first obtaining a permit from the board as required by this Code section or after the revocation of any such permit shall be guilty of a misdemeanor. (Code 1933, § 114-610, enacted by Ga. L. 1935, p. 146, § 1; Code 1933, § 114-9902, enacted by Ga. L. 1935, p. 146, § 2; Ga. L. 1987, p. 806, § 4.)

Cross references. — Punishment for misdemeanors generally, § 17-10-4.

34-9-132. Grounds for revocation of insurance carrier's permit.

The board is authorized, of its own motion or upon complaint filed with it, after notice of not less than ten days and a hearing thereon, to revoke any permit granted under Code Section 34-9-131 if an employer is ready, willing, and able to pay a premium at the rate prescribed by the Insurance Department but it appears that the holder of such permit declines to accept and underwrite the risk assigned to it by the board or a bureau established and approved for rating purposes; or if it appears that the holder of any such permit fails and refuses to obey any valid order of the board or to pay any award entered against it by the board and not appealed from or affirmed on appeal; or if it appears that the holder of such permit is otherwise not qualified to carry on such business. (Code 1933, § 114-610, enacted by Ga. L. 1935, p. 146, § 1.)

RESEARCH REFERENCES

ALR. — Tort liability of worker's compensation insurer for wrongful delay or refusal to make payments due, 8 ALR4th 902.

34-9-133. Apportionment and assignment of rejected risks; Workers' Compensation Assigned Risk Insurance Plan; merit rating plan.

(a) The board shall prescribe the rules and regulations for apportioning rejected workers' compensation policies and may establish an equitable assignment of such policies and enforce such provisions; provided, however, the Commissioner of Insurance is authorized to establish or approve a method to apportion on a pro rata basis any rejected workers' compensation policy where four insurers duly authorized to write workers' compensation insurance refused, in writing, to issue the workers' compensation policy to cover said risk or where the agent for the applicant for such insurance confirms in writing to the four insurers their refusal to cover said risk. In formulating this method of assignment, a minimum loss ratio will be considered by the Commissioner of Insurance. Then, such established or approved method shall immediately assign an insurer to write such risk. The Commissioner of Insurance shall establish separate categories of risks rejected as the result of insufficient prior workers' compensation experience, risks rejected for factors other than workers' compensation loss experience, and risks rejected as the result of poor workers' compensation experience. Where such assignment has been made under the aforementioned method, the board shall not make the assignment.

(b) The method of apportioning and assigning rejected workers' compensation insurance policies provided in subsection (a) of this Code section shall include the assignment and apportionment of such policies covering vendors who provide logging services to a named insured or covering an association of such vendors.

(c)(1) The method of apportioning and assigning rejected workers' compensation insurance policies provided in subsections (a) and (b) of this Code section shall be known as the "Workers' Compensation Assigned Risk Insurance Plan" or "Plan." All policies issued under the Plan shall have the words "Georgia Workers' Compensation Assigned Risk Plan" placed in bold letters on the policy declarations page to ensure that rejected risks know that the policy has been issued in the Plan.

(2) For Plan policies with effective dates on or after January 1, 1996, the Commissioner of Insurance shall approve and implement a plan which establishes rates adequate to eliminate any Plan operating deficit by January 1, 1999.

(3) Such Plan shall be revised annually by the Plan administrator and presented to the Commissioner of Insurance for approval.

(4) Such Plan shall include, to the extent adequate to reduce the Plan operating deficit:

(A) Rating plans, procedures, and requirements placed on Plan policyholders; and

(B) Procedures and requirements placed on Plan insurers and the Plan administrator.

(5) Such Plan shall also include, but not be limited to:

(A) Plan policy assessments and surcharges;

(B) Credits for policyholders who have had no lost-time claims;

(C) A system of credits against assessment or participation of insurers for the voluntary writing of a risk or risks which are currently insured through the Plan;

(D) Provisions that the type or level of services by an insurer for Plan policyholders shall be no less than such type or level of services of such insurer for its policyholders not in the Plan; and

(E) Provisions for safety programs to be implemented by policyholders in cooperation with their insurer.

(d) The Plan required by subsection (c) of this Code section shall be structured, to the extent possible, so as to reduce the operating deficit of the Plan proportionately each year from January 1, 1996, through January 1, 1999.

(e) Notwithstanding anything to the contrary provided in subsection (c) or (d) of this Code section, the Commissioner of Insurance shall have the discretion to waive all or any portion of the Plan policy assessments and surcharges described in subsection (c) of this Code section if the operating deficit of the Plan for a respective Plan policy year improves by at least 15 percent as compared to the deficit for such Plan policy year calculated based upon rates in effect for the immediately preceding Plan policy year.

(f) For Plan policies with effective dates on or after January 1, 1999, the aggregate of all revenues received from rates and rating plans charged to participants who are insured under the Plan shall be set so that the amount received in premiums, together with reasonable investment income earned on those premiums, shall be sufficient to pay claims and reasonable expenses of providing coverage under the Plan and to establish appropriate levels of loss reserves, all in accordance with actuarial standards, including consideration of the effects of subsection (c) of this Code section. For purposes of this Code section, the term "actuarial standards" means standards adopted by the Casualty Actuarial Society in its Statement of Principles Regarding Property and Casualty Insurance Ratemaking and the Standards of Practice adopted by the Actuarial Standards Board. Any

premium or surcharge collected by the Plan in excess of the amount necessary to fund the projected ultimate losses and expenses of the Plan shall be refunded to the policyholders or applied to reduce premiums.

(g) Notwithstanding Code Sections 33-9-8 and 33-9-21, the Commissioner of Insurance shall cause the implementation of rates for policies issued pursuant to the Plan which are sufficient to conform with the requirements of paragraphs (1) and (2) of subsection (c) of this Code section.

(h) On or before December 15, 1995, and each subsequent year, the Commissioner of Insurance shall submit a report to the appropriate standing committees of the General Assembly concerning the status and results of operation of the Plan. Such report shall include but not be limited to a report on the Plan deficit, burden and trends in reducing such deficit, number of policies and amount of premium underwritten by the Plan, rating of such policies based upon the three-tier rating program, his or her estimate of the effect of policyholder safety committees on policyholder loss experience, operation of workers' compensation insurance specialty markets in this state, impact of the servicing carrier remedial program and results of servicing carrier incentives and disincentives, review of the efficiency of the servicing carrier bid program, and any other information the Commissioner of Insurance or the respective chairpersons of such standing committees deem necessary to evaluate the Plan and the workers' compensation insurance market in this state.

(i) On or before July 1, 1995, the Commissioner of Insurance shall promulgate rules and regulations to implement this Code section. Such rules and regulations shall include the system of credits required by subparagraph (c)(5)(C) of this Code section, which credits shall not be less than the following:

(1) For policies with an annual premium of \$7,500.00 or less, a credit of four times the amount of such annual premium;

(2) For policies with an annual premium of at least \$7,501.00, but not exceeding \$15,000.00, a credit of three times the amount of such annual premium;

(3) For policies with an annual premium of at least \$15,001.00, but not exceeding \$25,000.00, a credit of two times the amount of such annual premium;

(4) For policies with an annual premium of at least \$25,001.00, but not exceeding \$200,000.00, a credit of one and one-half times the amount of such annual premium; or

(5) For policies with an annual premium of \$200,001.00 or greater, a credit of the amount of such annual premium.

(j) A merit rating plan shall be implemented by the Plan administrator and the Commissioner of Insurance in compliance with subparagraph (c) (5) (B) of this Code section to establish credits for policyholders who have had no lost-time claims and debits for a specified number of lost-time claims to include the following:

(1) A policyholder who is not experience rated, whose annual premium is less than \$5,000.00, and who is subject to a merit rating plan of credits and debits to be applied to the Georgia manual premium for the policyholder in the Plan;

(2) The merit rating plan shall be based upon the number of lost-time claims of the policyholder during the most recent one-year period for which statistics are available. This one-year period is that which would otherwise be used for experience rating purposes;

(3) The credits and debits under such plan shall be as follows:

(A) No lost-time claims for the most recent year, a 12 1/2 percent credit;

(B) One lost-time claim for the most recent year, no credit or debit; and

(C) Two or more lost-time claims for the most recent year, a 5 percent debit;

(4) The insurer shall obtain the claims information of the policyholder and shall notify the policyholder of the credit or debit premium adjustment and the reason for same in writing within 90 days of the effective date of the policy. The insurer, upon request, shall provide additional safety plan information to a policyholder who develops a debit merit rating adjustment; and

(5) Debits and credits used in this merit rating plan shall not apply to the Georgia minimum premium for a risk. (Code 1933, § 114-620, enacted by Ga. L. 1935, p. 146, § 1; Ga. L. 1982, p. 644, § 7; Ga. L. 1990, p. 781, § 1; Ga. L. 1992, p. 1322, § 1; Ga. L. 1992, p. 1942, § 13; Ga. L. 1993, p. 91, § 34; Ga. L. 1995, p. 1365, § 1; Ga. L. 1996, p. 1527, § 1.)

Code Commission notes. — Pursuant to § 28-9-5, in 1986, “Commissioner of Insurance” was substituted for “Insurance Commissioner” in two places.

Law reviews. — For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992).

JUDICIAL DECISIONS

Independent investigation not required. — In an action by a workers’ compensation insurer based on negligent misrepresentations by an agent and the insured that the insured qualified for coverage through the

assigned risk pool, the trial court did not err in failing to charge that an insurer may rely on representations in an insurance application as true without conducting an independent investigation. *United States Fid. &*

Guar. Co. v. Paul Assocs., 230 Ga. App. 243, 496 S.E.2d 283 (1998).

Strickland, 241 Ga. App. 504, 526 S.E.2d 924 (1999).

Cited in National Council on Comp. Ins. v.

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Required participation of companies providing alternative insurance coverage. — Companies providing alternative insurance coverage in lieu of workers' compensation insurance may be required to participate in

the Workers' Compensation Assigned Risk Insurance Plan by a rule properly promulgated under the Administrative Procedure Act. 1995 Op. Att'y Gen. No. 95-33.

34-9-134. Appeals from decisions under Code Sections 34-9-122 and 34-9-131 through 34-9-133.

Appeal from any decision under Code Sections 34-9-122 and 34-9-131 through 34-9-133 may be made in the manner provided elsewhere for appeals from orders or judgments of the members of the board. (Code 1933, § 114-610, enacted by Ga. L. 1935, p. 146, § 1.)

34-9-135. Disclosure of costs by insurer.

(a) Each workers' compensation insurer shall disclose on or before March 1 of each year its costs, as provided in subsection (c) of this Code section, for the preceding calendar year.

(b) The disclosure required by this Code section shall be in the form prescribed by the Commissioner of Insurance and shall be filed with the Commissioner of Insurance.

(c) The disclosure required by this Code section shall include at a minimum the workers' compensation insurer's total underwriting costs, administrative costs, legal defense costs, reserves, payments from reserves for claims, payments to the insurer from reserves, payments for medical benefits on behalf of employees pursuant to this chapter, payments for rehabilitation benefits on behalf of employees pursuant to this chapter, payments for weekly benefits to employees pursuant to this chapter, lump sum payments made to employees pursuant to this chapter, and payments to employees' attorneys made pursuant to this chapter, and the amounts of any taxes, fees, or assessments required by law. (Code 1981, § 34-9-135, enacted by Ga. L. 1992, p. 1942, § 14.)

Law reviews. — For note on 1992 enactment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992).

34-9-136. Statistical data submitted by insurance company to rating organization; verification by employer; issuance of experience modification worksheets to insured.

(a) Before an insurance company is authorized to submit statistical data on an employer to any licensed rating organization for purposes of determining the employer's experience modification factor, the insurance company must verify with the employer the accuracy of the data. In so verifying, the insurance company shall provide to the employer: (1) the data to be submitted; and (2) a statement in boldface type, to be signed by an authorized representative of the employer, and submitted by the insurance company to the licensed rating organization along with the statistical data. Said statement shall indicate that the statistical data to be submitted have been reviewed by the authorized representative of the employer; that said data are accurate; and that an insurance company representative has explained to the employer's representative that the statistical data to be submitted may affect the employer's premium for workers' compensation insurance coverage.

(b) When a licensed rating organization issues an insured's experience modification worksheet to the insured's workers' compensation insurance company, the licensed rating organization shall submit a copy of the worksheet to the insured. (Code 1981, § 34-9-136, enacted by Ga. L. 1992, p. 1942, § 14; Ga. L. 1993, p. 1365, § 2.)

Law reviews. — For annual survey article discussing workers' compensation law, see 52 Mercer L. Rev. 505 (2000).

For note on 1992 enactment of this Code

section, see 9 Ga. St. U. L. Rev. 285 (1992). For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 152 (1993).

JUDICIAL DECISIONS

Evidence of violation. — In an action to recover premiums due on workers' compensation insurance policies, evidence showing plaintiff insurer's violation of O.C.G.A. § 34-9-136 was a circumstance that could be considered with respect to defendant's coun-

terclaim for damages to its business caused by excessive premiums charged. *International Indem. Co. v. Regional Employer Serv., Inc.*, 239 Ga. App. 420, 520 S.E.2d 533, cert. denied, 1999 Ga. LEXIS 1019 (1999).

34-9-137. Considerations in employer's experience modification factor.

Whenever an experience modification factor is applied to the premium of an employer's policy of workers' compensation insurance, consideration shall be given to:

(1) Any amounts recovered by such employer or its insurer pursuant to Code Section 34-9-11.1, relating to rights of action against third parties and subrogation; and

(2) Code Section 34-9-360, relating to reimbursements from the Subsequent Injury Trust Fund. In addition, the insurer shall not include in the computation of such factor any penalties which were incurred pursuant to this chapter by the actions of the insurer or its representative. (Code 1981, § 34-9-137, enacted by Ga. L. 1992, p. 1942, § 14; Ga. L. 1994, p. 887, § 9.)

Law reviews. — For note on 1992 enactment of this Code section, see 9 Ga. St. U. L. Rev. 285 (1992). For note on the 1994 amendment of this Code section, see 11 Ga. St. U. L. Rev. 204 (1994).

34-9-138. Consideration of employer's experience while self-insured.

Any insurance company which voluntarily writes a policy for any employer which was self-insured under any provision of this chapter shall include such employer's prior experience while self-insured to determine or have determined an experience modifier for such employer. (Code 1981, § 34-9-138, enacted by Ga. L. 1996, p. 919, § 1.)

Law reviews. — For review of 1996 workers' compensation legislation, see 13 Ga. St. U. L. Rev. 227 (1996).

ARTICLE 5

GROUP SELF-INSURANCE FUNDS

Cross references. — Health insurance plans for public school teachers and other public school employees, § 20-2-880 et seq. Duty of Department of Administrative Services to formulate program of self-insurance for workers' compensation benefits for state employees, § 50-5-12 et seq.

Administrative rules and regulations. — Group self insurance funds, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Commissioner of Insurance Chapter 120-2-34.

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Workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) **authorizes use of one municipality's share of common pool**, or group self-insurance fund, to pay the workers' com-

pensation claims of employees from another municipality. 1980 Op. Att'y Gen. No. 80-145.

34-9-150. Purpose of article.

It is the intent of the General Assembly to provide an alternative mechanism through which bona fide members of trade associations and professional associations as well as groups of municipalities, counties, school boards, and hospital authorities may extend workers' compensation benefits to their employees through group self-insurance programs. This alternative is authorized to enable the members of these groups to lower

workers' compensation costs by reducing administrative expenses and to encourage a reduction in claims through active loss prevention, loss control, and rehabilitation programs. It is therefore intended that this article be liberally construed to effectuate these purposes. (Code 1933, § 114-601a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1.)

Law reviews. — For article surveying developments in Georgia workers' compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981).

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workers' Compensation, § 692 et seq.

34-9-151. Definitions.

As used in this article, the term:

(1) "Administrator" means any individual, partnership, or corporation, except a sponsoring association or associations, designated and authorized by the board of the fund to carry out the day-to-day operations of the fund, including, but not limited to, the processing and payment of claims.

(2) "Basic rate" means the annual premium rate charged prior to any credit being given for applicable experience debits or credits or for applicable discounts or surcharges.

(3) "Board of the fund" means the board of trustees of any fund created pursuant to this article.

(4) "Commissioner" means the Commissioner of Insurance of the State of Georgia.

(5) "County" means a county of this state. Such term shall include a consolidated city-county government and any public authority, commission, board, or similar body created or activated by an Act of the General Assembly or by a resolution or ordinance of the governing authority of a county, individually or jointly with any other political subdivision or subdivisions of this state, pursuant to the Constitution of this state or an Act of the General Assembly and which carries out its functions on a county-wide basis, a multicounty basis, or wholly within the unincorporated area of a county.

(6) "Fund" means a joint fund for workers' compensation established pursuant to this article.

(7) "Gross annual premium" means the total annual premium determined by multiplying the payroll for the applicable workers' compensation job classifications by the appropriate annual premium rate for each classification.

(8) "Hospital authority" means any legally constituted board, commission, or authority which has been created for the purpose of and is actually governing the operation of a public hospital created in accordance with the laws of this state.

(9) "Intrastate agreement" means the written agreement subscribed to and abided by the members of the fund, which agreement establishes the fund and provides for its operation and through which each member agrees to assume and discharge, jointly and severally, any and all liability under this article relating to or arising out of the operations of the fund.

(10) "Member" means an employer who is a member of a fund established by a trade association or professional association or by a group of municipalities, counties, school boards, or hospital authorities in accordance with this article. "Member" also means a trade association or professional association which elects to cover its own employees under a fund established by its members.

(11) "Municipality" means an incorporated municipality of this state, a consolidated city-county government, and any local public authority, commission, board, or other similar agency which is created by a general or local Act of the General Assembly and which carries out its functions wholly or partly within the corporate boundaries of an incorporated municipality of this state. This term shall also include such bodies which are created or activated by an appropriate ordinance or resolution of the governing body of a municipal corporation, individually or jointly with other political subdivisions of the state.

(12) "Normal annual premium" means the standard annual premium plus or minus applicable surcharges or discounts.

(13) "Premium" means any consideration, by whatever name called, paid to a fund by a member for coverage under the fund.

(14) "Professional association" means a corporation or unincorporated association which at the time it initially makes application to form a fund under this chapter has been organized for a period of at least three years and is domiciled in the State of Georgia, is engaged in substantial activity for the benefit of its members, other than the sponsorship of a fund operated pursuant to this article, and is comprised of a bona fide group of employers who are engaged in the same or in substantially similar types of professions and have similar governing industry classifications as approved by the Commissioner regarding workers' compensation and employers' liability insurance.

(15) "School board" means a public board of education of any county or of any independent school system of this state.

(16) "Standard annual premium" means the gross annual premium plus or minus applicable experience credits or debits.

(17) "Surplus" means the total assets of the fund less its liabilities and reserves as determined in accordance with the requirements of this article.

(18) "Surplus share" or "proportionate share" means the initial contribution paid to a fund by a member as a condition of membership in the fund.

(19) "Trade association" means a corporation or unincorporated association which at the time it initially makes application to form a fund under this chapter has been organized for a period of at least three years, domiciled in the State of Georgia, is engaged in substantial activity for the benefit of its members, other than the sponsorship of a fund operated pursuant to this article, and is comprised of a bona fide group of employers who are engaged in the same or in substantially similar types of businesses or professions within this state and who have similar governing industry classifications as approved by the Commissioner regarding workers' compensation and employers' liability insurance. (Code 1933, § 114-602a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 1987, p. 1110, § 2; Ga. L. 1987, p. 1397, § 1; Ga. L. 1991, p. 947, § 1; Ga. L. 1995, p. 1201, § 1.)

Code Commission notes. — Pursuant to § 28-9-5, in 1987, "Commissioner of Insurance" was substituted for "Insurance Commissioner" in paragraph (4).

Law reviews. — For article surveying developments in Georgia workers' compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981).

34-9-151.1. Eligibility for establishing a fund.

(a) Any group or groups of employers who are engaged in similar business activities may establish a fund or funds provided that:

(1) Such fund or funds shall comply with the provisions of this article;

(2) Separate classes, as described in Code Section 34-9-152, may not be commingled in any fund; and

(3) Such fund or funds shall be established by one or more professional or trade associations.

(b) Any professional or trade association may establish a fund or funds.

(c) Any fund established prior to January 1, 1995, and which is operating in compliance with this article or in compliance with the requirements of the applicable rules and regulations of the Commissioner shall be deemed to be in compliance with this article. (Code 1981, § 34-9-151.1, enacted by Ga. L. 1995, p. 1201, § 2.)

34-9-151.2. Filing of intent to form fund; notice of intent to refuse to issue certificate of authority.

(a) At least 30 days prior to executing the initial intrastate agreement required by this article, any group authorized to form a fund under this article shall file with the Commissioner an intent to form a fund on such form as prescribed by the Commissioner. Such form shall include:

(1) The name of the group forming the fund;

(2) The name of the proposed administrator;

(3) The type or types of employers to be offered membership in the fund;

(4) A statement that the group is knowledgeable of and will comply with the requirements of this article and any rules or regulations pertaining thereto; and

(5) A copy of the intrastate agreement that will be used to establish a fund.

(b) Upon receipt and review of the information supplied with the notice of intent to form a fund provided under subsection (a) of this Code section, the Commissioner, pursuant to his or her authority under Code Section 34-9-169, may issue a notice of intent to refuse to issue a certificate of authority, which notice of intent shall be based upon the Commissioner's determination that the proposed fund would not be in compliance with the provisions of this article. The proposed fund may not be formed and the intrastate agreement may not be executed until the Commissioner withdraws in writing the notice of intent to refuse to issue a certificate of authority. (Code 1981, § 34-9-151.2, enacted by Ga. L. 1995, p. 1201, § 2.)

34-9-152. Application to Commissioner for certificate of authority to create fund; contents of application; filing fee; membership of fund.

(a) Any group of municipalities, counties, school boards, or hospital authorities or any trade association or professional association or any other group authorized by this article may enter into an intrastate agreement for the purpose of extending workers' compensation benefits to employees of its members. Once a fund is established pursuant to the intrastate agreement, an officer or administrator of the fund shall, within ten days of the effective date of such agreement, deliver a copy of the agreement to the Commissioner. The fund shall provide workers' compensation coverage to the employees of members who deposit moneys for premiums into the fund. On or before the effective date of such coverage, the fund shall file with the State Board of Workers' Compensation the evidence of coverage form required by the board's rules issued pursuant to Code Section 34-9-126.

(b)(1) For purposes of this article, municipalities, counties, school boards, hospital authorities, trade associations, and professional associations shall each be deemed to constitute separate classes. Except as provided in paragraph (2) of this subsection, no member of any one such class shall join with a member of another class or classes for the purpose of creating a fund pursuant to this article. There shall be only one group self-insurance fund for municipalities and only one group self-insurance fund for counties; provided, however, if the Commissioner determines that there are special or unique circumstances or needs of a group of counties or municipalities which justify the establishment of an additional group self-insurance fund or funds for counties or municipalities, the Commissioner may authorize the establishment of such fund or funds.

(2) A board of education of an independent school system of any municipality is authorized to be a member of a fund comprised of municipalities.

(c) A fund must make application to the Commissioner for a certificate of authority within 90 days of the date of executing an intrastate agreement creating the fund. The application shall state that the fund has met the requirements of this subsection and the requirements of subsections (d) through (f) of this Code section and shall set forth the following:

- (1) The name of the fund;
- (2) The location of the fund's principal office, which shall be maintained within this state;
- (3) The location of the principal office of the sponsoring trade association, which shall be located in this state, or sponsoring professional association, which shall be located in this state, or group of municipalities, counties, school boards, or hospital authorities;
- (4) The names and addresses of the members;
- (5) The principal business of each member;
- (6) The name and address of a Georgia resident designated and appointed as the fund's proposed registered agent for service of process in this state;
- (7) The names and addresses of the officers and directors of the proposed fund and a statement of whether or not any of such officers and directors has been convicted of any crimes other than minor traffic violations within the last ten years;
- (8) The powers of the officers and directors and the term of office of each;
- (9) A brief outline of the method by which the administrative obligations of the fund shall be met;

(10) A copy of the bylaws of the fund;

(11) A copy of the intrastate agreement among the members;

(12) The name and address of the administrator and, if the administrator is a corporation, the names and addresses of its officers and directors and a statement concerning whether or not the administrator or any of the officers or directors thereof, if the administrator is a corporation, has been convicted of any crimes other than minor traffic violations within the last ten years;

(13) A statement of the previous experience and background of any administrator of the fund, including reference to any licenses it may hold or have held in this state or any other state within the last ten years;

(14) The most recent audited statement of the financial condition of any administrator of the fund or the most recent annual statement of such administrator if it is an insurer. Any financial statement provided as required by this paragraph shall not be deemed to be a public document and shall be maintained in confidence by the Commissioner;

(15) A copy of any agreements between the fund and any contract administrator of the fund;

(16) A statement of the financial condition of the fund listing all of its assets and liabilities as of the end of the last preceding month prior to the date of the application on such a form as may be prescribed by the Commissioner;

(17) A copy of each contract, endorsement, and application form it proposes to issue or use;

(18) Excluding funds formed by counties, municipalities, or school boards, a current, audited financial statement or other acceptable financial statement of each member of the fund. This statement shall be required of each member at the time of application to the fund, but shall not be required at any other time unless such member shall become 90 days delinquent in payment to the fund. Any financial statement provided pursuant to this article shall not be deemed to be a public document and shall be maintained in confidence by the Commissioner; and

(19) Such other information, documents, or statements as the Commissioner may reasonably require.

(d) Each application for a certificate of authority shall be accompanied by a filing fee in the amount required by subparagraph (CC) of paragraph (1) of Code Section 33-8-1, which fee shall not be refundable.

(e) A fund authorized by this article may be established only with the participation of ten or more members and shall have no fewer than 1,000

employees in the aggregate. The names of the participants and any information submitted by any member shall not be deemed to be public information and shall be maintained in confidence by the Commissioner. Any fund licensed after July 1, 1995, shall have no fewer than 15 members and 1,500 employees in the aggregate. Any fund which attains compliance and subsequently falls below the minimum number of members or aggregate employees may be granted additional time to regain compliance, up to a maximum of 180 days.

(f) A fund authorized by this article may be established only if it has and thereafter maintains gross annual premiums of \$300,000.00. Any fund licensed after July 1, 1995, may be established only if it has and thereafter maintains a gross annual premium of \$1 million. Any fund which attains compliance and subsequently falls below the minimum required premium may be granted additional time to regain compliance, up to a maximum of 180 days.

(g) All employers who are members of a class which forms a fund pursuant to this article shall be eligible for membership in such fund unless membership is denied such employers by the trustees according to underwriting guidelines established by the trustees of the fund and approved by the Commissioner in accordance with this article.

(h) Any fund formed pursuant to this article may accept as a member of such fund any other employer of the same class, as defined in subsection (b) of this Code section, which makes application for membership and otherwise meets the requirements of this article and the underwriting guidelines established by the trustees of the fund and approved by the Commissioner. (Code 1933, § 114-603a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 1991, p. 369, § 1; Ga. L. 1992, p. 2424, § 2; Ga. L. 1995, p. 1201, § 3; Ga. L. 1996, p. 919, § 2.)

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Self-insurers deemed regulated agencies.

— Groups of municipalities, counties, school boards, hospital authorities or trade associations furnishing self-insurance for workers'

compensation are regulated entities for the purposes of O.C.G.A. § 21-5-30.1. 1994 Op. Att'y Gen. No. 94-20.

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq.

C.J.S. — 44 C.J.S., Insurance, §§ 105, 108.

100 C.J.S., Workers' Compensation, § 692 et seq.

34-9-153. Issuance of certificate of authority; grounds for denial or revocation; annual renewal fee.

(a) The Commissioner shall examine the application made under Code Section 34-9-152 to determine whether the fund will be able to comply with the laws of this state and whether membership in the fund will enable the members of the fund to meet their liability for workers' compensation benefits under this chapter. If the Commissioner finds that the fund is capable of complying with such requirements and meeting such liability, he shall issue a certificate authorizing the fund to provide workers' compensation benefits on behalf of its members.

(b) If the Commissioner refuses to issue a certificate of authority, he shall issue an order setting forth the reasons for refusal and forward it to the proposed fund. A copy of the order shall be sent to each member of the fund.

(c) The Commissioner shall approve or disapprove the application for a certificate of authority within 90 days of receipt by him of the application and all of the supporting information he has requested.

(d) The Commissioner may refuse to issue or renew or may suspend or revoke the certificate of authority of any fund, in accordance with Code Section 34-9-169, for failure of the fund to comply with any provision of this article or with any of the rules, regulations, or orders of the Commissioner issued pursuant thereto.

(e) The certificate shall be renewed annually by the Commissioner, upon payment by the fund of the renewal fee required by subparagraph (CC) of paragraph (1) of Code Section 33-8-1. (Code 1933, § 114-604a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 1995, p. 1201, § 4.)

Code Commission notes. — Pursuant to § 28-9-5, in 1988, "receipt" was substituted for "receipts" in subsection (c).

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq. 100 C.J.S., Workers' Compensation, § 692 et seq.

C.J.S. — 44 C.J.S., Insurance, §§ 105, 108.

34-9-154. Compliance with workers' compensation obligations by participation in fund.

The participation by a member in a fund created pursuant to this article shall enable it to comply with its duty as an employer to assure payment of workers' compensation in accordance with this chapter. (Code 1933, § 114-605a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq.

34-9-155. License required for solicitation of membership or participation in fund; procedure for admission of new members; underwriting criteria.

(a) Any other provision of law to the contrary notwithstanding, no person other than a trustee, officer, or administrator of the fund shall solicit membership or participation in any fund unless such person:

(1) Has a valid agent's license for property and casualty insurance or a counselor's license issued pursuant to Article 1 of Chapter 23 of Title 33; or

(2) Is an officer, director, or employee of:

(A) A professional association or trade association; or

(B) A corporation with its income exempt pursuant to Section 115 of the United States Internal Revenue Code.

(b) After the inception date of a fund, prospective new members of the fund shall submit an application for membership to the board of the fund and, unless the fund elects to meet the requirements of subsection (c) of this Code section, to the Commissioner on a form prescribed by the Commissioner. The board of the fund or the administrator, with the approval of the board of the fund, shall establish the amount to be paid or contributed by each applicant to become a member of the fund. If the Commissioner does not disapprove the application of a prospective new member within 45 days, the applicant, upon payment or contribution to the fund as determined in accordance with this article, shall be authorized to become a member of the fund, to subscribe to and abide by the intrastate agreement, bylaws, rules, and regulations of the fund, and to share the liabilities and assets of the fund in accordance with its bylaws and with the applicable provisions of this article. The board of the fund may take into consideration the loss ratio of a prospective member in establishing such member's initial payment or contribution, provided that, notwithstanding the provisions of this Code section, such prospective member's initial payment or contribution shall be reasonable in relationship to the initial payment or contribution paid by the other members of the fund. Any person or group aggrieved by a determination of the board of the fund regarding the establishment of a member's initial payment or contribution shall have the right to appeal such determination to the Commissioner.

(c) The trustees of a fund may submit underwriting criteria to the Commissioner for approval and unless the Commissioner disapproves the underwriting criteria within 90 days, the fund shall be authorized to

approve or deny application for membership in the fund according to such underwriting criteria. The Commissioner, in conjunction with any examination of the fund, shall ensure that the fund is complying with the underwriting criteria submitted and approved by the Commissioner. (Code 1933, § 114-606a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 1993, p. 1365, § 3; Ga. L. 1995, p. 1201, § 5; Ga. L. 1996, p. 919, § 3.)

U.S. Code. — Section 115 of the federal United States Internal Revenue Code, referred to in subparagraph (a)(2)(B), is codified as 26 U.S.C. § 115.

Law reviews. — For note on 1993 amend-

ment of this Code section, see 10 Ga. St. U.L. Rev. 152 (1993). For review of 1996 workers' compensation legislation, see 13 Ga. St. U. L. Rev. 227 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq.

C.J.S. — 44 C.J.S., Insurance, §§ 105, 108.

34-9-156. Voluntary termination of members; grounds and procedure for involuntary termination of membership; effect of voluntary or involuntary termination on obligations.

(a) A member may elect to terminate voluntarily its participation in a fund by giving at least 90 days' advance written notice to the fund and to the Commissioner, unless the fund elects to meet the requirements of subsection (e) of this Code section. Such voluntary termination shall be approved by the Commissioner, or the fund, upon a finding by the Commissioner, or the fund, that such member is in good standing and that both member and fund have met all requirements of this article and of any rules and regulations issued by the Commissioner and the fund as of the proposed effective date of termination.

(b)(1)(A) A member may be involuntarily terminated as a member of a fund upon a finding by the Commissioner, after due notice and hearing, that such member has failed to comply with the requirements of this article or with the bylaws of the fund or the applicable intrastate agreement. Such hearings may be initiated by the Commissioner either upon the Commissioner's own motion or upon a recommendation of the board of the fund or the member facing involuntary termination. In the Commissioner's discretion, any hearings arising from this Code section may be consolidated if the issues involved are the same or substantially similar to those of other scheduled hearings.

(B) The trustees of a fund may involuntarily terminate a member of the fund if the fund elects to meet the requirements of subsection (e) of this Code section and if the trustees find that such member has failed to comply with the requirements of this article or with the bylaws of the fund or the applicable intrastate agreement.

(2) A member may be involuntarily terminated for failure to pay its proportionate share or any premiums or installments thereof due the fund or for failure otherwise to discharge its obligations to the fund when due. Written notice stating the time when the termination will be effective, which time shall be not less than 15 days from the date of notice or such other specific longer period as may be provided in the intrastate agreement or by statute, may be delivered in person or by depositing such notice in the United States mail, to be dispatched by at least first-class mail to the last address of record of the member, and receiving therefor the receipt provided by the United States Postal Service. Such notice may or may not be accompanied by a tender of the unearned premium paid by the member, calculated on a pro rata basis. If such tender is not made simultaneously with such notice, it shall be made within 15 days of notice of termination unless an audit or rate investigation is required, in which case such tender shall be made as soon as practicable.

(c) Any member who either voluntarily terminates membership or is involuntarily terminated from membership in a fund pursuant to this Code section shall remain jointly and severally liable for all obligations of the fund as of the date of such termination, including, but not limited to, any obligations of the fund to pay claims against the fund arising out of any occurrence, incident, or accident which took place during the member's membership in the fund.

(d) Any member who is voluntarily terminated or is involuntarily terminated shall be provided with the data necessary for the replacement workers' compensation insurer to determine or have determined an experience modifier for such former member.

(e) A fund may submit criteria to the Commissioner to be used in the removal of a member from the fund and unless the Commissioner disapproves the criteria in writing in 90 days, the fund shall be authorized to voluntarily or involuntarily remove a member from the fund according to the submitted criteria. The Commissioner, in conjunction with any examination of the fund, shall ensure that the fund is complying with the criteria submitted and approved by the Commissioner. (Code 1933, § 114-607a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 1982, p. 3, § 34; Ga. L. 1995, p. 1201, § 6; Ga. L. 1996, p. 919, § 4.)

Code Commission notes. — Pursuant to the first sentence in subsection (a) and, in Code Section 28-9-5, in 1996, "subsection paragraph (b)(2), "first-class" was substituted for "first class" in the second sentence. (e)" was substituted for "paragraph (e)" in

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq.

C.J.S. — 44 C.J.S., Insurance, §§ 105, 108, 100 C.J.S., Workers' Compensation, § 699.

34-9-157. Boards of trustees — Appointment of members.

Each fund created pursuant to this article shall be operated by a board of trustees chosen by the mutual agreement of the participating members of such fund in accordance with this article and with the bylaws of the fund. The appointment of any trustee shall be subject to the approval of the Commissioner. (Code 1933, § 114-608a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq.

C.J.S. — 44 C.J.S., Insurance, §§ 105, 108.

34-9-158. Boards of trustees — Powers.

The board of the fund shall have the following specific powers, together with such other powers granted elsewhere in this article as may be necessary or incidental to effectuate the purposes of this article:

(1) To invest and reinvest funds held by it in accordance with Code Section 34-9-163;

(2) To collect and disburse all money due or payable in accordance with this article;

(3) To employ and contract with banks, corporate trustees, insurance agents, surplus lines brokers, insurers authorized to do business in this state, and approved surplus lines carriers;

(4) To employ and contract with actuaries, accountants, contract administrators, and other agents and employees necessary for the operation of the fund;

(5) To employ an administrator for the fund;

(6) To contract with other persons or public bodies of this state for the use of services or facilities necessary, useful, or incidental to the operation of the fund;

(7) To employ legal counsel;

(8) To execute other contracts necessary or incidental to the operation of the fund;

(9) To pay dividends to or levy assessments on its members;

(10) To purchase bonds and insurance necessary to comply with the requirements of this article and the rules and regulations of the Commissioner; and

(11) To do and perform such other and further acts, not inconsistent with this article or with other laws of this state, which may be necessary for

the efficient and proper operation of the fund. (Code 1933, § 114-609a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 1995, p. 1201, § 7.)

34-9-159. Annual reports of affairs and operations of funds; additional periodic reports; verification of reports; compliance condition for renewal of certificates.

On or before March 1 in each year after it shall have commenced to do business pursuant to a certificate of authority, every fund shall make and file with the Commissioner a report of its affairs and operations during the last preceding calendar year. This annual report shall be made in such form and shall contain such information as the Commissioner may, from time to time, by regulation, prescribe and require to protect the public interest, the interests of the members of the fund, and the interests of the employees of each member. The Commissioner may, by regulation, require such additional periodic reports as the Commissioner may from time to time prescribe as necessary or appropriate to protect the members and their employees and the public, to ensure the solvency of any fund, to inform the members of the fund, and to assure fair dealing in the investments of any fund. The Commissioner may require that the reports be verified under oath by such appropriate officers or agents as the Commissioner may designate by regulation and may require the reports to be furnished to persons or entities the Commissioner determines to have a legitimate interest therein. The Commissioner may, based upon the Commissioner's evaluation of the condition of individual funds, exempt that fund from submitting any report, except the annual report required by this article. Compliance with this Code section shall be a condition of the renewal of a certificate of authority under Code Section 34-9-153. (Code 1933, § 114-610a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 1995, p. 1201, § 8.)

RESEARCH REFERENCES

Am. Jur. 2d. — 44 Am. Jur. 2d, Insurance, § 1842 et seq. **C.J.S.** — 44A C.J.S., Insurance, § 1828.

34-9-160. Method of determining financial condition and solvency of a fund and financial capacity of fund to pay obligations.

In determining the financial condition and solvency of a fund and the financial capacity of a fund to pay workers' compensation obligations promptly and otherwise to meet its obligations under this chapter, the Commissioner shall take into consideration the following:

- (1) The security deposit required by Code Section 34-9-161;
- (2) The surplus required by Code Section 34-9-162;

(3) Such other considerations as the Commissioner may, by rule or regulation, deem necessary or appropriate;

(4) The Commissioner shall charge as liabilities the same reserves as are required of incorporated insurers issuing nonassessable policies on a reserve basis;

(5) The surplus shares of members shall be allowed as assets, except that any premiums delinquent for 90 days shall first be charged against such surplus shares;

(6) The surplus shares of members shall not be charged as a liability;

(7) All premiums delinquent less than 90 days shall be allowed as assets;

(8) An assessment levied upon members and not collected shall not be allowed as an asset;

(9) The computation of reserves shall be based upon premiums other than membership fees and without any deduction for expenses and the compensation of any contract administrator; and

(10) The existence and face value of contracts or policies of excess insurance or other measures of financial capacity as the Commissioner may deem appropriate, including the authority of municipalities, counties, and school boards, to levy and collect taxes pursuant to the laws of this state. (Code 1933, § 114-611a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 1995, p. 1201, § 9.)

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq.

C.J.S. — 44 C.J.S., Insurance, §§ 105, 108.

34-9-161. Securities deposit; excess loss funding program.

(a)(1) Each fund shall maintain a deposit consisting of securities eligible for deposit by domestic insurance companies in accordance with Chapter 12 of Title 33 in the amount of \$200,000.00, which amount equates to the deposits required of a domestic insurance company pursuant to Code Section 33-3-8.

(2) A fund may post a surety bond or bonds in the amount of \$250,000.00 to satisfy the securities deposit requirement of paragraph (1) of this subsection. Such bond or bonds shall be acceptable only if issued by an insurer whose form has been approved by the Commissioner.

(3) The security deposit required by this subsection shall be allowed as an asset and shall not be deemed as part of the surplus required by Code Section 34-9-162.

(b) The excess loss funding program of a fund shall be approved by the Commissioner as a condition to the issuance and maintenance of a certificate of authority of any fund created pursuant to this article. An excess loss funding program may consist of excess insurance, self-funding from unobligated surplus of an agency, any combination of the foregoing, or any other funding program acceptable to the Commissioner. A fund may be permitted to purchase excess insurance:

(1) From insurers authorized to transact business in this state; or

(2) From approved surplus lines carriers. (Code 1933, § 114-612a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 1982, p. 3, § 34; Ga. L. 1987, p. 1397, § 2; Ga. L. 1989, p. 1075, § 1; Ga. L. 1990, p. 997, § 1; Ga. L. 1995, p. 1201, § 10.)

Law reviews. — For article surveying developments in Georgia workers' compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq.

C.J.S. — 44 C.J.S., Insurance, §§ 105, 108. 100 C.J.S., Workers' Compensation, § 698.

34-9-162. Maintenance of surplus and expendable surplus; waiver of surplus requirements; return of surplus to members of fund.

(a) A fund formed pursuant to this article shall possess and thereafter maintain a minimum surplus of not less than \$200,000.00.

(b) Any fund established prior to July 1, 1995, which has satisfied the surplus requirement of this Code section by utilization of a surety bond shall replace such bond with cash or cash equivalent within 60 months of the date such bond was submitted to the Commissioner.

(c) Any fund established prior to July 1, 1995, which had received from the Commissioner a waiver of surplus pursuant to subsection (b) of this Code section as it existed prior to July 1, 1995, shall have until July 1, 1998, to replace such waiver with actual surplus and provide evidence of such surplus to the Commissioner.

(d) At the discretion of the board of the fund, any surplus exceeding the requirements of this Code section and the total of all other liabilities of the fund may be returned to the members of the fund. The board of the fund shall notify the Commissioner by letter within ten days following the return of any surplus. (Code 1933, § 114-613a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 1982, p. 3, § 34; Ga. L. 1989, p. 1075, § 2; Ga. L. 1995, p. 1201, § 11.)

Law reviews. — For article surveying developments in Georgia workers' compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq.

C.J.S. — 44 C.J.S., Insurance, §§ 105, 108.

34-9-163. Investment of assets; maintenance of loss reserves.

(a) Except as otherwise specifically provided for in this article, the investable assets of a fund shall be invested only in securities or other investments permitted by the laws of this state for the investment of assets constituting the legal reserves of property and casualty insurance companies or in such other securities or investments as the Commissioner may permit such insurers to invest their funds under Title 33. Such investments shall be subject to the same terms, conditions, and limitations which apply to property and casualty insurance companies under Title 33.

(b) For all claims under policies written in the three years immediately preceding the date as of which the statement is made, a fund shall maintain:

(1) Actual loss reserves, incurred but not reported loss reserves, and reserves for aggregate excess insurance which, combined with actual loss and loss expense payments, shall be in an amount at least equal to the loss fund percentage as stated in the fund's excess insurance policy or such higher amounts as required by the Commissioner; or

(2) With the approval of the Commissioner, loss reserves in an amount equal to the greater of the amount established by an independent casualty actuary in accordance with actuarial standards or 45 percent of earned premiums written in each of the three years prior to the date on which the report or statement is to be made, less all loss and loss expense payments made in connection with the claims under policies written in those three years. For the purposes of this paragraph, the term "actuarial standards" means the standards adopted by the Casualty Actuarial Society in its Statement of Principles Regarding Property and Casualty Loss and Loss Adjustment Expense Reserves and the Standards of Practice adopted by the Actuarial Standards Board. (Code 1933, § 114-614a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 1989, p. 1075, § 3; Ga. L. 1990, p. 997, § 2; Ga. L. 1995, p. 1201, § 12; Ga. L. 1996, p. 919, § 5.)

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq.

C.J.S. — 44 C.J.S., Insurance, §§ 105, 108.

34-9-164. Payment of operating expenses by members of fund; liability of members; payment by funds of expenses of State Board of Workers' Compensation; legal capacity of funds.

(a) Each member shall pay into the fund its share of the fund's projected obligation for workers' compensation liability, administrative expenses, and other costs incurred by the fund as may be determined by the board of the fund or by the fund's administrator and approved by the board of the fund, all in accordance with this article. The share shall be adjusted by the board of the fund according to the claims experience of each participating member in accordance with criteria set forth in the bylaws of the fund. The premium for each year shall be paid by each member at the beginning of each fund year unless otherwise provided for under the intrastate agreement or under a payment plan developed by the board of the fund and submitted to and approved by the Commissioner. The board of the fund shall make payments to the employees of the members out of the fund for workers' compensation benefits pursuant to and in accordance with the claims procedures set forth in this chapter; and the board of the fund shall determine what, if any, dividends or assessments shall be paid to or levied against the participating members of the fund.

(b) The board of each fund shall establish and implement a loss prevention and loss control program for each member of the fund.

(c) Each member of the fund shall be jointly and severally liable for all legal obligations of the fund, including, but not limited to, any obligations of the fund to pay claims against the fund arising out of any occurrence, incident, or accident covered under this chapter.

(d) Each fund shall be treated as a self-insurer for the purposes of Article 9 of this chapter.

(e) Each fund shall be liable under Code Section 34-9-63 for its share of the expenses of the State Board of Workers' Compensation and, for the purposes of that Code section only, it shall be treated as though it were an insurer.

(f) Each fund may sue and be sued in its own name. Service of process shall be perfected upon the fund by serving its registered Georgia agent for service of process or by otherwise serving the fund in accordance with the laws of this state. (Code 1933, § 114-615a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 1995, p. 1201, § 13; Ga. L. 1996, p. 919, § 6.)

RESEARCH REFERENCES

- Am. Jur. 2d.** — 44A Am. Jur. 2d, Insurance, § 1828 et seq. 100 C.J.S., Workers' Compensation, § 692 et seq.
C.J.S. — 44 C.J.S., Insurance, §§ 105, 108.

34-9-165. Requirements as to contracts between funds and administrators not employed by funds.

(a) If a fund contracts with an administrator which is not an employee of the fund, the fund and the administrator must enter into a written agreement which shall be subject to review and approval by the Commissioner in accordance with this Code section. The agreement shall set forth the following:

(1) The powers of the administrator;

(2) The general services to be performed by the administrator;

(3) The manner and amount of compensation to be paid to the administrator and any arrangements between the fund and the administrator for the payment of administrative and other expenses incurred in connection with the operation of the fund;

(4) A contractual provision obligating the administrator to obtain and maintain such bonds, deposits, or insurance coverage as may be required to be maintained by this article; and

(5) A requirement that errors and omissions coverage or other appropriate liability insurance in an amount which is not less than that specified by the rules and regulations of the Commissioner be written with an authorized insurer or an eligible surplus lines insurer and be maintained at all times by the administrator.

(b) The agreement may provide for the following:

(1) The right of substitution of the administrator and the revocation of the agreement upon notice to the Commissioner;

(2) Restrictions upon the exercise of power by the administrator; and

(3) Any other lawful provision deemed necessary or appropriate.

(c) The terms of any such agreement shall be reasonable and equitable, and the agreement and any amendments thereto shall be filed with the Commissioner at least 30 days prior to their use. Any such agreement and any and all amendments thereto which have not been specifically disapproved by the Commissioner within 30 days after the filing thereof shall be deemed to be approved.

(d) A copy of the agreement and any and all amendments thereto shall be furnished to each member upon request.

(e) Except as provided in subsection (d) of this Code section, such agreements and amendments shall be confidential and privileged and shall not be released to the public by the Commissioner without the prior written consent of the parties thereto. (Code 1933, § 114-618a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 1995, p. 1201, § 14.)

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq.

C.J.S. — 44 C.J.S., Insurance, §§ 105, 108.

34-9-166. Fiduciary responsibilities of trustees, officers, or administrators of moneys.

Any trustee, officer, or administrator of a fund who receives, collects, disburses, or invests moneys in connection with the activities of the fund shall be responsible for such moneys in a fiduciary capacity. (Code 1933, § 114-623a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq.

C.J.S. — 44 C.J.S., Insurance, §§ 105, 108.

34-9-167. Bond, liability insurance, and resident office of administrator.

(a) The Commissioner shall require each administrator to have and maintain a fidelity bond pursuant to Code Section 33-23-102.

(b) Errors and omissions coverage or other appropriate liability insurance in an amount which is not less than that specified by the rules and regulations of the Commissioner shall be maintained at all times by an administrator of a fund; and a certificate by the insurer or other appropriate evidence of such coverage shall be filed with the Commissioner by the fund.

(c) Each administrator shall maintain an office in this state for the payment, processing, and adjustment of the claims of the fund or funds which it represents. (Code 1933, § 114-619a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 1996, p. 919, § 7.)

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq.

C.J.S. — 44 C.J.S., Insurance, §§ 105, 108.

34-9-168. Grounds and procedure for restraining transaction of business by fund or administrator; appointment of receivers; criminal prosecution.

If the Commissioner finds that any fund or its administrator (1) has failed to comply with any provision of this article, (2) is fraudulently operated, (3) is in such condition as to render further fund operations hazardous to the public interest or to the interests of the fund's members and their employees, (4) is financially unable to meet its obligations and claims as

they come due, or (5) has violated any other provision of law, he may apply to the Superior Court of Fulton County for an injunction. The court may forthwith issue a temporary injunction restraining the transaction of any business by the fund; and, after a full hearing, it may make the injunction permanent and appoint one or more receivers to take possession of the books, papers, moneys, and other assets of the fund in order to settle its affairs and distribute its funds to those entitled thereto, subject to such rules and orders as the court may prescribe. If it appears that a crime has been committed in connection with the administration or management of any fund, the Attorney General may pursue the appropriate criminal action. (Code 1933, § 114-621a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq. **C.J.S.** — 44 C.J.S., Insurance, §§ 105, 108.

34-9-169. Revocation and suspension of certificates of authority; probation and fine; voluntary dissolution or termination of functions.

(a) The Commissioner may revoke, suspend, or refuse to issue or renew the certificate of authority of any fund when and if, after investigation, he finds that:

(1) Any certificate of authority issued to the fund was obtained by fraud;

(2) There was any material misrepresentation in the application for the certificate of authority;

(3) The fund or its administrators have otherwise shown themselves to be untrustworthy or incompetent;

(4) Such fund or its administrator has violated any of the provisions of this article or the rules and regulations of the Commissioner promulgated pursuant to this article;

(5) The fund or its administrator has misappropriated, converted, illegally withheld, or refused to pay over upon proper demand any moneys which belong to a member, an employee of a member, or a person otherwise entitled thereto and which have been entrusted to the fund or its administrator in its fiduciary capacities; or

(6) The fund is found to be in an unsound condition or in such condition as to render its future transaction of business in this state hazardous to its members and their employees.

(b) Before the Commissioner shall revoke, suspend, or refuse to issue or renew the certificate of authority of any fund, he shall give the fund an

opportunity to be fully heard and to introduce evidence in its behalf. In lieu of revoking, suspending, or refusing to issue or renew the certificate of authority of any fund for any of the causes enumerated in this Code section, after hearing as provided in this article, the Commissioner may place the fund and its administrator on probation for a period of time not to exceed one year, may fine the fund not more than \$1,000.00 for each offense, or both, when, in his judgment, he finds that the public interest and the interests of the fund's members and their employees would not be harmed by the continued operation of the fund. The amount of any such penalty shall be paid by the fund to the Commissioner for the use of the state. At any hearing provided for by this Code section, the Commissioner shall have authority to administer oaths to witnesses. Any witness testifying falsely after taking an oath commits the offense of perjury.

(c) No fund shall be voluntarily dissolved or otherwise voluntarily cease to function unless:

(1) Written approval is first obtained from the Commissioner; and

(2) The Commissioner determines that all claims and other legal obligations of the fund have been paid or that adequate provisions for such payment have been made. (Code 1933, § 114-622a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 2004, p. 631, § 34.)

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq.

C.J.S. — 44 C.J.S., Insurance, §§ 105, 108. 100 C.J.S., Workers' Compensation, § 699.

34-9-170. Taxes — Imposition; deductions, reductions, abatements, and credits.

Reserved. Repealed by Ga. L. 1990, p. 997, § 3, effective July 1, 1990.

34-9-171. Tax exemption.

Funds organized and operating pursuant to this article shall be exempt from state and local premium taxes. (Code 1933, § 114-627a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 1990, p. 997, § 4.)

34-9-172. Examinations by Commissioner to verify solvency of funds.

(a) The Commissioner shall have the authority to require and conduct periodic examinations to verify the solvency of funds in the same manner and under the same conditions as insurers are examined under Chapter 2 of Title 33, except that each fund shall be examined at least once each five years. The Commissioner shall have the authority to require information to substantiate that the sponsoring association is engaged in substantial activity for the benefit of its members in accordance with the definitions of Code

Section 34-9-151, but that authority is not to be construed as the right to regulate or inspect that association or its members.

(b) The Commissioner is authorized to contract with private examiners to conduct examinations pursuant to subsection (a) of this Code section. If employees of the department conduct the examinations, the fund being examined shall pay to the department the reasonable expense of conducting the examination. If contract examiners conduct the examination, the fund being examined shall, at the discretion of the Commissioner, pay the costs so incurred either to the department or to the contracting party. The Commissioner may use appropriated funds to conduct the examinations and shall provide by regulation for matters relative to the conduct of such examinations, including, without limitation, the expenditure of available funds for that purpose. (Code 1933, § 114-628a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 1995, p. 1201, § 15; Ga. L. 1998, p. 267, § 1.)

Law reviews. — For review of 1998 legislation relating to labor and industrial relations, see 15 Ga. St. U. L. Rev. 181 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq.

C.J.S. — 44 C.J.S., Insurance, §§ 105, 108.

34-9-173. Remedy of deficiencies in surplus or reserve; initiation of insolvency proceedings; assessments upon liquidation.

(a) If the assets of a fund are at any time insufficient to enable a fund to discharge its legal liabilities and other obligations and to maintain the reserves and surplus required of it under this article, it shall forthwith make up the deficiency or levy an assessment upon its members for the amount needed to make up the deficiency.

(b) If the fund fails to make up the deficiency or to make the required assessment of its members within 30 days after the Commissioner orders it to do so or if the deficiency is not fully made up within 60 days after the date on which any such assessment is made or within such longer period of time as may be specified by the Commissioner, the fund shall be deemed to be insolvent and shall be proceeded against in the same manner as are domestic insurers under Chapter 37 of Title 33; and the Commissioner shall have the same powers and limitations in such proceedings as are provided under that chapter, except as otherwise provided for in this article.

(c) If the liquidation of a fund is ordered, an assessment shall be levied upon its members for such an amount as the Commissioner determines to be necessary to discharge all liabilities of the fund, including the reasonable costs of liquidation. (Code 1933, § 114-620a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq.

C.J.S. — 44 C.J.S., Insurance, §§ 105, 108.

34-9-174. Promulgation of rules and regulations.

The Commissioner shall have authority to promulgate rules and regulations to effectuate the provisions of this article. (Code 1933, § 114-629a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1.)

RESEARCH REFERENCES

C.J.S. — 73 C.J.S., Public Administrative Law and Procedure, § 171 et seq.

34-9-175. Hearings or other proceedings for aggrieved parties.

Any party which is aggrieved by any act, determination, order, or any other action of the Commissioner taken pursuant to this article may request a hearing before the Commissioner or otherwise proceed in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Code 1933, § 114-616a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Administrative Law, § 298 et seq.

Law and Procedure, § 204. 73A C.J.S., Public Administrative Law and Procedure, § 223

C.J.S. — 73 C.J.S., Public Administrative et seq.

34-9-176. Service of process; venue of actions.

Except as otherwise provided in this article, service of process and venue shall be governed by the applicable provisions of Titles 9 and 14. (Code 1933, § 114-631a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1.)

34-9-177. Funds not to be deemed insurers.

Notwithstanding any provisions of this article which might be construed to the contrary, no fund shall be considered an insurer for the purposes of Title 33 except for the limited purposes specified in this article; and, specifically, no fund shall be considered to be an insurer for the purposes of Chapter 36 of Title 33, the "Georgia Insurers Insolvency Pool Act," or other laws of this state which relate to insurers or insurance companies. (Code 1933, § 114-630a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1; Ga. L. 1992, p. 6, § 34.)

34-9-178. Construction of article.

Nothing in this article shall be construed to apply to employers who elect to self-insure individually for workers' compensation pursuant to Code Section 34-9-121 and the rules of the State Board of Workers' Compensation or pursuant to any reciprocal agreements or contracts of indemnity executed prior to March 8, 1960, creating funds for the purpose of satisfying the obligations of self-insured employers under this chapter. (Code 1933, § 114-632a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1.)

34-9-179. Application of Chapter 6 of Title 33 to funds; enforcement by Commissioner.

Chapter 6 of Title 33 shall apply to "funds," as defined in this article; and, for the purpose of determining whether a violation of that chapter has occurred, a member and its employees shall be deemed to be "insureds" or "policyholders," as used in the above-mentioned chapter, whichever is applicable. In enforcing this Code section, the Commissioner shall be deemed to possess the same powers and be subject to the same restrictions as are applicable to the Commissioner under Chapter 6 of Title 33. (Code 1933, § 114-625a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1.)

34-9-180. Officials of funds prohibited from having pecuniary interests in transactions; exceptions.

(a) An officer, trustee, administrator, member of any committee, or employee of a fund who is charged with the duty of investing or handling the fund's assets shall not deposit or invest such assets except in the name of the fund; shall not borrow the assets of such fund; shall not be pecuniarily interested in any loan, pledge of deposit, security, investment, sale, purchase, exchange, reinsurance, or other similar transaction or property of such fund; and shall not take or receive for his or her own use any fee, brokerage, commission, gift, or other consideration for or on account of any such transaction made by or on behalf of such fund.

(b) No fund shall guarantee any financial obligation of any of its officers, trustees, or administrators.

(c) This Code section shall not prohibit a trustee, officer, member of a committee, or employee of a fund from being covered by the fund as an employee of a member and enjoying the usual rights so provided for employees of members.

(d) The Commissioner shall, by regulation, define and permit additional exceptions to the prohibition contained in subsection (a) of this Code section solely to enable payment of reasonable compensation to a trustee or

administrator who is not otherwise an officer or employee of the fund or to a corporation or firm in which a trustee or administrator is interested, for necessary services performed or sales or purchases made to or for the fund in the ordinary course of the fund's business and in the usual private professional or business capacity of the trustee or administrator or of the corporation or firm. (Code 1933, § 114-624a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Commission payment to recruiters of members. — Under current law, it is not improper for a group workers' compensation self-insurance fund to recruit members, paying the recruiters on a commission basis. 1984 Op. Att'y Gen. No. 84-8.

RESEARCH REFERENCES

Am. Jur. 2d. — 44A Am. Jur. 2d, Insurance, § 1828 et seq.

C.J.S. — 44 C.J.S., Insurance, §§ 105, 108.

34-9-181. Administrative fines, probation, or additional penalties.

(a) The Commissioner may, after a hearing, impose upon a fund an administrative fine if he finds that the fund, through the acts of its officers, employees, agents, or representatives, has with such frequency as to indicate its general business practice within this state:

(1) Refused, without just cause, to pay proper claims arising under workers' compensation coverage provided by the fund; or

(2) Compelled, without just cause, employee claimants of members or other persons entitled to the proceeds of the workers' compensation coverage provided by the fund to accept less than the amount due them or to bring an action against the fund to secure full payment or settlement thereof.

(b) The administrative fine imposed for violations set forth in subsection (a) of this Code section shall not exceed \$1,000.00 for each act of misconduct constituting a violation of this Code section; provided, however, that a fine of not more than \$5,000.00 may be imposed for each act of willful misconduct constituting a violation of this Code section.

(c) In addition to all other penalties provided for under this article, the Commissioner shall have the authority to place any fund on probation for a period of time not to exceed one year for each and every act or violation of this article or of the rules and regulations or orders of the Commissioner issued pursuant hereto and may subject such fund to a monetary penalty of up to \$1,000.00 for each and every act in violation of this article or of the rules, regulations, or orders of the Commissioner issued pursuant hereto. If the fund or its administrator knew or reasonably should have known that

the fund was in violation of this article or of the rules and regulations or orders of the Commissioner, the monetary penalty provided for in this Code section may be increased to an amount up to \$5,000.00 for each and every act or violation. (Code 1933, § 114-617a, enacted by Ga. L. 1980, p. 1686, § 1; Ga. L. 1981, p. 1759, § 1.)

34-9-182. Deadline for compliance.

Except where otherwise specified in this article, funds established pursuant to this article shall have until July 1, 1998, to comply with the requirements of this article. (Code 1981, § 34-9-182, enacted by Ga. L. 1995, p. 1201, § 16.)

ARTICLE 6

PAYMENT OF COMPENSATION

Law reviews. — For note on 1995 amendments of Code sections in this article, see 12 Ga. St. U.L. Rev. 280 (1995).

JUDICIAL DECISIONS

Reduction of retirement benefits where workers' compensation paid. — For case holding permissible certain reductions in retirement payments where workers' compensation also received, see Alessi v.

Raybestos-Manhattan, Inc., 451 U.S. 504, 101 S. Ct. 1895, 68 L. Ed. 2d 402 (1981).

Cited in State v. Head, 163 Ga. App. 842, 296 S.E.2d 157 (1982).

PART 1

MEDICAL ATTENTION

Law reviews. — For note on the 1994 amendments of Code Sections 34-9-200 to 34-9-201 and enactment of Code Section

34-9-208 of this part, see 11 Ga. St. U.L. Rev. 204 (1994).

JUDICIAL DECISIONS

Cited in Hanover Ins. Co. v. Sharpe, 148 Ga. App. 195, 250 S.E.2d 815 (1978).

RESEARCH REFERENCES

ALR. — Workmen's compensation: applicability of provisions as to medical or surgical services as affected by the character or qualifications of the person rendering them, 40 ALR 1265.

Settlement of claim or recovery against

physician or surgeon or one responsible for his malpractice on account of aggravation of injury as affecting right to compensation under Workmen's Compensation Act, 98 ALR 1392.

Limit of compensation fixed by Work-

men's Compensation Act as inclusive or exclusive of medical or hospitalization expenses, 128 ALR 136.

Workmen's compensation: construction

and effect of provisions in relation to compensation of physicians or others rendering services to injured employee, 143 ALR 1264.

34-9-200. Compensation for medical care, artificial members, and other treatment and supplies; effect of employee's refusal of treatment; employer's liability for temporary care.

(a) The employer shall furnish the employee entitled to benefits under this chapter such medical, surgical, and hospital care and other treatment, items, and services which are prescribed by a licensed physician, including medical and surgical supplies, artificial members, and prosthetic devices and aids damaged or destroyed in a compensable accident, which in the judgment of the State Board of Workers' Compensation shall be reasonably required and appear likely to effect a cure, give relief, or restore the employee to suitable employment.

(b) Upon the request of an employee or an employer, or upon its own motion, the board may in its judgment, after notice is given in writing of the request to all interested parties and allowing any interested party 15 days from the date of said notice to file in writing its objections to the request, order a change of physician or treatment and designate other treatment or another physician; and, in such case, the expenses shall be borne by the employer upon the same terms and conditions as provided in subsection (a) of this Code section.

(c) As long as an employee is receiving compensation, he or she shall submit himself or herself to examination by the authorized treating physician at reasonable times. If the employee refuses to submit himself or herself to or in any way obstructs such an examination requested by and provided for by the employer, upon order of the board his or her right to compensation shall be suspended until such refusal or objection ceases and no compensation shall at any time be payable for the period of suspension unless in the opinion of the board the circumstances justify the refusal or obstruction.

(d) If an emergency arises and the employer fails to provide the medical or other care as specified in this Code section, or if other compelling reasons force the employee to seek temporary care, the employee is authorized to seek such temporary care as may be necessary. The employer shall pay the reasonable costs of the temporary care if ordered by the board. (Ga. L. 1920, p. 167, § 26; Code 1933, § 114-501; Ga. L. 1937, p. 528; Ga. L. 1949, p. 1357, § 4; Ga. L. 1955, p. 210, § 5; Ga. L. 1963, p. 141, § 12; Ga. L. 1968, p. 3, § 4; Ga. L. 1971, p. 895, § 2; Ga. L. 1975, p. 190, § 7; Ga. L. 1985, p. 727, § 3; Ga. L. 1990, p. 1409, § 4; Ga. L. 1994, p. 887, § 10; Ga. L. 2003, p. 364, § 2.)

Editor's notes. — Ga. L. 2003, p. 364, § 8, not codified by the General Assembly, provides that: "It is the intent of the General Assembly that compensation benefits shall not be suspended under subsection (c) of Code Section 34-9-200 as enacted by this Act without first obtaining an order from the Board of Workers' Compensation authorizing such suspension of benefits."

Law reviews. — For annual survey of workers' compensation, see 38 Mercer L. Rev. 431 (1986). For survey article on workers' compensation law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For annual survey of workers' compensation law, see 58 Mercer L. Rev. 453 (2006).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
MEDICAL TREATMENT GENERALLY

General Consideration

Purpose of section. — This section was not designed to determine a change in the physical condition of the claimant to the end that the compensation then being received by the claimant shall be altered directly by the proceedings provided under that section. *City of Atlanta v. Padgett*, 68 Ga. App. 96, 22 S.E.2d 197 (1942) (see O.C.G.A. § 34-9-200).

This section was designed to bring about, hopefully for the better, a change in claimant's medical condition. *General Ins. Co. of Am. v. Bradley*, 152 Ga. App. 600, 263 S.E.2d 446 (1979) (see O.C.G.A. § 34-9-200).

No period of limitation for continued medical benefits. — Court of Appeals properly affirmed the judgment of the superior court noting that an award of medical expenses was held to be an award of compensation within the meaning of the original Workmen's Compensation Act, O.C.G.A. § 34-9-1 et seq., and in applying that principle to find that the change-in-condition statute applied to cases in which income benefits had not been paid; further, this interpretation was consistent with the recognition that no period of limitation was provided for seeking continued medical benefits under O.C.G.A. § 34-9-200. *Footstar, Inc. v. Liberty Mut. Ins. Co.*, 281 Ga. 448, 637 S.E.2d 692 (2006).

Employer responsibility for artificial members, prosthetic devices, and aids. — The 1985 amendment made the employer responsible for all artificial members, prosthetic devices and aids deemed necessary by the board to effect a cure, give relief, or

restore the employee to suitable employment. *Thompson v. Wilbert Vault Co.*, 178 Ga. App. 489, 343 S.E.2d 515 (1986) (applying amendment retroactively).

Nonmedical in-home attendant care. — A worker injured before July 1, 1985, the effective date of the 1985 amendment to O.C.G.A. § 34-9-200, could recover the cost of nonmedical in-home attendant care prescribed by a physician and provided to the worker even though such recovery was barred prior to the 1985 amendment, but compensation would be allowed only for costs incurred on and after July 1, 1985, and not from the date of the injury. *Interchange Village v. Clark*, 185 Ga. App. 97, 363 S.E.2d 350 (1987).

The 1985 amendment to O.C.G.A. § 34-9-200 would allow an injured worker to recover the cost of nonmedical, at-home attendant care prescribed by a physician but provided by a worker's emancipated child who moved into the worker's home expecting to be compensated for the child's services. *Interchange Village v. Clark*, 185 Ga. App. 97, 363 S.E.2d 350 (1987).

Recovery of cost of at-home attendant care by licensed practical nurses was authorized by O.C.G.A. § 34-9-200, even prior to its 1985 amendment, as constituting "other treatment" for a quadriplegic who was not receiving institutional care. *Hopson v. Hickman*, 182 Ga. App. 865, 357 S.E.2d 280, cert. denied, 183 Ga. App. 906, 357 S.E.2d 280 (1987).

Liability for household services. — The employer is liable under O.C.G.A. § 34-9-200(a) to compensate the injured employee for the full amount of domestic

General Consideration (Cont'd)

household services only where the factfinder determines that all those services are for the exclusive benefit of the injured employee and directly give relief to the work-related injury. Otherwise, the employer is liable only for a proportional share of the household maintenance services performed in the household to relieve the work-related injury of the employee exclusively, regardless of the individual allocation of household maintenance services in the employee's household prior to the employee's work-related injury. *Berry College, Inc. v. Storey*, 199 Ga. App. 298, 404 S.E.2d 640 (1991), cert. denied, 199 Ga. App. 905, 404 S.E.2d 640 (1991).

Provision of handicap-accessible housing. — O.C.G.A. § 34-9-200.1 permits the Workers' Compensation Board to require the employer to provide handicap-accessible housing to an injured employee. *Pringle v. Mayor of Savannah*, 223 Ga. App. 751, 478 S.E.2d 139 (1996).

O.C.G.A. §§ 34-9-200(b) and 34-9-201(d) provide the sole method of changing physicians or treatment, including, apparently, any change effected by the employer-approved physician in referring the employee to another physician pursuant to § 34-9-201(c). Therefore, an employer-approved physician has no authority under § 34-9-201(c) to effect a change of physician or treatment by "revoking a referral", regardless of how the revocation is made. *Brown v. Transamerica IMS*, 200 Ga. App. 272, 407 S.E.2d 430 (1991).

Appealability of subsection (b) order. — Decision of the board granting or denying a change in physicians under O.C.G.A. § 34-9-200(b) is appealable to the superior court. *Columbus Foundries, Inc. v. Moore*, 175 Ga. App. 387, 333 S.E.2d 212 (1985).

Claimant's burden of proof. — The claimant bore the burden of proving that the services for which claimant sought compensation were such as to give relief directly to claimant's work-related injury and were exclusively for claimant's benefit. *Jarallah v. Pickett Suite Hotel*, 204 Ga. App. 684, 420 S.E.2d 366 (1992).

Applicability of later version. — Although an employee's injury occurred in 2000, the 2003 version of O.C.G.A. § 34-9-200(c) was

applicable with respect to defining the employee's obligations for continuing treatment, as the change in O.C.G.A. § 34-9-200(c) merely affected the scope of treatment required; accordingly, as the employee did not present a cogent argument or supporting authority as to why the prior version of the statute should have been applied, the claim was deemed abandoned pursuant to Ga. Ct. App. R. 25(c)(2). *Dallas v. Flying J, Inc.*, 279 Ga. App. 786, 632 S.E.2d 389 (2006).

Suspension of benefits proper. — Administrative law judge and the Georgia Workers' Compensation Board properly suspended a workers' compensation claimant's benefits as the claimant refused to submit to an examination of the claimant's treating physician at the request of an employer under O.C.G.A. § 34-9-202(a) and (c) as: (1) § 34-9-202 required the claimant to undergo an examination by "a duly qualified physician or surgeon" or face a suspension of benefits; (2) the treating physician was duly qualified; (3) § 34-9-202 did not require that the examination be done by an "independent" physician; (4) former § 34-9-200(c) dealt with the refusal to accept treatment ordered by the Board, which was a different situation; and (5) the version of O.C.G.A. § 34-9-200(c) set forth after a 2003 amendment and § 34-9-202 authorized the suspension of benefits if a claimant refused to submit to an employer-requested examination. *Goswick v. Murray County Bd. of Educ.*, 281 Ga. App. 442, 636 S.E.2d 133 (2006), cert. denied, 2007 Ga. LEXIS 102 (Ga. 2007).

Cited in *Insurance Co. of N. Am. v. Money*, 152 Ga. App. 72, 262 S.E.2d 240 (1979); *City of Acworth v. Williams*, 162 Ga. App. 694, 293 S.E.2d 352 (1982); *Hensel Phelps Constr. Co. v. Manigault*, 167 Ga. App. 599, 307 S.E.2d 79 (1983); *Georgia Power Co. v. Brown*, 169 Ga. App. 45, 311 S.E.2d 236 (1983); *Boaz v. K-Mart Corp.*, 254 Ga. 707, 334 S.E.2d 167 (1985); *Murray County Bd. of Educ. v. Wilbanks*, 190 Ga. App. 611, 379 S.E.2d 559 (1989); *Wier v. Skyline Messenger Serv.*, 203 Ga. App. 673, 417 S.E.2d 693 (1992); *Capital Atlanta, Inc. v. Carroll*, 213 Ga. App. 214, 444 S.E.2d 592 (1994); *Autry v. Mayor of Savannah*, 222 Ga. App. 691, 475 S.E.2d 702 (1996); *Housing Auth. v. Jackson*,

226 Ga. App. 182, 486 S.E.2d 54 (1997).

Medical Treatment Generally

Question of fact as to provision. — Whether there is an emergency and whether the employer failed to provide medical care for the claimant is a question of fact to be resolved by the State Board of Workers' Compensation. *Anderson v. GMC*, 118 Ga. App. 4, 162 S.E.2d 464 (1968).

Refusal of medical treatment. — Where an operation, although recommended by physicians, and although it may reduce the injury, is attended with extraordinary pain and suffering, and is dangerous to life, and is of such an extremely delicate character that it can be successfully performed only by the most skilled and competent bone specialist, and where it does not appear that the services of a competent physician for the performance of the operation are tendered, the operation tendered cannot reasonably be expected to relieve the injury. The injured employee is therefore justified in refusing to accept the operation tendered. *American Mut. Liab. Ins. Co. v. Braden*, 40 Ga. App. 178, 149 S.E. 98 (1929).

Failure to cooperate in continuing medical treatment. — Although an employee attempted to make an appointment for continuing medical treatment, as ordered to do, the walk-in clinic at which the appointment was to be refused to make scheduled appointments and instead the employee was informed that appointments were made on a walk-in basis; accordingly, the employee's failure to have walked in and had the appointment was deemed a failure to cooperate with medical treatment, and termination of benefits and the refusal to reinstate them was proper pursuant to O.C.G.A. § 34-9-200(c). *Dallas v. Flying J, Inc.*, 279 Ga. App. 786, 632 S.E.2d 389 (2006).

Change of physicians or treatment. — Subsection (b) of O.C.G.A. § 34-9-200 and O.C.G.A. § 34-9-201(d) prescribe the exclusive method for changing physicians or treatment, including any change effected by the referral of the employee by the employer-approved physician to another physician pursuant to § 34-9-201(c). *Lee Fabricators v. Cook*, 203 Ga. App. 450, 417 S.E.2d 35, cert. denied, 203 Ga. App. 906, 417 S.E.2d 35 (1992).

Employer's prior refusal to provide bene-

fits did not excuse the claimant from filing a petition for change in physicians once the dispute was resolved in the claimant's favor and the employer was then providing medical care. *Wright v. Overnite Transp. Co.*, 214 Ga. App. 822, 449 S.E.2d 167 (1994).

Superior court did not err in failing to vacate an order allowing an employee to change an authorized treating physician, as the employer failed to show that due to the employee's misleading service and the Board's loss of its pleadings, it was the victim of constructive fraud which amounted to the deprivation of due process; while the employer should have been served with the evidence presented to the administrative law judge, and the Board should have properly handled the employee's filings, the employer could not show that it suffered any harm or injury. *MARTA v. Reid*, 282 Ga. App. 877, 640 S.E.2d 300 (2006).

Common law decision's retroactive application. — Superior court's holding that the *Lee Fabricators* case, holding that O.C.G.A. §§ 34-9-200 and 34-9-201 prescribe the exclusive method for changing physicians or treatment, should not be applied retroactively required reversal, as there was no evidence that such an application would work significant hardship or injustice. *Dart Container Corp. v. Jones*, 209 Ga. App. 331, 433 S.E.2d 417 (1993); *Craig v. Red Lobster Restaurant*, 214 Ga. App. 829, 449 S.E.2d 307 (1994).

Denial of request for change of physicians. — The proper standard of review for reviewing the board's affirmance of an administrative law judge's denial of an employee's request for a change of physicians is whether the board acted arbitrarily or in excess of its powers. *Franchise Enters., Inc. v. Sullivan*, 190 Ga. App. 767, 380 S.E.2d 68 (1989).

Board may authorize compensation of claimant refusing treatment. — A claimant under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is entitled to compensation during the period of claimant's refusal to accept medical treatment when it appears that the State Board of Workers' Compensation did not order the treatment, or having ordered treatment, further determines that the circumstances justify the refusal of the claimant to accept the treatment. *Magnus Metal Div. of Nat'l Lead Co. v.*

Medical Treatment Generally (Cont'd)

Stephens, 115 Ga. App. 432, 154 S.E.2d 869 (1967).

Criteria for determining compensability.

— The employer is liable for compensating the injured employee for the full amount of services prescribed by a licensed physician only where the factfinder determines that all those services are for the exclusive benefit of the injured employee and directly give relief to the work-related injury. *Jarallah v. Pickett Suite Hotel*, 204 Ga. App. 684, 420 S.E.2d 366 (1992).

Treatment held to be unauthorized.

— The claimed expenses of an employee who suffered injuries to the employee's neck and back in the course of employment, who was treated by a physician selected and authorized by the employer, which physician forwarded to the employee a "physical therapy slip" and prescription which instructed "please treat as needed", but who nevertheless proceeded to incur expenses for medical treatment which certainly could not be classified as physical therapy, were for unauthorized services. *Brown Transp. Corp. v. Holcombe*, 171 Ga. App. 532, 320 S.E.2d 552 (1984), *aff'd*, 253 Ga. 719, 324 S.E.2d 446 (1985).

Claim for evaluation in addition to authorized evaluation denied. — Appellee's claim of reimbursement for a rehabilitation evaluation was denied where the evaluation was initiated by the appellee after undergoing a similar examination authorized by the Board of Workers' Compensation, no emergency existed necessitating a second evaluation, and appellee's disability could have been caused by alcohol or malnutrition rather than injury. *City of Atlanta v. Walker*, 169 Ga. App. 34, 311 S.E.2d 479 (1983).

Non-FDA approved treatments. — An employer was liable to furnish a surgical procedure that had not been approved by the FDA where the employee's authorized treating physician prescribed the procedure and referred the employee to a physician to perform it. *Williams v. West Central Ga. Bank*, 225 Ga. App. 237, 483 S.E.2d 607 (1997).

When claimant entitled to see "any" doctor. — When the employer cut the employee off from receiving medical benefits, the claimant was entitled to see any doctor, not just a company doctor, and to receive medi-

cal benefits if claimant could prove claimant was still injured at the time as a result of the accident in question. *Georgia Power Co. v. Brasill*, 171 Ga. App. 569, 320 S.E.2d 573 (1984), *aff'd*, 253 Ga. 766, 327 S.E.2d 226 (1985).

Employer not liable for unauthorized expenses. — Where employer contended that certain treatment for which compensation was being sought was unauthorized, the employer was liable only for medical expenses ordered by the physician to whom the claimant had been referred by the initially authorized physician for physical therapy, as such other expenses were unauthorized due to a failure to relate to physical therapy, and on the ground that no order was obtained from the Workers' Compensation Board changing the physicians and/or treatment originally extant. *Holcombe v. Brown Transp. Corp.*, 253 Ga. 719, 324 S.E.2d 446 (1985).

Determination as to whether change in condition has taken place. — It was one thing to require the claimant to submit to reasonable medical and surgical treatment under this section in an effort to bring about a change in condition, and an entirely different thing to determine whether or not a change in condition had already taken place. *City of Atlanta v. Padgett*, 68 Ga. App. 96, 22 S.E.2d 197 (1942) (see O.C.G.A. § 34-9-200).

Attorney fees properly awarded. — Administrative law judge (ALJ) and the Georgia Workers' Compensation Board properly awarded an employer its attorney fees as: (1) the claimant did not appeal the ALJ's decision to require the claimant to submit to an examination, but simply defied it; (2) the blatant defiance of an ALJ order was evidence that the claimant defended the proceedings in part without reasonable grounds; (3) the claimant was not required to defy the order so as to present the claimant's justification for doing so; (4) the claimant had a chance to present the claimant's justification to the ALJ, and failed to reiterate the claimant's position on an appeal to the Board; and (5) the ALJ and the Board had some evidence upon which to base a finding that when the claimant contested the sanctions motion, the claimant did so without reasonable grounds. *Goswick v. Murray County Bd. of Educ.*, 281 Ga. App. 442, 636 S.E.2d 133 (2006), *cert. denied*, 2007 Ga. LEXIS 102 (Ga. 2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 442 et seq.

C.J.S. — 101 C.J.S., Workers' Compensation, § 1452 et seq.

ALR. — Workmen's compensation: duty of injured employee to submit to operation or to take other measures to restore earning capacity, 18 ALR 431; 73 ALR 1303; 105 ALR 1470.

Workers' compensation: value of home services provided by victim's relative, 65 ALR4th 142.

Workers' compensation: recovery for home service provided by spouse, 67 ALR4th 765.

Workers' compensation: reasonableness

of employee's refusal of medical services tendered by employer, 72 ALR4th 905.

Workers' compensation: compensability of injuries incurred traveling to or from medical treatment of earlier compensable injury, 83 ALR4th 110.

Workers' compensation as covering cost of penile or similar implants related to sexual or reproductive activity, 89 ALR4th 1057.

What amounts to failure or refusal to submit to medical treatment sufficient to bar recovery of workers' compensation, 3 ALR5th 907.

Social security: right to disability benefits as affected by refusal to submit to, or cooperate in, medical or surgical treatment, 114 ALR Fed. 141.

34-9-200.1. Rehabilitation benefits; effect of employee's refusal of treatment; rehabilitation suppliers; catastrophic injury cases.

(a) In the event of a catastrophic injury, the employer shall furnish the employee entitled to benefits under this chapter with reasonable and necessary rehabilitation services. The employer either shall appoint a registered rehabilitation supplier or give reasons why rehabilitation is not necessary within 48 hours of the employer's acceptance of the injury as compensable or notification of a final determination of compensability, whichever occurs later. If it is determined that rehabilitation is required under this Code section, the employer shall have a period of 20 days from the date of notification of that determination within which to select a rehabilitation supplier. If the employer fails to select a rehabilitation supplier within such time period, a rehabilitation supplier shall be appointed by the board to provide services at the expense of the employer. The rehabilitation supplier appointed to a catastrophic injury case shall have the expertise which, in the judgment of the board, is necessary to provide rehabilitation services in such case.

(b) A change in the designated rehabilitation supplier shall be made only with approval of the board. Any party to the case may request the board for a change in rehabilitation supplier. The request shall be in a form and manner prescribed by rule of the board and copies of the request shall be served on all parties and each involved rehabilitation supplier. Written objections to the request for a change in rehabilitation supplier may be filed with the board during the 15 day period following the date shown on the certificate of service and the board shall resolve such objections.

(c) The refusal of the employee without reasonable cause to accept rehabilitation shall entitle the board in its discretion to suspend or reduce

the compensation otherwise payable to such employee unless, in the opinion of the board, the circumstances justify the refusal, as determined in the manner provided under Code Section 34-9-100. The board may require recommendations from a panel of specialists in determining whether or not suspension or reduction of compensation is justified.

(d) Fees of rehabilitation suppliers and the reasonableness and necessity of their services shall be subject to the approval of the State Board of Workers' Compensation. All rehabilitation suppliers shall file with the board all forms required by the board. No rehabilitation supplier shall bill an employee for authorized rehabilitation services. The board may require recommendations from a panel of appropriate peers of the rehabilitation supplier in determining whether the fees submitted and necessity of services rendered were reasonable. The recommendations of the panel of appropriate peers shall be evidence of the reasonableness of fees and necessity of service which the board may consider.

(e) Failure of the employee's attorney to cooperate with the rehabilitation supplier may result in the suspension or reduction of the fees provided in Code Section 34-9-108 if, in the judgment of the board, the failure to cooperate hindered the restoration of the employee to suitable employment.

(f) Any rehabilitation supplier shall have a certification or license as set forth by board rule and shall be registered with the State Board of Workers' Compensation. The board shall have the authority to refuse to register an applicant as a rehabilitation supplier, to remove a rehabilitation supplier from a case, to require corrective actions of a rehabilitation supplier, to assess penalties as provided under Code Section 34-9-18 against a rehabilitation supplier, or to suspend or revoke the board registration of a rehabilitation supplier for failure to comply with this chapter or the rules and regulations of the board or the standards of ethics of the applicable licensing or certifying body. Revocation of registration shall be determined in a hearing before an administrative law judge and an adverse decision may be appealed as provided under Code Sections 34-9-103 and 34-9-105. The board shall establish by rule based upon recognized qualifications, educational standards, and competency in the field of rehabilitation suppliers, as determined and set out by the board, those persons who will be authorized to provide rehabilitation services to injured employees under this chapter.

(g) "Catastrophic injury" means any injury which is one of the following:

(1) Spinal cord injury involving severe paralysis of an arm, a leg, or the trunk;

(2) Amputation of an arm, a hand, a foot, or a leg involving the effective loss of use of that appendage;

(3) Severe brain or closed head injury as evidenced by:

- (A) Severe sensory or motor disturbances;
- (B) Severe communication disturbances;
- (C) Severe complex integrated disturbances of cerebral function;
- (D) Severe disturbances of consciousness;
- (E) Severe episodic neurological disorders; or

(F) Other conditions at least as severe in nature as any condition provided in subparagraphs (A) through (E) of this paragraph;

(4) Second or third degree burns over 25 percent of the body as a whole or third degree burns to 5 percent or more of the face or hands;

(5) Total or industrial blindness; or

(6)(A) Any other injury of a nature and severity that prevents the employee from being able to perform his or her prior work and any work available in substantial numbers within the national economy for which such employee is otherwise qualified; provided, however, if the injury has not already been accepted as a catastrophic injury by the employer and the authorized treating physician has released the employee to return to work with restrictions, there shall be a rebuttable presumption, during a period not to exceed 130 weeks from the date of injury, that the injury is not a catastrophic injury. During such period, in determining whether an injury is catastrophic, the board shall give consideration to all relevant factors including, but not limited to, the number of hours for which an employee has been released. A decision granting or denying disability income benefits under Title II or supplemental security income benefits under Title XVI of the Social Security Act shall be admissible in evidence and the board shall give the evidence the consideration and deference due under the circumstances regarding the issue of whether the injury is a catastrophic injury; provided, however, that no presumption shall be created by any decision granting or denying disability income benefits under Title II or supplemental security income benefits under Title XVI of the Social Security Act.

(B) Once an employee who is designated as having a catastrophic injury under this subsection has reached the age of eligibility for retirement benefits as defined in 42 U.S.C. Section 416(l), as amended March 2, 2004, there shall arise a rebuttable presumption that the injury is no longer a catastrophic injury; provided, however, that this presumption shall not arise upon reaching early retirement age as defined in 42 U.S.C. Section 416(1), as amended March 2, 2004. When using this presumption, a determination that the injury is no longer catastrophic can only be made by the board after it has conducted an evidentiary hearing.

The rehabilitation supplier appointed to a catastrophic injury case shall have the expertise which, in the judgment of the board, is necessary to provide rehabilitation services in such case.

(h) In the event of an injury that is not catastrophic, the parties may elect that the employer will provide a rehabilitation supplier on a voluntary basis for so long as the parties agree in writing. The rehabilitation supplier utilized by the parties must hold one of the certifications or licenses specified in subsection (f) of this Code section and be registered with the State Board of Workers' Compensation or have the expertise which, in the judgment of the board, is necessary to provide rehabilitation services in the case.

(i) Subsequent to either an employer's designating an employee's injury as catastrophic or a board determination as to the catastrophic or noncatastrophic nature of an employee's injury, either party may request a new determination, based on reasonable grounds, as to the catastrophic or noncatastrophic nature of the employee's injury. (Code 1981, § 34-9-200.1, enacted by Ga. L. 1985, p. 727, § 4; Ga. L. 1989, p. 579, §§ 3, 4; Ga. L. 1990, p. 1409, § 5; Ga. L. 1992, p. 1942, § 15; Ga. L. 1995, p. 642, § 9; Ga. L. 1996, p. 1291, § 8; Ga. L. 1997, p. 1367, § 6; Ga. L. 1999, p. 817, § 3; Ga. L. 2002, p. 846, § 2; Ga. L. 2003, p. 364, § 3; Ga. L. 2005, p. 1210, §§ 5, 6/HB 327; Ga. L. 2007, p. 616, § 3/HB 424.)

The 2007 amendment, effective July 1, 2007, in subsection (a), substituted "20 days" for "15 days" in the middle of the third sentence, and substituted "shall" for "will" in the middle of the fourth sentence.

Code Commission notes. — Pursuant to § 28-9-5, in 1986, in former subsection (f) (see subsection (e)) "the" was deleted preceding "Code Section".

Pursuant to Code Section 28-9-5, in 1992, a semicolon was substituted for the period at the end of subparagraph (g)(3)(F).

Editor's notes. — Ga. L. 1995, p. 642, § 13, not codified by the General Assembly, provides for severability.

U.S. Code. — Title XVI of the Social Security Act, referred to in paragraph (g)(6), is codified at 42 U.S.C. 1381 et seq.

Title II of the Social Security Act, referred to in paragraph (g)(6), is codified at 42 U.S.C. 401 et seq.

Law reviews. — For survey article on workers' compensation law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For annual survey of workers' compensation law, see 57 Mercer L. Rev. 419 (2005). For annual survey of workers' compensation law, see 58 Mercer L. Rev. 453 (2006).

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992). For review of 1996 workers' compensation legislation, see 13 Ga. St. U. L. Rev. 233 (1996).

JUDICIAL DECISIONS

Constitutionality of former paragraph (g)(6). — The provision of paragraph (g)(6), prior to the 1995 amendment, did not unconstitutionally mandate a workers' compensation administrative law judge to conclusively presume a finding of "catastrophic injury" solely because the claimant had been

awarded Social Security disability benefits. Cobb County Sch. Dist. v. Barker, 271 Ga. 35, 518 S.E.2d 126 (1999).

Georgia State Board of Workers' Compensation could have found that an expert's testimony on accommodation jobs was in the context of a general discussion; as the expert

testified that the workers' compensation claimant was capable of performing certain jobs, even considering the claimant's restrictions, the expert's testimony complied with Social Security Administration policy, which was applied in analyzing the testimony under the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-200.1(g)(6). *Davis v. Carter Mech., Inc.*, 272 Ga. App. 773, 612 S.E.2d 879 (2005).

Interpretation of "or" within § 34-9-200.1(g)(6). — Trial court properly reversed a decision by the Georgia Workers' Compensation Appellate Division and reinstated a decision of an administrative law judge who found that an employee suffered a "catastrophic injury" for purposes of O.C.G.A. § 34-9-200.1(g)(6), as the employee was unable to perform the prior work done, although the employee was able to perform other work available in substantial numbers within the national economy; the relevant provision of § 34-9-200.1(g)(6) used "or" between the two types of work that an employee could perform rather than "and" and that phraseology was deemed unambiguous, plain, and capable of having only one meaning, based on statutory interpretation rules under O.C.G.A. § 1-3-1(a) and legislative changes over time to § 34-9-200.1(g)(6). *Rite-Aid Corp. v. Davis*, 280 Ga. App. 522, 634 S.E.2d 480 (2006).

Provision of handicap-accessible housing. — O.C.G.A. § 34-9-200.1 permits the Workers' Compensation Board to require the employer to provide handicap-accessible housing to an injured employee. *Pringle v. Mayor of Savannah*, 223 Ga. App. 751, 478 S.E.2d 139 (1996).

Appointment of rehabilitation supplier. — Where employee awarded workers' compensation benefits petitioned the board for the appointment of a rehabilitation supplier and requested a particular supplier by name, and the employer objected to the award and appealed to the full board, the court found that the board exceeded its authority in appointing a specific rehabilitation supplier without first giving the employer notice and an opportunity to name the supplier. *Walden v. Cutlery Corp.*, 190 Ga. App. 363, 378 S.E.2d 697 (1989).

Working claimant may still need services. — The mere fact that claimant was able to work at a job "suitable to his impaired

condition" did not mean that claimant was not in need of medical, psychological, or vocational services, where claimant was still physically impaired as a result of claimant's compensable injury and had not found suitable work. *Jackson v. Peachtree Hous. Div.*, 187 Ga. App. 612, 371 S.E.2d 112, cert. denied, 187 Ga. App. 907, 370 S.E.2d 194 (1988).

Discretion of board to suspend or reduce compensation. — Even upon a finding of refusal to accept vocational rehabilitation (cooperate) without reasonable cause, the board is merely authorized to alter the compensation "in its discretion" unless in its "opinion" the "circumstances justify the refusal." These broad avenues of discretion are limited only by the standard in O.C.G.A. § 34-9-240, which requires cessation of compensation when a suitable job is procured and an employee unjustifiably refuses it. *Carod Bldg. Servs. v. Williams*, 182 Ga. App. 340, 355 S.E.2d 723 (1987).

Presumption from receipt of Social Security benefits rebutted. — After the State Board of Workers' Compensation denied an employee's request to have the employee's back injury designated catastrophic, based on evidence that the employee could perform light duty and sedentary work, a trial court should have affirmed that determination because there was evidence in the record to support it; the presumption of catastrophic injury which arose upon the award to the employee of Social Security disability benefits, pursuant to O.C.G.A. § 34-9-200.1(g)(6), was adequately rebutted by the evidence. *Jered Indus. v. Pearson*, 261 Ga. App. 373, 582 S.E.2d 522 (2003).

While the employer's expert did not take into account all of the limitations identified by the claimant's expert, the discrepancy went to the weight to be accorded the expert's report and not to its competence; it was in the province of the Georgia State Board of Workers' Compensation to determine whether the experts considered the appropriate factors. *Davis v. Carter Mech., Inc.*, 272 Ga. App. 773, 612 S.E.2d 879 (2005).

Expert testimony complied with statutory requirements. — Employer's expert's testimony complied with O.C.G.A. § 34-9-200.1(g)(6), even though the expert did not testify that the jobs that were identi-

fied for the workers' compensation claimant were available; the Georgia legislature's use of the term "availability" in § 34-9-200.1(g)(6) is not intended to require a showing beyond proof that work exists in substantial numbers within the national economy. *Davis v. Carter Mech., Inc.*, 272 Ga. App. 773, 612 S.E.2d 879 (2005).

Employee's age as a consideration. — Because an employee's age was one of the issues considered by an ALJ in reaching a decision that the employee's injuries were catastrophic under O.C.G.A. § 34-9-200.1(g)(6), and such was also considered in a rehabilitation expert's opinion, the superior court's finding that age was not properly considered was simply unfounded and thus, reversible error. *Caswell, Inc. v. Spencer*, 280 Ga. App. 141, 633 S.E.2d 449 (2006).

Catastrophic injury finding supported. — Administrative law judge's findings with respect to a determination that an employee suffered a "catastrophic injury" pursuant to O.C.G.A. § 34-9-200.1(g)(6) were supported by competent and credible evidence contained within the record and, accordingly, a court's obligation on judicial review was to

confirm that finding; the employee was unable to perform prior work as a store manager, merchandiser, or cashier due to the neck and shoulder injuries, although the employee could perform sedentary jobs available in substantial numbers in the national economy, but the inability to perform the employee's work alone sufficed under the unambiguous provisions of § 34-9-200.1(g)(6) to warrant relief. *Rite-Aid Corp. v. Davis*, 280 Ga. App. 522, 634 S.E.2d 480 (2006).

Catastrophic injury finding not supported. — A trial court's reversal of a State Board of Workers' Compensation decision finding that a claimant had a catastrophic injury was upheld on appeal since there was no competent evidence before the board of the unavailability of work within the national economy for which the claimant was otherwise qualified; the board concluded that the claimant's injury was catastrophic based solely on its own experience, which the board was without authority to do without considering whether the claimant was unable to perform any work available in substantial numbers within the national economy. *Reid v. Ga. Bldg. Auth.*, 283 Ga. App. 413, 641 S.E.2d 642 (2007).

OPINIONS OF THE ATTORNEY GENERAL

Liability in connection with peer review duties. — Employees of the Rehabilitation Department of State Board of Workers' Compensation performing "peer review" duties are afforded the same protection from liability for their actions as other public officers in the executive branch of state government. 1986 Op. Att'y Gen. No. 86-46.

An employee performing peer review duties would be entitled to representation by the state in any action arising out of the performance of the employee's official duties. 1986 Op. Att'y Gen. No. 86-46.

Protection of members of peer review

panel. — A person who is a private rehabilitation supplier serving on a peer review panel for the State Board of Workers' Compensation would not be afforded the statutory protection provided in O.C.G.A. § 31-7-130, et seq., which relates to peer review groups evaluating the quality and efficiency of professional health care providers, regardless of whether that peer review committee conformed to the model promulgated by the National Association of Rehabilitation Professionals. 1987 Op. Att'y Gen. No. 87-4.

RESEARCH REFERENCES

ALR. — Workers' compensation: vocational rehabilitation statutes, 67 ALR4th 612.

34-9-201. Selection of physician from panel of physicians; change of physician or treatment; liability of employer for failure to maintain panel.

(a) As used in this Code section, the term “physician” shall include any person licensed to practice a healing art and any remedial treatment and care in the State of Georgia.

(b) The employer may satisfy the requirements for furnishing medical care under Code Section 34-9-200 in one of the following manners:

(1) The employer shall maintain a list of at least six physicians or professional associations or corporations of physicians who are reasonably accessible to the employees; provided, however, that the board may grant exceptions to the required size of the panel where it is demonstrated that more than four physicians or groups of physicians are not reasonably accessible. This list shall be known as the “Panel of Physicians.” At least one of the physicians must practice the specialty of orthopedic surgery. Not more than two industrial clinics shall be included on the panel. An employee may accept the services of a physician selected by the employer from the panel or may select another physician from the panel. The physicians selected under this subsection from the panel may arrange for any consultation, referral, and extraordinary or other specialized medical services as the nature of the injury shall require without prior authorization from the board; provided, however, that any medical practitioner providing services as arranged by a primary authorized treating physician under this subsection shall not be permitted to arrange for any additional referrals. The employee may make one change from one physician to another on the same panel without prior authorization of the board;

(2) The employer may maintain a list of physicians in conformity with the guidelines and criteria established and contained in the Rules and Regulations of the State Board of Workers' Compensation. This list shall be known as the “Conformed Panel of Physicians.” An employee may obtain the services of any physician from the conformed panel and may thereafter also elect to change to another physician on the panel without prior authorization of the board. The physician so selected will then become the primary authorized treating physician in control of the employee's medical care and may arrange for any consultation, referral, and extraordinary or other specialized medical services as the nature of the injury shall require without prior authorization by the board; provided, however, that any of the physicians to whom the employee is referred by the primary authorized treating physician shall not be permitted to arrange for any additional referrals; or

(3) A self-insured employer or the workers' compensation insurer of an employer may contract with a managed care organization certified

pursuant to Code Section 34-9-208 for medical services required by this chapter to be provided to injured employees. Medical services provided under this paragraph shall be known as "Managed Care Organization Procedures." Those employees who are subject to the contract shall receive medical services in the manner prescribed in the contract. Each such contract must comply with the certification standards provided in Code Section 34-9-208. Self-insured employers or workers' compensation insurers who contract with a managed care organization for medical services shall give notice to the employees of the eligible medical service providers and such other information regarding the contract and manner of receiving medical services as the board may prescribe.

(c) Consistent with the method elected under subsection (b) of this Code section, the employer shall post the Panel of Physicians or Conformed Panel of Physicians or Managed Care Organization Procedures in prominent places upon the business premises and otherwise take all reasonable measures to ensure that employees:

(1) Understand the function of the panel or managed care organization procedures and the employee's right to select a physician therefrom in case of injury; and

(2) Are given appropriate assistance in contacting panel or managed care organization members when necessary.

(d) Notwithstanding the other provisions contained in this Code section, if an inability to make a selection of a physician as prescribed in this Code section is the result of an emergency or similarly justifiable reason, the selection requirements of this Code section shall not apply as long as such inability persists.

(e) Upon the request of an employee or an employer, or upon its own motion, the board may order a change of physician or treatment as provided under Code Section 34-9-200.

(f) If the employer fails to provide any of the procedures for selection of physicians as set forth in subsection (c) of this Code section, an employee may select any physician to render service at the expense of the employer.

(g) The board shall promulgate rules and regulations to ensure, whenever feasible, the participation of minority physicians on panels of physicians maintained by employers or in managed care organizations pursuant to this Code section. (Code 1933, § 114-504, enacted by Ga. L. 1978, p. 2220, § 9; Ga. L. 1990, p. 1409, § 6; Ga. L. 1992, p. 1942, §§ 16, 17; Ga. L. 1994, p. 887, § 11; Ga. L. 1998, p. 1508, § 4; Ga. L. 2000, p. 1321, § 3; Ga. L. 2001, p. 748, § 3.)

Law reviews. — For review of 1998 legislation relating to labor and industrial relations, see 15 Ga. St. U. L. Rev. 185 (1998).

For article, "Workers' Compensation," see 53 Mercer L. Rev. 521 (2001).

For note on 1992 amendment of this Code

section, see 9 Ga. St. U.L. Rev. 285 (1992).
For note on 2000 amendment of O.C.G.A.

§ 34-9-201, see 17 Ga. St. U.L. Rev. 231
(2000).

JUDICIAL DECISIONS

Common law decision's retroactive application. — Superior court's holding that the *Lee Fabricators* case, holding that O.C.G.A. §§ 34-9-200 and 34-9-201 prescribe the exclusive method for changing physicians or treatment, should not be applied retroactively required reversal as there was no evidence that such an application would work significant hardship or injustice. *Dart Container Corp. v. Jones*, 209 Ga. App. 331, 433 S.E.2d 417 (1993); *Craig v. Red Lobster Restaurant*, 214 Ga. App. 829, 449 S.E.2d 307 (1994).

If an employer fails to maintain the required panel of physicians, the medical treatment received by an employee on account of the employment-related injury is deemed, for statute of limitation purposes, to be remedial treatment furnished by the employer. *Georgia Inst. of Technology v. Gore*, 167 Ga. App. 359, 306 S.E.2d 338 (1983).

Because there was a genuine issue of fact as to whether the defendant's stepson was an employee thereby subjecting defendant to the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., there was no "admitted" failure to comply with O.C.G.A. § 34-9-201, and the plaintiff's failure to properly file a claim within the statute of limitations resulted in the claim being time-barred. *Gann v. Poe*, 236 Ga. App. 138, 512 S.E.2d 1 (1999).

O.C.G.A. §§ 34-9-201(d) [now (e)] and 34-9-200(b) provide the sole method of changing physicians or treatment, including, apparently, any change effected by the employer-approved physician in referring the employee to another physician pursuant to subsection (c) (see (b)(1)). Therefore, an employer-approved physician has no authority under subsection (c) (see (b)(1)) to effect a change of physician or treatment by "revoking a referral," regardless of how such revocation is made. *Brown v. Transamerica IMS*, 200 Ga. App. 272, 407 S.E.2d 430 (1991).

Worker's change of physician not justified. See *K-Mart Corp. v. Anderson*, 166 Ga. App. 421, 304 S.E.2d 526 (1983).

Employer not liable for unauthorized expenses. — Where employer contended that certain treatment for which compensation was being sought was unauthorized, the employer was liable only for medical expenses ordered by the physician to whom the claimant had been referred by the initially authorized physician for physical therapy, as such other expenses were unauthorized due to a failure to relate to physical therapy, and that no order was obtained from the Workers' Compensation Board changing the physicians and/or treatment originally extant. *Holcombe v. Brown Transp. Corp.*, 253 Ga. 719, 324 S.E.2d 446 (1985).

Employee was not entitled to recover medical expenses incurred at the hands of an unauthorized physician prior to the filing of a notice to controvert by the employer, where the employee was aware of the panel of physicians since the employee had prepared and posted the list. *State v. Tungler*, 181 Ga. App. 21, 351 S.E.2d 248 (1986).

Where the employer agreed to pay medical expenses incurred from the employee's unapproved medical providers with the stipulation that one of the unapproved providers would be the employee's authorized treating physician and the employer would not be liable for any additional charges by other medical providers, the ALJ was correct in finding that the employee would not be reimbursed for expenses which occurred after this agreement was reached. *Owens-Illinois, Inc. v. Champion*, 203 Ga. App. 736, 417 S.E.2d 703, cert. denied, 203 Ga. App. 907, 417 S.E.2d 703 (1992).

Employer's failure to timely file a notice to controvert did not preclude it from denying responsibility for medical services from a physician not on the posted panel, where the employer had no reason to assume that claimant was seeking workers' compensation medical, rather than income, benefits. *ITT-Continental Baking Co. v. Powell*, 182 Ga. App. 533, 356 S.E.2d 267 (1987).

The employer did not "controvert" employee's claim by refusing to pay for treatment by a physician not on the employer's approved panel; it simply asserted its rights

under subsection (c) of O.C.G.A. § 34-9-201 (as it existed prior to the 1994 amendment) and was not responsible for the unauthorized charges. *Nu Skin Int'l, Inc. v. Baxter*, 211 Ga. App. 32, 438 S.E.2d 130 (1993); *Georgia Baptist Medical Ctr. v. Moore*, 219 Ga. App. 171, 464 S.E.2d 265 (1995).

The 1994 amendment of paragraph (b)(1) of O.C.G.A. § 34-9-201, providing that authorized physicians may "arrange for any consultation, referral ... or other medical services ... without prior authorization of the board", applied retroactively to require an employer to pay for medical services provided by a psychiatrist to whom claimant was referred without authorization by the approved treating physician. *Porter v. Ingles Mkt., Inc.*, 219 Ga. App. 145, 464 S.E.2d 212 (1995).

The 1994 amendment of paragraph (b)(1) of O.C.G.A. § 34-9-201, providing that the authorized treating physician may arrange for referrals to other medical practitioners without prior authorization from the board, was remedial and should be given retroactive effect. *Barnes v. City of Atlanta Police Dep't*, 219 Ga. App. 139, 464 S.E.2d 609 (1995).

Employer was liable for employee's precontrovert medical expenses even though the employee sought treatment from a personal physician rather than an authorized physician, because the employer's failure to provide workers' compensation coverage rendered ineffective any list of physicians posted by the employer. *Kwon v. Fleming*, 184 Ga. App. 861, 363 S.E.2d 28 (1987).

Right to go to nonposted physician. — When an employer cuts the employee off from receiving medical benefits, the employee is entitled to see any doctor if the employee can prove the employee is still injured at the time as a result of the accident. *Boaz v. K-Mart Corp.*, 254 Ga. 707, 334 S.E.2d 167 (1985).

Employee who had been dismissed from

treatment by an approved or posted physician as cured, even though still in need of treatment, was justified in going to a nonposted physician of the employee's choice. *Pritchard Servs. v. Lett*, 183 Ga. App. 298, 358 S.E.2d 842 (1987).

If employer does not furnish treatment. — The employee will be liable for nonauthorized treatment if the expenses are incurred without giving the employer an opportunity to furnish treatment; if the employer does not adequately meet the duty of providing treatment the employee may make other arrangements and once treatment by a physician is undertaken an employer may not change positions and cut off the right to continue such treatment. *Boaz v. K-Mart Corp.*, 254 Ga. 707, 334 S.E.2d 167 (1985).

Emergency. — Where an employee's severe depression was an "emergency" at the time of the employee's hospitalization, the employer was liable for associated medical expenses. *K Mart Corp. v. Bright*, 210 Ga. App. 658, 436 S.E.2d 801 (1993).

Cited in *Dairymen, Inc. v. Wood*, 162 Ga. App. 430, 291 S.E.2d 763 (1982); *Georgia Power Co. v. Brown*, 169 Ga. App. 45, 311 S.E.2d 236 (1983); *Brown Transp. Corp. v. Holcombe*, 171 Ga. App. 532, 320 S.E.2d 552 (1984); *Southeastern Aluminum Recycling, Inc. v. Rayburn*, 172 Ga. App. 648, 324 S.E.2d 194 (1984); *Fitzpatrick v. GMC*, 172 Ga. App. 515, 323 S.E.2d 703 (1984); *Scandrett v. Talmadge Farms, Inc.*, 174 Ga. App. 547, 330 S.E.2d 772 (1985); *Keenan v. Jackson & Keenan Constr. Co.*, 175 Ga. App. 730, 334 S.E.2d 329 (1985); *Howard v. Superior Contractors*, 180 Ga. App. 68, 348 S.E.2d 563 (1986); *Hardee's v. Bailey*, 180 Ga. App. 332, 349 S.E.2d 211 (1986); *Ledbetter v. Pine Knoll Nursing Home*, 180 Ga. App. 654, 350 S.E.2d 299 (1986); *Southwire Co. v. Hull*, 212 Ga. App. 131, 441 S.E.2d 293 (1994); *Capital Atlanta, Inc. v. Carroll*, 213 Ga. App. 214, 444 S.E.2d 592 (1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, §§ 452, 453.

C.J.S. — 100 C.J.S., Workers' Compensation, § 489.

ALR. — Workmen's compensation: applicability of provisions as to medical or surgi-

cal services as affected by the character or qualifications of the person rendering them, 40 ALR 1265.

Workmen's compensation: duty of injured employee to submit to an examination, 41 ALR 866.

Workmen's compensation: selection or change of physician, surgeon, or hospital, 142 ALR 1205.

34-9-202. Examination of injured employee; request for autopsy; examination by physician designated by employee.

(a) After an injury and as long as he claims compensation, the employee, if so requested by his or her employer, shall submit himself or herself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the board. Such examination may include physical, psychiatric, and psychological examinations.

(b) The employee shall have the right to have present at such examination any duly qualified physician or surgeon provided and paid by him. No fact communicated to or otherwise learned by any physician or surgeon who may have attended or examined the employee or who may have been present at any examination shall be privileged either in hearings provided for by this chapter or in any action at law brought to recover damages against any employer who may have accepted the compensation provisions of this chapter.

(c) If the employee refuses to submit himself to or in any way obstructs such examination requested by and provided for by the employer, his right to compensation and his right to take or prosecute any proceedings under this chapter shall be suspended until such refusal or objection ceases; and no compensation shall at any time be payable for the period of suspension unless in the opinion of the board the circumstances justify the refusal or obstruction.

(d) The employer or the board shall have the right in any case of death to require an autopsy at the expense of the party requesting the same.

(e) Notwithstanding the rights afforded an employee under Code Section 34-9-201, the employee, after an accepted compensable injury and within 120 days of receipt of any income benefits, shall have the right to one examination at a reasonable time and place, within this state or within 50 miles of the employee's residence, by a duly qualified physician or surgeon designated by the employee and to be paid for by the employer. Such examination, of which the employer or insurer shall be notified in writing in advance, shall not repeat any diagnostic procedures which have been performed since the date of the employee's injury unless the costs of such diagnostic procedures which are in excess of \$250.00 are paid for by a party other than the employer or the insurer. Such examination may include physical, psychiatric, and psychological examinations. (Ga. L. 1920, p. 167, § 28; Code 1933, § 114-503; Ga. L. 1990, p. 1409, § 7; Ga. L. 2001, p. 748, § 4; Ga. L. 2007, p. 616, § 4/HB 424.)

The 2007 amendment, effective July 1, 2007, in subsection (a), in the first sentence, inserted “or her” and inserted “or herself”, and added the last sentence; and added the last sentence in subsection (e).

Cross references. — Physical examinations of persons pursuant to civil actions generally, § 9-11-35. Appointment of physician or surgeon by board to examine em-

ployee prior to hearing of claim for workers' compensation, § 34-9-101.

Law reviews. — For article, “Workers' Compensation,” see 53 Mercer L. Rev. 521 (2001). For survey article on workers' compensation law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003).

JUDICIAL DECISIONS

This section provided that the board may require an autopsy by appropriate order and that an employer might require an autopsy by seeking such an order from the board. *Employers Mut. Liab. Ins. Co. v. Carson*, 100 Ga. App. 409, 111 S.E.2d 918 (1959) (see O.C.G.A. § 34-9-202).

Attorney fees properly awarded. — Administrative law judge (ALJ) and the Georgia Workers' Compensation Board properly awarded an employer its attorney fees as: (1) the claimant did not appeal the ALJ's decision to require the claimant to submit to an examination, but simply defied it; (2) the blatant defiance of an ALJ order was evidence that the claimant defended the proceedings in part without reasonable grounds; (3) the claimant was not required to defy the order so as to present the claimant's justification for doing so; (4) the claimant had a chance to present the claimant's justification to the ALJ, and failed to reiterate the claimant's position on an appeal to the Board; and (5) the ALJ and the Board had some evidence upon which to base a finding that when the claimant contested the sanctions motion, the claimant did so without reasonable grounds. *Goswick v. Murray County Bd. of Educ.*, 281 Ga. App. 442, 636 S.E.2d 133 (2006), cert. denied, 2007 Ga. LEXIS 102 (Ga. 2007).

Orders remained in force pending appeal in absence of supersedeas order. — Reviewing court did not err in affirming a refusal by the Georgia Workers' Compensation Board to require an employer to continue making disability payments to a workers' compensation claimant pending the appeal proceedings as in O.C.G.A. § 34-9-202(c), the Geor-

gia legislature decided that supersedeas did not attach pending the appeal of a benefit suspension order based on a refusal to undergo an examination; further the order was analogous to an injunction as the administrative law judge's and the Board's orders did not award monies, but relieved the employer from taking certain actions at any time, and remained in force pending the appeal in the absence of a special order of supersedeas. *Goswick v. Murray County Bd. of Educ.*, 281 Ga. App. 442, 636 S.E.2d 133 (2006), cert. denied, 2007 Ga. LEXIS 102 (Ga. 2007).

Suspension of benefits proper. — Administrative law judge and the Georgia Workers' Compensation Board properly suspended a workers' compensation claimant's benefits as the claimant refused to submit to an examination of the claimant's treating physician at the request of an employer under O.C.G.A. § 34-9-202(a) and (c) as: (1) § 34-9-202 required the claimant to undergo an examination by “a duly qualified physician or surgeon” or face a suspension of benefits; (2) the treating physician was duly qualified; (3) § 34-9-202 did not require that the examination be done by an “independent” physician; (4) former O.C.G.A. § 34-9-200(c) dealt with the refusal to accept treatment ordered by the Board, which was a different situation; and (5) the version of § 34-9-200(c) set forth after a 2003 amendment and § 34-9-202 authorized the suspension of benefits if a claimant refused to submit to an employer-requested examination. *Goswick v. Murray County Bd. of Educ.*, 281 Ga. App. 442, 636 S.E.2d 133 (2006), cert. denied, 2007 Ga. LEXIS 102 (Ga. 2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 582.
C.J.S. — 100 C.J.S., Workers' Compensation, § 918 et seq. 100A C.J.S. Workers' Compensation, § 1035 et seq.

34-9-203. Employer's pecuniary liability for medical charges; liability for medical malpractice; payment of reasonable charges; inclusion of reports and documentation with charges; defense for failure to make payments; penalties.

(a) The pecuniary liability of the employer for medical, surgical, hospital service, or other treatment required, when ordered by the board, shall be limited to such charges as prevail in the State of Georgia for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured persons.

(b) The employer shall not be liable in damages for malpractice by a physician or surgeon furnished pursuant to this chapter, but the consequences of any malpractice shall be deemed part of the injury resulting from the accident and shall be compensated for as such.

(c)(1) All reasonable charges for medical, surgical, hospital, and pharmacy goods and services shall be payable by the employer or its workers' compensation insurer within 30 days from the date that the employer or the insurer receives the charges and reports required by the board. The employer or insurer shall, within 30 days after receipt of charges for health care goods or services, mail to the provider of such health care goods or services payment of such charges or a letter or other written notice that states the reasons the employer or insurer has for not paying the claim, either in whole or in part, and which also gives the person so notified a written itemization of any documents or other information needed to process the claim or any portion thereof.

(2) The failure by the employee or the health care goods or services provider to include with its submission of charges any reports or other documents required by the board shall constitute a defense for the employer's or insurer's failure to pay the submitted charges within 30 days of receipt of the charges. However, if the employer or insurer fails to send the employee or the health care goods or services provider the requisite notice indicating a need for further documentation within 30 days of receipt of the charges, the employer and insurer will be deemed to have waived the right to defend a claim for failure to pay such charges in a timely fashion on the grounds that the charges were not appropriately accompanied by required reports. Such waiver shall not extend to any other defense the employer and insurer may have with respect to a claim of untimely payment.

(3) If any charges for health care goods or services are not paid when due, or any reimbursement for health care goods or services paid by the

employee or any charges for mileage incurred by the employee are not paid when due, penalties shall be added to such charges and paid at the same time as and in addition to the charges claimed for the health care goods or services. For any payment of charges paid more than 30 days after their due date, but paid within 60 days of such date, there shall be added to such charges an amount equal to 10 percent of the charges. For any payment of charges paid more than 60 days after their due date, but paid within 90 days of such date, there shall be added to such charges an amount equal to 20 percent of the charges. For any charges not paid within 90 days of their due date, in addition to the 20 percent add-on penalty, the employer or insurer shall pay interest on that combined sum in an amount equal to 12 percent per annum from the ninety-first day after the date the charges were due until full payment is made. All such penalties and interest shall be paid to the provider of the health care goods or services.

(4) Notwithstanding any other provision of this subsection, if the employee or the provider of health care goods or services fails to submit its charges to the employer or its workers' compensation insurer within one year of the date of service or the issuance of such goods or services or, in the case of an employee, within one year of the date of incurring of mileage expenses, then the provider is deemed to have waived its right to collect such charges from the employer, its workers' compensation insurer, and the employee; and, in regard to mileage expenses, the employee is deemed to have waived his or her right to collect such charges from the employer or its workers' compensation insurer. (Ga. L. 1920, p. 167, § 27; Code 1933, § 114-502; Ga. L. 1937, p. 528; Ga. L. 1987, p. 806, § 5; Ga. L. 1995, p. 642, § 10; Ga. L. 2000, p. 1321, § 4; Ga. L. 2001, p. 748, § 5; Ga. L. 2003, p. 364, § 4; Ga. L. 2004, p. 631, § 34; Ga. L. 2006, p. 676, § 3/HB 1240.)

The 2006 amendment, effective July 1, 2006, in paragraph (c)(4), inserted "or, in the case of an employee, within one year of the date of incurring of mileage expenses" near the middle, and added "; and, in regard to mileage expenses, the employee is deemed to have waived his or her right to collect such charges from the employer or its workers' compensation insurer" at the end.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2003, "health care" was substituted for "healthcare" in paragraph (c)(2).

Editor's notes. — Ga. L. 1995, p. 642, § 13, not codified by the General Assembly, provides for severability.

Law reviews. — For article, "Workers' Compensation," see 53 Mercer L. Rev. 521 (2001). For survey article on workers' compensation law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003).

For note on 2000 amendment of O.C.G.A. § 34-9-203, see 17 Ga. St. U.L. Rev. 231 (2000).

JUDICIAL DECISIONS

Constitutionality. — The fact that O.C.G.A. § 34-9-203 requires the employer to compensate an employee for the consequences of a physician's malpractice, without giving

the employer the corresponding right to recover its losses through subrogation, does not deprive the employer of any constitutional right of due process. *K-Mart Apparel Corp. v. Temples*, 260 Ga. 871, 401 S.E.2d 5 (1991).

Exclusivity. — Pursuant to the exclusive remedy provision of the Workers' Compensation Act, set forth at O.C.G.A. § 34-9-11(a), an employer was entitled to summary judgment against claims by an injured employee who obtained benefits under the Act and then sued the employer under independent tort theories of vicarious

liability on behalf of medical staff that worked for the employer, a hospital, who had rendered treatment to the employee for the injuries; the exclusivity provisions barred the employee's assertion of malpractice by treating physicians against the employer, as any consequences of malpractice or delay in treatment were part of the injury and were compensated as such under O.C.G.A. § 34-9-203(b). *Crisp Reg'l Hosp., Inc. v. Oliver*, 275 Ga. App. 578, 621 S.E.2d 554 (2005).

Cited in *Doss v. Food Lion, Inc.*, 267 Ga. 312, 477 S.E.2d 577 (1996).

34-9-204. Compensation where death or disability caused by nonwork related injury.

(a) No compensation shall be payable for the death or disability of an employee if his or her death is caused by or, insofar as his or her disability, may be aggravated, caused, or continued by a subsequent nonwork related injury which breaks the chain of causation between the compensable injury and the employee's disability.

(b) It is the intent of the General Assembly that this Code section codify existing case law. (Ga. L. 1920, p. 167, § 28; Code 1933, § 114-503; Ga. L. 1998, p. 1508, § 5.)

Law reviews. — For review of 1998 legislation relating to labor and industrial relations, see 15 Ga. St. U. L. Rev. 185 (1998).

RESEARCH REFERENCES

ALR. — Social security: right to disability benefits as affected by refusal to submit to, or cooperate in, medical or surgical treatment, 114 ALR Fed. 141.

34-9-205. Board approval of physician's fees, hospital, and other charges; collection of fees; schedule of charges; filing costs for peer review.

(a) Fees of physicians, charges of hospitals, charges for prescription drugs, and charges for other items and services under this chapter shall be subject to the approval of the State Board of Workers' Compensation. No physician, hospital, or other provider of services shall be entitled to collect any fee unless reports required by the board have been made.

(b) Annually, the board shall publish a list by geographical location of usual, customary, and reasonable charges for all medical services provided under subsection (a) of this Code section. The board may consult with medical specialists in preparing said list. Fees within this list shall be

presumed reasonable. No physician or hospital or medical supplier shall bill the employee for authorized medical treatment; provided, however, that if an employee fails to notify a physician, hospital, or medical supplier that he or she is being treated for an injury covered by workers' compensation insurance, such provider of medical services shall not be civilly liable to any person for erroneous billing for such covered treatment if the billing error is corrected by the provider upon notice of the same. The board may require recommendations from a panel of appropriate peers of the physician or hospital or other authorized medical supplier in determining whether the fees submitted and necessity of services rendered were reasonable. The recommendations of the panel of appropriate peers shall be evidence of the reasonableness of fees and necessity of service which the board shall consider in its determinations.

(c) Any party requesting peer review pursuant to the provisions of this Code section shall pay to the board such filing costs for peer review as established by the board; provided, however, that the prevailing party in any peer review request shall be entitled to recover its filing costs, if any, from the party which does not prevail. (Ga. L. 1920, p. 167, § 63; Code 1933, § 114-714; Ga. L. 1937, p. 528; Ga. L. 1978, p. 2220, § 15; Ga. L. 1985, p. 727, § 5; Ga. L. 1990, p. 1409, § 8; Ga. L. 1992, p. 6, § 34; Ga. L. 1997, p. 1367, § 7; Ga. L. 2007, p. 616, § 5/HB 424.)

The 2007 amendment, effective July 1, 2007, substituted "physicians, charges of hospitals, charges for prescription drugs, and charges for other items and" for "physicians and charges of hospitals, and other"

near the beginning of the first sentence in subsection (a); inserted a comma following "Annually" at the beginning of subsection (b); and inserted "that" near the middle of subsection (c).

JUDICIAL DECISIONS

Jurisdiction. — Tort action by workers against health care providers who billed the workers for medical services in violation of O.C.G.A. § 34-9-205 was properly dismissed since the complaints were grounded upon an alleged violation of the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., and redress was through the workers' compensation remedies. *Mullis v. NC-CNH, Inc.*, 218 Ga. App. 332, 461 S.E.2d 237 (1995).

Fee schedule is a guideline rather than a "rule" which must be followed, and the board's approval of charges beyond those on the schedule can be challenged only on abuse-of-discretion grounds. *Chatham County Dep't of Family & Children Servs. v. Williams*, 221 Ga. App. 366, 471 S.E.2d 316 (1996).

Approval of attorney's fees. — Authority to approve attorney's fees necessarily in-

cludes the authority to approve pro tanto as well as in toto any contract between the claimant and an attorney prosecuting the compensation claim. *Clark v. Royal Globe Ins. Co.*, 116 Ga. App. 561, 158 S.E.2d 699 (1967).

Authority to approve attorney's fees is limited to the examination and approval of contracts between the claimant and claimant's attorney and does not include the authority to set the fees of attorneys, or to examine and approve contracts between attorneys as to the division of fees when associated to represent a claimant. *Clark v. Royal Globe Ins. Co.*, 116 Ga. App. 561, 158 S.E.2d 699 (1967).

Jurisdiction of action for violation of fee schedule. — State court did not have jurisdiction of action arising from an alleged violation of a fee schedule by a photocopy

company which supplied copies of medical records to institutions for workers' compensation claimants. Claimants' redress was through workers' compensation remedies. *Smart Professional Photocopy Corp. v. Dixon*, 216 Ga. App. 825, 456 S.E.2d 233 (1995).

Workers' Compensation Board regulated photocopying charges. — Because the Georgia Workers' Compensation Board, and not the Health Records Act, O.C.G.A. § 31-33-3, regulated the medical photocopying charges

in workers' compensation proceedings, the trial court properly dismissed a declaratory judgment complaint filed by a photocopier, which sought guidance regarding the appropriate fee structure for medical photocopying services in workers' compensation proceedings, for failure to state a claim upon which relief could be granted. *Smart Document Solutions, LLC v. Hall*, 290 Ga. App. 483, 659 S.E.2d 838 (2008).

Cited in *Cowart v. Ara Transp., Inc.*, 178 Ga. App. 766, 344 S.E.2d 734 (1986).

OPINIONS OF THE ATTORNEY GENERAL

Procedure for referral of rehabilitative service fees to peer review committee unauthorized. — The State Board of Workers' Compensation lacks the statutory authority to establish a procedure where questions concerning fee charges for rehabilitation services are referred to a peer review committee. 1983 Op. Att'y Gen. No. 83-28.

Fee schedule for vocational rehabilitation. — The State Board of Workers' Compensation has the authority to implement a fee schedule for vocational rehabilitation suppliers. 1991 Op. Att'y Gen. No. 91-31.

34-9-206. Reimbursement for costs of medical treatment.

(a) Any party to a claim under this chapter, a group insurance company, or other health care provider who covers the costs of medical treatment for a person who subsequently files a claim under this chapter may give notice in writing to the board at any time during the pendency of the claim that such provider is or should be a party at interest as a result of payments made in the employee's behalf for medical treatment.

(b) In cases where a group insurance company or other health care provider covers the costs of medical treatment for a person who subsequently files a claim and is entitled to benefits under this chapter, the board shall be authorized to order the employer or workers' compensation insurance carrier to repay the group insurance company or other health care provider the funds it has expended for the claimant's medical treatment, provided that such employer or its workers' compensation insurance carrier is liable under this chapter for such medical treatment and provided, further, that such other provider has become or should be a party at interest pursuant to the provisions of subsection (a) of this Code section. The employer or its workers' compensation insurance carrier deemed liable for such medical treatment shall not be obligated to pay such sums directly to the employee unless, and only to the extent that, it is proven that the employee has paid for such medical treatment himself. (Code 1981, § 34-9-206, enacted by Ga. L. 1985, p. 727, § 6; Ga. L. 1990, p. 1409, § 9.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1986, in subsection

(b) commas were inserted preceding and following "further".

JUDICIAL DECISIONS

Requirement of section. — The only requirement of O.C.G.A. § 34-9-206 is that the provider must have covered the costs of medical treatment. *Tolleson Lumber Co. v. Kirk*, 200 Ga. App. 689, 409 S.E.2d 260 (1991).

No liability where statute of limitations runs. — Where a claimant was injured in 1985, but did not file a claim for Workers' Compensation benefits until July 1987, the claim was barred by the statute of limitations contained in O.C.G.A. § 34-9-82(a), and neither the employer nor its compensation carrier was liable. Thus, neither the employer nor its compensation carrier was liable to the group health provider for medical expenses incurred by the claimant from 1985 to July 1987 for treatment of the 1985 work-related injury. *State Wholesalers, Inc. v. Parks*, 194 Ga. App. 900, 392 S.E.2d 64 (1990).

Personal injury protection carrier as party

at interest. — Under O.C.G.A. § 34-9-206, a motor vehicle personal injury protection carrier which covered certain medical expenses of the claimant can be a party at interest to a workers' compensation claim. *Tolleson Lumber Co. v. Kirk*, 200 Ga. App. 689, 409 S.E.2d 260 (1991).

Claimant's right to direct payment affected by time of injury. — The 1990 amendment allowing a workers' compensation insurer to gain the windfall that results when a third-party provider does not seek payment constituted a substantive change not applicable to a 1988 injury, and, thus, a claimant covered under the prior law was entitled to be paid directly for the amount of the claimant's medical expenses which were paid by a third party provider which had not sought reimbursement. *Carroll v. Diamond Rug & Carpet Mills, Inc.*, 224 Ga. App. 361, 480 S.E.2d 374 (1997).

34-9-207. Employee's waiver of confidentiality of communications with physician; release for medical records and information.

(a) When an employee has submitted a claim for workers' compensation benefits or is receiving payment of weekly income benefits or the employer has paid any medical expenses, that employee shall be deemed to have waived any privilege or confidentiality concerning any communications related to the claim or history or treatment of injury arising from the incident that the employee has had with any physician, including, but not limited to, communications with psychiatrists or psychologists. Notwithstanding any other provision of law to the contrary, when requested by the employer any physician who has examined, treated, or tested the employee or consulted about the employee shall provide within a reasonable time and for a reasonable charge all information and records related to the examination, treatment, testing, or consultation concerning the employee.

(b) When an employee has submitted a claim for workers' compensation benefits or is receiving payment of weekly income benefits or the employer has paid any medical expenses, the employee shall provide the employer with a signed release for medical records and information related to the claim or history or treatment of injury arising from the incident, including information related to the treatment for any mental condition or drug or alcohol abuse. Said release shall designate the provider and shall state that

it will expire on the date of the hearing. If the employee refuses to provide a signed release for medical information as required by this subsection, any weekly income benefits being received by the employee shall be suspended and no hearing shall be scheduled at the request of the employee until such signed release is provided. (Code 1981, § 34-9-207, enacted by Ga. L. 1992, p. 1942, § 18.)

Law reviews. — For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992).

JUDICIAL DECISIONS

Workers' Compensation Board regulated photocopying charges. — Because the Georgia Workers' Compensation Board, and not the Health Records Act, O.C.G.A. § 31-33-3, regulated the medical photocopying charges in workers' compensation proceedings, the trial court properly dismissed a declaratory judgment complaint filed by a photocopier,

which sought guidance regarding the appropriate fee structure for medical photocopying services in workers' compensation proceedings, for failure to state a claim upon which relief could be granted. *Smart Document Solutions, LLC v. Hall*, 290 Ga. App. 483, 659 S.E.2d 838 (2008).

34-9-208. Certification of managed health care providers.

(a) Any health care provider or group of medical service providers may make written application to the board to become certified to provide managed care to injured employees for injuries and diseases compensable under this chapter.

(b) Each application for certification shall be accompanied by a reasonable fee prescribed by the board. A certificate is valid for such period as the board may prescribe unless sooner revoked or suspended.

(c) Application for certification shall be made in such form and manner and shall set forth such information regarding the proposed plan for providing services as the board may prescribe. The information shall include, but not be limited to:

(1) A list of the names of all individuals who will provide services under the managed care plan, together with appropriate evidence of compliance with any licensing or certification requirements for that individual to practice in this state;

(2) A description of the times, places, and manner of providing services under the plan;

(3) A description of the times, places, and manner of providing other related optional services the applicants wish to provide; and

(4) Satisfactory evidence of ability to comply with any financial requirements to ensure delivery of service in accordance with the plan which the board may prescribe.

(d) The board shall certify health care providers or a group of medical service providers to provide managed care under a plan if the board finds that the plan:

(1) Proposes to provide services that meet quality, continuity, and other treatment standards prescribed by the board and will provide all medical and health care services that may be required by this chapter in a manner that is timely, effective, and convenient for the employee;

(2) Provides appropriate financial incentives to reduce service costs and utilization without sacrificing the quality of service;

(3) Provides adequate methods of peer review, service utilization review, and dispute resolution to prevent inappropriate or excessive treatment, to exclude from participation in the plan those individuals who violate these treatment standards, and to provide for the resolution of such medical disputes as the board considers appropriate;

(4) Provides a program involving cooperative efforts by the employees, the employer, and the managed care organization to promote consultative and other services that will contribute to workplace health and safety and early return to work for injured employees;

(5) Provides a timely and accurate method of reporting to the board necessary information regarding medical and health care service costs and utilization to enable the board to determine the effectiveness of the plan; and

(6) Complies with any other requirement the board determines is necessary to provide quality medical services and health care to injured workers at a reasonable cost.

(e) The board shall refuse to certify or may revoke or suspend the certification of any health care provider or group of medical service providers to provide managed care if the members of the board find that:

(1) The plan for providing medical or health care services fails to meet the requirements of this Code section; or

(2) Service under the plan is not being provided in accordance with the terms of a certified plan.

(f) Utilization review, quality assurance, and peer review activities pursuant to this Code section shall be subject to the review of the board or the board's designated representatives. Data generated by or received in connection with these activities, including written reports, notes, or records of any such activities, or of the board's review thereof, shall be confidential and shall not be disclosed by the board except as considered necessary by the board in the administration of this chapter. The board may report professional misconduct to an appropriate licensing authority.

(g) No data generated by utilization review, quality assurance, or peer review activities pursuant to this Code section or the board's review thereof shall be used in any action, suit, or proceeding except to the extent considered necessary by the board in the administration of this chapter.

(h) A person participating in utilization review, quality assurance, or peer review activities pursuant to this Code section shall not be examined as to any communication made in the course of such activities or the findings thereof, nor shall any personnel be subject to an action for civil damage for affirmative actions taken or statements made in good faith. (Code 1981, § 34-9-208, enacted by Ga. L. 1994, p. 887, § 12.)

JUDICIAL DECISIONS

Cited in *MARTA v. Reid*, 282 Ga. App. 877, 640 S.E.2d 300 (2006).

PART 2

METHOD OF PAYMENT

34-9-220. Period of incapacity preceding payment of compensation.

No compensation shall be allowed for the first seven calendar days of incapacity resulting from an injury, including the day of the injury, except the benefits provided for in Code Section 34-9-200; provided, however, that, if an employee is incapacitated for 21 consecutive days following an injury, compensation shall be paid for such first seven calendar days of incapacity. (Ga. L. 1922, p. 185, § 2; Code 1933, § 114-401; Ga. L. 1963, p. 141, § 3; Ga. L. 1990, p. 1409, § 10.)

JUDICIAL DECISIONS

Date of a gradually-acquired injury should be set at the first time the injury becomes extensive enough either to prevent the claimant from working or to constitute a disability as itemized in the Workers' Compensation Act (see O.C.G.A. § 34-9-1 et seq.). *Employers Mut. Liab. Ins. Co. v. Shipman*, 108 Ga. App. 184, 132 S.E.2d 568 (1963).

Burden on employer. — Because an employee used the employee's vacation, personal, and sick leave time because the employee was unable to work due to a compensable injury, and the employee was unaware that the employee was entitled to workers' compensation benefits, after determining that the employee was entitled to

temporary total disability income benefits, a credit to the employer was denied under O.C.G.A. § 34-9-243(b), as the employer failed to meet its burden of showing that it was entitled to such a credit for employer-funded payments under a disability plan, wage continuation plan, or disability insurance policy, or that the employee was paid the employee's regular wages pursuant to O.C.G.A. § 34-9-220. *Glisson v. Rooms To Go*, 270 Ga. App. 689, 608 S.E.2d 50 (2004).

Cited in *Langston v. Maryland Cas. Co.*, 43 Ga. App. 854, 160 S.E. 823 (1931); *New York Indem. Co. v. Allen*, 47 Ga. App. 657, 171 S.E. 191 (1933); *New Amsterdam Cas. Co. v. McFarley*, 191 Ga. 334, 12 S.E.2d 355 (1940); *Pittsburgh Plate Glass Co. v. Bailey*, 111 Ga.

App. 609, 142 S.E.2d 388 (1965); *Harris v. Atlanta Coca-Cola Bottling Co.*, 128 Ga. App. 193, 196 S.E.2d 159 (1973).

RESEARCH REFERENCES

ALR. — Remedy for enforcement of award made under Workmen's Compensation Act in case of injury to public officer or employee, 10 ALR 190. Workmen's compensation: statutory phrase "incapacity for work" or the like, as including inability to obtain work following an injury, 33 ALR 115.

34-9-221. Procedure; payment controverted by employer; delinquency charge; enforcement.

(a) Income benefits shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability is controverted by the employer. Payments shall be made in cash, by negotiable instrument, or, upon agreement of the parties, by electronic funds transfer.

(b) The first payment of income benefits shall become due on the twenty-first day after the employer has knowledge of the injury or death, on which day all income benefits then due shall be paid. Thereafter, income benefits shall be due and payable in weekly installments; provided, however, that the board may, in its discretion, authorize payments to be made in different installments if it determines that this would be beneficial to all parties concerned. Such weekly payments shall be considered to be paid when due when mailed from within the State of Georgia to the address specified by the employee or to the address of record according to the board. Such weekly payments shall be considered to be paid when due when mailed from outside the State of Georgia no later than three days prior to the due date to the address specified by the employee or the address of record according to the board. Such weekly payments shall be considered to be paid when due at the time they are made by electronic funds transfer to an account specified by the employee.

(c) Upon making the first payment and upon suspension of payment for any cause, the employer shall immediately notify the board and the employee, in accordance with forms prescribed by the board, that payment of income benefits has begun or has been suspended, as the case may be.

(d) If the employer controverts the right to compensation, it shall file with the board, on or before the twenty-first day after knowledge of the alleged injury or death, a notice in accordance with the form prescribed by the board, stating that the right of compensation is controverted and stating the name of the claimant, the name of the employer, the date of the alleged injury or death, and the ground upon which the right to compensation is controverted.

(e) If any income benefits payable without an award are not paid when due, there shall be added to the accrued income benefits an amount equal

to 15 percent thereof, which shall be paid at the same time as, but in addition to, the accrued income benefits unless notice is filed under subsection (d) of this Code section or unless this nonpayment is excused by the board after a showing by the employer that owing to conditions beyond control of the employer the income benefits could not be paid within the period prescribed.

(f) If income benefits payable under the terms of an award are not paid within 20 days after becoming due, there shall be added to the accrued income benefits an amount equal to 20 percent thereof, which shall be paid at the same time as, but in addition to, the accrued benefits unless review of the award is granted by the board.

(g) Within 30 days after final payment of compensation, the employer shall send to the board a notice in accordance with the form prescribed by the board, stating that final payment has been made and stating the total amount of compensation paid, the name of the employee and any other person to whom compensation has been paid, the date of the injury or death, and the date to which income benefits have been paid.

(h) Where compensation is being paid without an award, the right to compensation shall not be controverted except upon the grounds of change in condition or newly discovered evidence unless notice to controvert is filed with the board within 60 days of the due date of first payment of compensation.

(i) Where compensation is being paid with or without an award and an employer or insurer elects to controvert on the grounds of a change in condition or newly discovered evidence, the employer shall, not later than ten days prior to the due date of the first omitted payment of income benefits, file with the board and the employee or beneficiary a notice to controvert the claim in the manner prescribed by the board.

(j) The board or any administrative law judge shall issue such orders as may be necessary to enforce the penalty provisions of this Code section. (Ga. L. 1920, p. 167, § 55; Code 1933, § 114-705; Ga. L. 1978, p. 2220, § 10; Ga. L. 1985, p. 727, § 7; Ga. L. 1987, p. 806, § 6; Ga. L. 1990, p. 1409, § 11; Ga. L. 1992, p. 1942, § 19; Ga. L. 1998, p. 1508, § 6; Ga. L. 1999, p. 817, § 4; Ga. L. 2000, p. 1321, § 5; Ga. L. 2002, p. 846, § 3.)

Law reviews. — For article surveying developments in Georgia workers' compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981). For annual survey of workers' compensation, see 38 Mercer L. Rev. 431 (1986). For review of 1998 legislation relating to labor and industrial relations, see 15 Ga. St. U. L. Rev. 185 (1998). For annual survey article discussing

workers' compensation law, see 52 Mercer L. Rev. 505 (2000). For survey article on workers' compensation law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For annual survey of law of worker's compensation, see 56 Mercer L. Rev. 479 (2004).

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992).

For note on 2000 amendment of O.C.G.A. § 34-9-221, see 17 Ga. St. U.L. Rev. 231 (2000).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION PRACTICE AND PROCEDURE APPLICATION

General Consideration

Constitutionality. — The ten-day notice of the impending termination and post-termination hearing procedures of O.C.G.A. § 34-9-221 and Board Rule 22 (i) are constitutionally sufficient to satisfy the requirements of due process. *Cryder v. Oxendine*, 24 F.3d 175 (11th Cir. 1994).

Legislative intent behind O.C.G.A. § 34-9-221 was to minimize the hardship on the injured worker by requiring the employer either to act quickly when it knows a claim is controvertible, so as to expedite final resolution of the matter, or to pay compensation while investigating the matter more closely. *Southeastern Aluminum Recycling, Inc. v. Rayburn*, 172 Ga. App. 648, 324 S.E.2d 194 (1984).

The 1985 amendment of O.C.G.A. § 34-9-221(e) did not create a new substantive right to have the benefits paid when due, but merely shortened the time period within which the employer can make the payments without a penalty, which is a procedural matter, and the change could therefore be applied retroactively. *Dan River, Inc. v. Carroll*, 192 Ga. App. 537, 385 S.E.2d 686 (1989).

Decision of the board has the same force and effect as the decision or judgment of any other tribunal known to the system of jurisprudence. *Hartford Accident & Indem. Co. v. Webb*, 109 Ga. App. 667, 137 S.E.2d 362 (1964).

Compliance required. — That an employee has suffered an injury compensable under the terms of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) may be conclusively established by an agreement filed with and approved by the compensation board, or by an award of the board after hearing evidence. Regardless of which of these two methods is employed, it is a deci-

sion or judgment of the board which must be complied with until it is superseded by a new award. *Hartford Accident & Indem. Co. v. Webb*, 109 Ga. App. 667, 137 S.E.2d 362 (1964); *American Mut. Liab. Ins. Co. v. Chandler*, 112 Ga. App. 574, 145 S.E.2d 816 (1965).

Penalty due under O.C.G.A. § 34-9-221(e) was part of the "compensation" required to be paid to the employee without an award and, where the employer failed to pay the penalty, its notice to controvert and suspend payment under O.C.G.A. § 34-9-221(h) was invalid. *Cartersville Ready Mix Co. v. Hamby*, 224 Ga. App. 116, 479 S.E.2d 767 (1996).

Penalty included in judgment. — A penalty for late payment of benefits under O.C.G.A. § 34-9-221(f) was not required to be authorized by an award of the board in order to be included in a judgment of the superior court rendered under O.C.G.A. § 34-9-106. *Ayers v. Rembert*, 241 Ga. App. 698, 527 S.E.2d 290 (1999).

Noncompliance as issue of fact. — Whether noncompliance with O.C.G.A. § 34-9-221 is without reasonable grounds is an issue of fact to be determined by the board, and its decision will be affirmed by the appellate court if there is any evidence to support it. *Carr v. A.P. & Harry Jones Logging*, 198 Ga. App. 698, 402 S.E.2d 538 (1991).

Cessation of payments by self-insurer. — Where a self-insurer temporarily ceased benefits payments, but notified the board and the Insurance Commissioner, and where there was no evidence in the claimant's record authorizing a finding of willfulness or the imposition of a civil penalty, there was no error of fact or of law made by the administrative law judge or the board in failing to assess a civil penalty or to award attorney's fees. *Grier v. Proctor*, 195 Ga. App. 116, 393 S.E.2d 18 (1990).

Conclusiveness of award. — Where an award has been entered by the board in favor of the claimant and is still outstanding, the award is conclusive as to the disability of the claimant and the continuance thereof, and the burden of proof is on the employer to show a change in condition of the claimant which would authorize the board to make a new award ending or diminishing the compensation previously awarded. *Hartford Accident & Indem. Co. v. Webb*, 109 Ga. App. 667, 137 S.E.2d 362 (1964).

An agreement to pay compensation approved by the board amounts to an award for compensation in terms of the agreement. *Taylor v. Sunnyland Packing Co.*, 112 Ga. App. 544, 145 S.E.2d 587 (1965).

Compensation agreement precludes later contradiction. — A compensation agreement precludes either party from later contesting or contradicting facts admitted to exist as of the time of the agreement. *Continental Cas. Co. v. Donnell*, 112 Ga. App. 274, 145 S.E.2d 89 (1965).

Effect of agreement. — An agreement executed by the parties and approved by the board possesses all of the force of an award of compensation. *Continental Cas. Co. v. Bump*, 218 Ga. 187, 126 S.E.2d 783 (1962).

Agreement conclusive from date of execution. — The conclusiveness established by an agreement filed with and approved by the board that an employee has suffered an injury compensable under the terms of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) dates from the moment of the execution of the agreement. *Bump v. Continental Cas. Co.*, 109 Ga. App. 228, 136 S.E.2d 14 (1964).

Contesting act's applicability after initial acceptance of benefits. — The initial acceptance of voluntarily paid benefits should not preclude the injured employee from contesting, in a timely manner, the applicability of the act to the incident in question. This does not permit a double recovery since, if the employee recovers at common law, the defendant employer would be entitled either to a set-off for benefits erroneously paid under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., or to present evidence of benefits collected by the employee as provided by O.C.G.A. § 51-12-1(b). *Associated Hosts of Ga., Inc. v. Marley*, 184 Ga. App. 352, 361 S.E.2d 496 (1987).

Ability of employer/insurer to controvert liability. — By enacting O.C.G.A. § 34-9-221(d), the legislature has provided a means by which an employer/insurer can controvert compensability prior to paying any benefits. *Goode Bros. Poultry Co. v. Kin*, 201 Ga. App. 557, 411 S.E.2d 724, cert. denied, 201 Ga. App. 903, 411 S.E.2d 724 (1991).

An adverse ruling against an employer on its suspension of an employee's benefits did not invalidate its notice to controvert based on newly discovered evidence. *Cumberland Distrib. Servs., Inc. v. Fuson*, 228 Ga. App. 380, 492 S.E.2d 2 (1997).

Although an employer's failure to have paid a statutory penalty under O.C.G.A. § 34-9-221(e) rendered its notice to controvert invalid under § 34-9-221(h), such that it was barred from contesting the issue of a compensable injury of an employee who was receiving temporary total disability benefits, such invalid notice did not bar the employer from asserting that the employee had a change in condition under § 34-9-221(i) that warranted discontinuation of the benefits. *Fallin v. Merritt Maint. & Welding, Inc.*, 283 Ga. App. 485, 642 S.E.2d 122 (2007).

Employer not estopped from controverting liability. — The fact that an employer provided medical treatments and disability benefits for the temporary aggravation of a worker's preexisting condition did not mean that it accepted the compensability of the preexisting condition, and the employer was not estopped from contesting the compensability of any subsequent disability arising from such condition. *Chem Lawn Servs. v. Stephens*, 220 Ga. App. 239, 469 S.E.2d 375 (1996).

Employer was not precluded from presenting a defense to an employee's claim for benefits by the employer's failure to make benefit payments to the employee before filing a notice to controvert that was late. *Stephenson v. Roper Pump Co.*, 261 Ga. App. 131, 581 S.E.2d 741 (2003).

Cited in *General Accident, Fire & Life Assurance Corp. v. Beatty*, 174 Ga. 314, 162 S.E. 668 (1932); *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939); *Tillman v. Moody*, 181 Ga. 530, 182 S.E. 906 (1935); *Lumbermen's Mut. Cas. Co. v. Cook*, 195 Ga. 397, 24 S.E.2d 309 (1943); *Maryland Cas. Co. v. Stephens*, 76 Ga. App. 723, 47

General Consideration (Cont'd)

S.E.2d 108 (1948); *New Amsterdam Cas. Co. v. Brown*, 81 Ga. App. 790, 60 S.E.2d 245 (1950); *Georgia Marine Salvage Co. v. Merritt*, 82 Ga. App. 111, 60 S.E.2d 419 (1950); *National Sur. Corp. v. Nelson*, 99 Ga. App. 95, 107 S.E.2d 718 (1959); *Sears, Roebuck & Co. v. Wilson*, 215 Ga. 746, 113 S.E.2d 611 (1960); *Firth v. Liberty Mut. Ins. Co.*, 107 Ga. App. 285, 129 S.E.2d 812 (1963); *Fidelity & Cas. Co. v. Parham*, 218 Ga. 640, 129 S.E.2d 868 (1963); *GMC v. Harrison*, 107 Ga. App. 667, 131 S.E.2d 234 (1963); *Guess v. Liberty Mut. Ins. Co.*, 219 Ga. 581, 134 S.E.2d 783 (1964); *Awbrey v. Davis*, 219 Ga. 598, 134 S.E.2d 785 (1964); *Proctor v. Dixie Bell Mills, Inc.*, 113 Ga. App. 787, 149 S.E.2d 550 (1966); *Simpson v. Travelers Ins. Co.*, 117 Ga. App. 43, 159 S.E.2d 294 (1967); *Martin v. GMC, Fisher Body Div.*, 224 Ga. 677, 164 S.E.2d 107 (1968); *Atlanta Coca Cola Bottling Co. v. Gates*, 225 Ga. 824, 171 S.E.2d 723 (1969); *Fireman's Fund Ins. Co. v. Crowder*, 123 Ga. App. 469, 181 S.E.2d 530 (1971); *Harris v. Atlanta Coca-Cola Bottling Co.*, 128 Ga. App. 193, 196 S.E.2d 159 (1973); *Spengler v. Employers Com. Union Ins. Co.*, 131 Ga. App. 443, 206 S.E.2d 693 (1974); *Tuck v. Fidelity & Cas. Co.*, 131 Ga. App. 807, 207 S.E.2d 210 (1974); *GMC v. Dover*, 239 Ga. 611, 238 S.E.2d 403 (1977); *Insurance Co. of N. Am. v. Henson*, 150 Ga. App. 788, 258 S.E.2d 706 (1979); *Haygood v. Home Transp. Co.*, 244 Ga. 165, 259 S.E.2d 429 (1979); *Commercial Union Assurance Co. v. R.C. Van Lines*, 156 Ga. App. 420, 274 S.E.2d 781 (1980); *Liberty Mut. Ins. Co. v. Kirkland*, 156 Ga. App. 576, 275 S.E.2d 152 (1980); *Sunbelt Airlines v. Hunt*, 158 Ga. App. 429, 280 S.E.2d 435 (1981); *Binswanger Glass Co. v. Brooks*, 160 Ga. App. 701, 288 S.E.2d 61 (1981); *Seitzingers, Inc. v. Barnes*, 161 Ga. App. 855, 289 S.E.2d 315 (1982); *Kelley v. West Point Pepperell, Inc.*, 164 Ga. App. 187, 296 S.E.2d 191 (1982); *Carroll v. Dan River Mills, Inc.*, 169 Ga. App. 558, 313 S.E.2d 741 (1984); *J & M Transp. Co. v. Crowe*, 173 Ga. App. 13, 325 S.E.2d 412 (1984); *State v. Mitchell*, 177 Ga. App. 333, 339 S.E.2d 384 (1985); *Calwell v. Perry*, 179 Ga. App. 682, 347 S.E.2d 286 (1986); *Georgia Ins. Co. v. Brown*, 179 Ga. App. 687, 347 S.E.2d 290 (1986); *Hardee's v. Bailey*, 180 Ga. App. 332, 349 S.E.2d 211 (1986); *State v.*

Graul, 181 Ga. App. 573, 353 S.E.2d 70 (1987); *Owen of Ga., Inc. v. Waugaman*, 185 Ga. App. 827, 366 S.E.2d 173 (1988); *McGinty v. Alfred L. Simpson & Co.*, 188 Ga. App. 718, 374 S.E.2d 217 (1988); *Raley v. Lanco Paint & Drywall*, 190 Ga. App. 462, 379 S.E.2d 196 (1989); *Cypress Ins. Co. v. Duncan*, 281 Ga. App. 469, 636 S.E.2d 159 (2006).

Practice and Procedure

Untimely notice did not preclude denial of responsibility for medical services. — Employer's failure to timely file a notice to controvert did not preclude it from denying responsibility for medical services from a physician not on the posted panel, where the employer had no reason to assume that claimant was seeking workers' compensation medical, rather than income, benefits. *ITT-Continental Baking Co. v. Powell*, 182 Ga. App. 533, 356 S.E.2d 267 (1987).

Belief of no liability to employee was insufficient for failure to give notice to controvert the claim. — Believing that it was not liable to the employee was an insufficient reason for the motor common carrier to fail to file a notice to controvert the claim, as required by O.C.G.A. § 34-9-221(d). There was no specificity in the statute concerning the grounds on which the right to compensation was controverted. *C. Brown Trucking, Inc. v. Rushing*, 265 Ga. App. 676, 595 S.E.2d 346 (2004).

Failure to timely file a notice to controvert does not estop the employer from defending against a claim. *American Int'l Adjusting Co. v. Davis*, 202 Ga. App. 276, 414 S.E.2d 292 (1991).

Scope of board's authority. — Board is not bound to merely determine whether or not employer properly controverted claim for sole ground listed in notice to controvert but may determine all issues within the bounds of its rules and regulations and the law. *Southern Bell Tel. & Tel. Co. v. Hodges*, 164 Ga. App. 757, 298 S.E.2d 570 (1982).

O.C.G.A. § 34-9-221(d) does not create nor constitute a statute of limitation foreclosing an employer's defense upon an employer's failure to file notice to controvert within 21 days of the date of an accident. *Linder v. Alterman Foods, Inc.*, 162 Ga. App. 786, 292 S.E.2d 900 (1982).

Limitations period for controverting liability. — O.C.G.A. § 34-9-221(h) creates a 60-day statute of limitation on an employer's ability to controvert liability as to any injury for which benefits have already been voluntarily held, except upon grounds of change in condition or newly discovered evidence. *Carpet Transp., Inc. v. Pittman*, 187 Ga. App. 463, 370 S.E.2d 651 (1988).

O.C.G.A. § 34-9-221(h) did not prohibit the employer from contesting the correct amount of compensation more than 60 days from the due date of the first payment. *Leon Dawson/Crawford Forest Prods. v. Walker*, 192 Ga. App. 887, 386 S.E.2d 690 (1989).

O.C.G.A. § 34-9-221(h) did not apply to a dispute between two insurers as to which was liable for workers' compensation, where the employee's right to compensation was not being challenged by any of the parties. *Columbus Intermediate Care Home, Inc. v. Johnston*, 196 Ga. App. 516, 396 S.E.2d 268 (1990).

Where employer bound itself to payment of compensation benefits without an award, an intervening Georgia Supreme Court holding that an employer is not obligated to pay workers' compensation benefits to an injured worker who misrepresented the worker's physical condition at the time the worker was hired did not exclude the employer from compliance with the statute of limitations contained in subsection (h) of O.C.G.A. § 34-9-221. *Snapper Power Equip. Co. v. Crook*, 206 Ga. App. 373, 425 S.E.2d 393 (1992).

O.C.G.A. § 34-9-221(h) creates a 60-day statute of limitation on an employer's ability to controvert employee's right to compensation itself. *Floyd S. Pike Elec. Contractors v. Williams*, 207 Ga. App. 86, 427 S.E.2d 67 (1993).

O.C.G.A. § 34-9-221(i) requires 10-days' notice before suspension of benefits. It matters not when the employer/insurer was entitled to suspend benefits. The claimant is entitled to benefits for 10 days following the filing of such notice. *Jackson v. Peachtree Hous. Div.*, 187 Ga. App. 612, 371 S.E.2d 112, cert. denied, 187 Ga. App. 907, 370 S.E.2d 194 (1988).

Computing the 20-day mandate of subsection (f). — The general computation of time provision of O.C.G.A. § 1-3-1(d)(3) is the starting point for computing the 20-day

mandate of O.C.G.A. § 34-9-221(f). *Liberty Nat'l Life Ins. Co. v. Coley*, 201 Ga. App. 623, 411 S.E.2d 553, cert. denied, 201 Ga. App. 904, 411 S.E.2d 553 (1991).

Where the twentieth day for payment under O.C.G.A. § 34-9-221(f) was Christmas Day, receipt of checks by claimant's attorney on December 26 constituted payment within the contemplation of subsection (f). *Liberty Nat'l Life Ins. Co. v. Coley*, 201 Ga. App. 623, 411 S.E.2d 553, cert. denied, 201 Ga. App. 904, 411 S.E.2d 553 (1991).

Requiring the payor of negotiable instruments to calculate into the 20-day payment period under O.C.G.A. § 34-9-221(f) such factors as weather prognoses, banking hours and regulations, and the claimant's or attorney's cooperation in negotiating the instruments within the allocated time frame, would defy reason and equity and effectively shorten the period the statute specifies. *Liberty Nat'l Life Ins. Co. v. Coley*, 201 Ga. App. 623, 411 S.E.2d 553, cert. denied, 201 Ga. App. 904, 411 S.E.2d 553 (1991).

Mailing of benefits on twentieth day insufficient. — The plain language of O.C.G.A. § 34-9-221(f) and Rule 221(a) and (f) of the Rules and Regulations of the State Board of Workers' Compensation mandates that payment of benefits be received by a claimant within 20 days of an award. Mailing of benefits by the 20th day is insufficient. *Dykes v. Superior Elec. Contractors*, 179 Ga. App. 793, 348 S.E.2d 120 (1986).

Employer filing notice of appeal after 20th day. — The filing of a notice of appeal by the employer after the 20th day but within 30 days following the issuance of an award does not constitute an automatic supersedeas but leaves the employee free to collect the amount of the award, as well as the 20 percent penalty, at the employee's peril. *McLean Trucking Co. v. Florence*, 179 Ga. App. 514, 347 S.E.2d 333 (1986); *Cox Enters., Inc. v. Marshall*, 190 Ga. App. 322, 378 S.E.2d 725 (1989).

Notice to controvert filed 26 days after injury untimely. — Where there was evidence indicating that the injury was received on or before September 22, 1980, and notice to the employer was given on the day of injury, the employer's filing of notice to controvert on October 17, 1980, was untimely. *Moon v. Cook & Co.*, 170 Ga. App. 569, 317 S.E.2d 642 (1984).

Practice and Procedure (Cont'd)

Twenty-one day statute of limitations for notice to controvert was tolled and notice to controvert filed 23 months after injury was allowed where injured employee was contacted shortly after the accident by a representative of the insurer, but the employee did not disclose questionable circumstances of the injury which occurred during private endeavors, and the employer impliedly misrepresented to insurer that the employee was engaged in county work at the time of the accident. *Spiva v. Union County*, 172 Ga. App. 151, 322 S.E.2d 351 (1984), overruled on other grounds, *Bahadori v. Sizzler #1543*, 230 Ga. App. 52, 505 S.E.2d 23 (1997), *Bahadori v. National Union Fire Ins. Co.*, 270 Ga. 203, 507 S.E.2d 467 (1998).

Review limited by failure to take appeal. — The superior court erred in determining that the original award of attorney's fees should have been reversed for a lack of sufficient evidence to support it where no appeal was taken before the time for appeal passed. The only issue that the superior court was authorized to consider was whether the subsequent construction of the original award as evidencing an award of add-on attorney's fees was correct. *Dawson v. Atlanta Processing Co.*, 190 Ga. App. 293, 378 S.E.2d 695 (1989).

Hearing on responsibility of subsequent insurer required. — A trial court erred in dismissing a request for a hearing sought by an employer's prior workers' compensation insurance carrier since an ALJ should have conducted a hearing on the issue presented by the carrier, namely, whether the next insurer for the employer was responsible for providing a claimant with benefits. *TIG Specialty Ins. Co. v. Brown*, 283 Ga. App. 445, 641 S.E.2d 684 (2007).

Failure to comply with section not waiver of challenge to benefits. — Failure to comply with O.C.G.A. § 34-9-221 in suspending or terminating benefits does not prevent the employer/insurer from contending that no or lesser benefits are due after a certain date due to a change in condition; rather, it subjects the employer/insurer to potential liability for attorney fees if the failure was without reasonable grounds. *Sadie G. Mays Mem. Nursing Home v. Freeman*, 163 Ga. App. 557, 295 S.E.2d 340 (1982).

Failure to file notice within 21 days does not act as estoppel preventing an employer and insurer from controverting a claim for compensation. The General Assembly has provided other sanctions against the failure to so file in O.C.G.A. § 34-9-108. *Raines & Milam v. Milam*, 161 Ga. App. 860, 289 S.E.2d 785 (1982).

Lack of specificity in subsection (d). — There is no specificity in O.C.G.A. § 34-9-221 (d) concerning grounds on which right to compensation can be controverted. *Georgia Power Co. v. Safford*, 171 Ga. App. 387, 319 S.E.2d 537 (1984).

Mandatory nature of subsection (d). — Word "shall" in subsection (d) of O.C.G.A. § 34-9-221 makes it mandatory that such notice be filed. *Raines & Milam v. Milam*, 161 Ga. App. 860, 289 S.E.2d 785 (1982).

Penalty for delay in payments. — The intentional delay of workers' compensation payments did not give rise to an independent cause of action against the employer or its insurer, as the penalties for such a delay were provided by O.C.G.A. § 34-9-221(e). *Bright v. Nimmo*, 253 Ga. 378, 320 S.E.2d 365 (1984); *Dutton v. Georgia Associated Gen. Contractor Self-Insurers Trust Fund*, 215 Ga. App. 607, 451 S.E.2d 504 (1994).

There was no independent cause of action, apart from the remedies available under O.C.G.A. § 34-9-221(e), where an employer and its insurer failed to pay income benefits "without reasonable grounds", resulting in the foreclosure on the employee's home. *Bright v. Nimmo*, 756 F.2d 1513 (11th Cir. 1985).

The Georgia penalty provision did not preclude plaintiff from maintaining plaintiff's claim for damages against an insurance carrier for cessation and withholding of workers' compensation benefits pursuant to a garnishment order. *Brazier v. Travelers Ins. Co.*, 602 F. Supp. 541 (N.D. Ga. 1984).

Workers' compensation claimant was not entitled to a late-payment penalty since the law firm's return of the first check issued by defendants did not invalidate the otherwise valid, timely payment; there was evidence that the first check was timely mailed and complied with the terms of the settlement agreement. *Abdul-Hakim v. Mead Sch. & Office Prods.*, 267 Ga. App. 121, 598 S.E.2d 808 (2004).

The state board of workers' compensation

properly assessed a 15 percent penalty against an employer for its failure to make benefit payments on a weekly basis as required by O.C.G.A. § 34-9-221(b); the statute required that payments be made weekly unless an alternate schedule was approved by the board, and it was undisputed that the employer had changed its payment schedule absent an order directing otherwise. *Renu Thrift Store, Inc. v. Figueroa*, 286 Ga. App. 455, 649 S.E.2d 528 (2007), cert. dismissed, 2007 Ga. LEXIS 812 (Ga. 2007).

Award pursuant to consent judgment due when approved by board. — When an award is made pursuant to a consent judgment, a judgment which is nonappealable, the award becomes “due” for purposes of O.C.G.A. § 34-9-221(f) when approved by the board. *Linehan v. Combined Ins. Co.*, 176 Ga. App. 815, 338 S.E.2d 34 (1985).

Newly discovered evidence. — Discovery of fact by insurer that injury did not arise out of and in the course of employment because claimant was working for partner individually and not for partnership when injury was sustained, was not newly discovered evidence under O.C.G.A. § 34-9-221(h) as it could have been diligently ascertained by the insurer before the first payment was made. *Anderson v. Araguel, Sanders, Carter & Swain*, 163 Ga. App. 610, 295 S.E.2d 750 (1982).

Evidence supported finding that employer acted with due diligence in obtaining a third medical test to determine employee's condition, the results of the test having constituted “newly discovered evidence” which authorized the suspension of benefits. *Carden v. Arrow Co.*, 193 Ga. App. 539, 388 S.E.2d 348 (1989).

Where the employer is thwarted in its opportunity to discover the evidence supporting its defense of the claim by the claimant's own misrepresentation of facts, evidence of noncompensability which is discovered after the expiration of the 60-day period for controverting a claim is newly discovered evidence which gives the employer a ground for controverting benefits. *Gordon County Farms v. Edwards*, 204 Ga. App. 770, 420 S.E.2d 607, cert. denied, 204 Ga. App. 921, 420 S.E.2d 607 (1992).

Diligence in obtaining evidence applies as of when compensation initiated. — The diligence requirement under subsection (h) of

O.C.G.A. § 34-9-221 for introduction of new evidence (new evidence must not have been discoverable by reasonable diligence) is judged on the basis of when compensation was voluntarily initiated rather than the date of the “first hearing.” *Georgia Power Co. v. Pinson*, 167 Ga. App. 90, 305 S.E.2d 887 (1983).

Application

Physician's opinion must not have been obtainable previously to be newly discovered. — In order to be given consideration as “newly discovered evidence”, under subsection (h) of O.C.G.A. § 34-9-221, not only would a physician's subsequent opinion have to be nonimpeaching of the physician's previous one, it would also have to be shown that it was not previously obtainable in the exercise of ordinary diligence. *Georgia Power Co. v. Pinson*, 167 Ga. App. 90, 305 S.E.2d 887 (1983).

Claimant's burden to show requisite number of employees as affecting employer's filing requirement. — Where purported employer has no express knowledge that a claim is brought against the employer in the employer's individual capacity and when so apprised does not controvert the basic fact that the employer is or was an employer of the alleged employee, then the employer need not file the form prescribed by rule promulgated under O.C.G.A. § 34-9-221 to controvert right to benefits nor would the employer be subject to an adverse presumption from a failure to file such form, but rather burden of showing employer-employee relationship and of showing that the employer was subject to provisions of the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., by virtue of having the requisite number of employees rests upon claimant. *Fowler v. Gilmer County Comm'rs of Rds. & Revenues*, 164 Ga. App. 1, 294 S.E.2d 708 (1982).

Allowance of attorney's fees under O.C.G.A. § 34-9-108 must be predicated upon determination that the noncompliance with O.C.G.A. § 34-9-221 of the party against whom such fees are to be assessed was “without reasonable grounds”. *Union Carbide Corp. v. Coffman*, 158 Ga. App. 360, 280 S.E.2d 140 (1981).

Merely engaging attorney to enforce rights under O.C.G.A. § 34-9-221 does not

Application (Cont'd)

authorize claimant to an award of attorney's fees under O.C.G.A. § 34-9-108 unless the employer's noncompliance with § 34-9-221 was "without reasonable grounds". *Union Carbide Corp. v. Coffman*, 158 Ga. App. 360, 280 S.E.2d 140 (1981).

Where an employer prevailed in asserting that any award for a worker's occupational disease would have to be apportioned pursuant to O.C.G.A. § 34-9-285, the employer's controverting the worker's claim obviously was not without reasonable grounds, so the worker was not entitled to attorney fees under §§ 34-9-108 and 34-9-221. *Whitaker v. Fieldcrest Mills, Inc.*, 174 Ga. App. 533, 330 S.E.2d 761 (1985).

"Unlawfulness" is not the correct standard for awarding attorney's fees pursuant to O.C.G.A. § 34-9-108(b)(2); an award of attorney's fees pursuant to that statute requires a finding of non-compliance with O.C.G.A. § 34-9-221 which was "without reasonable grounds." Where there was affirmative evidence of a reasonable ground for the employer to believe that no payment was due, and thereby to commit a technical violation of the time-frame requirements of § 34-9-221, the court erred in affirming the board's award of attorney's fees. *Waffle House, Inc. v. Bozeman*, 194 Ga. App. 860, 392 S.E.2d 48 (1990).

Where the employer filed the notice to controvert more than 21 days after knowledge of the employee's injury and made no explanation for its noncompliance with O.C.G.A. § 34-9-221(d), the appellate division's award of attorney fees to the employee was proper. *Bennett-Murray, Inc. v. Barnes*, 222 Ga. App. 137, 473 S.E.2d 166 (1996).

Where the finding of the board that the employer's defense was made without reasonable grounds was without evidence to support it, the superior court did not err by reversing an award of attorney's fees to the claimant. *Autry v. Mayor of Savannah*, 222 Ga. App. 691, 475 S.E.2d 702 (1996).

An employer's argument relating to a change in the claimant's condition based solely on the treating physician's change of opinion was not reasonable, and an award of attorney's fees to the claimant was proper. *St.*

Joseph's Hosp. v. Cope, 225 Ga. App. 781, 484 S.E.2d 727 (1997).

Employer's failure to timely file a notice that the employer intended to controvert the claimant's workers' compensation claim for benefits, plus its failure to give a reasonable explanation for not doing so, meant the administrative law judge was authorized to award attorney's fees and the trial court erred in determining otherwise in a case where the employer was accused of unreasonably defending the claim. *Milliken & Co. v. Poythress*, 257 Ga. App. 586, 571 S.E.2d 509 (2002).

Because a WC-2 was sufficient to place the state board of workers' compensation and an employee on notice of the reason for terminating the employee's benefits due to a change in condition for the better, the employee was entitled to benefits for the ten days following the filing of the notice and attorney's fees pursuant to O.C.G.A. § 34-9-108 if the board determined that the employer's failure to comply with O.C.G.A. § 34-9-221 was unreasonable. *Reliance Elec. Co. v. Brightwell*, 284 Ga. App. 235, 643 S.E.2d 742 (2007), cert. denied, 2007 Ga. LEXIS 535 (Ga. 2007).

Right to fees not terminated by settlement agreement. — If, based on the administrative law judge's finding that the suspension of benefits and the defense of the matter were unreasonable, the administrative law judge assessed attorney fees against the employer pursuant to subsection (i) of O.C.G.A. §§ 34-9-221 and 34-9-108(b), and where, subsequently, the employee dismissed the employee's attorney and entered into settlement negotiations, which resulted in settlement of the employee's case, such a settlement agreement did not terminate the attorney's right to attorney fees, although the attorney played no part in the negotiations. *Bass v. Annandale at Suwanee, Inc.*, 187 Ga. App. 209, 369 S.E.2d 529 (1988).

Effect of reversal on payment and penalty received by employee. — If the claimant elects to collect the award and penalty when due and an appeal is filed between the 20th and 30th day which results in a reversal, then both the award and penalty are nullified and must be reimbursed to the employer. *McLean Trucking Co. v. Florence*, 179 Ga. App. 514, 347 S.E.2d 333 (1986).

OPINIONS OF THE ATTORNEY GENERAL

State of Georgia may not make workers' compensation payments without an agree-

ment approved by the Workers' Compensation Board. 1975 Op. Att'y Gen. No. U75-23.

RESEARCH REFERENCES

ALR. — Admissibility of ancient documents as hearsay exception under Rule

803(16) of Federal Rules of Evidence, 186 ALR Fed. 485.

34-9-222. Lump sum payments of all or part of compensation generally.

(a) Upon the application of any party when benefits have been continued for a period of not less than 26 weeks, if the board determines that it is for the best interest of the claimant to prevent extreme hardship or is essential to the rehabilitation of the claimant, the board may order that the liability of the employer for future income benefits be discharged by the payment of a lump sum equal to the sum of all future payments, reduced to their present value upon the basis of interest calculated at 7 percent per annum.

(b) Under the same requirements of subsection (a) of this Code section, the board may order the employer to make advance payments of a part of the future income benefits by payment of a lump sum equal to such part of future payments. The repayment of partial lump sum advance payments, together with interest of 7 percent per annum, may be accomplished by reducing the period of payment or reducing the weekly benefit, or both, as may be directed by the board. (Ga. L. 1920, p. 167, § 43; Code 1933, § 114-417; Ga. L. 1937, p. 528; Ga. L. 1963, p. 141, § 10; Ga. L. 1978, p. 2220, § 8; Ga. L. 1988, p. 1679, § 22.)

JUDICIAL DECISIONS

Legislative intent. — Workers' Compensation Acts (see O.C.G.A. § 34-9-1 et seq.) are enacted to benefit employees and their dependents. The purpose of compensation is that it shall be in lieu of wages, and it is the intention of the Acts that it shall be paid as wages; that is, periodically. Any deviation from this method of payment is contrary to the declared purpose of the Acts and must be done only as provided by law. *Lumbermens Mut. Cas. Co. v. McIntyre*, 67 Ga. App. 666, 21 S.E.2d 446 (1942).

The legislative intent of O.C.G.A. § 34-9-222 was to provide that lump sum awards were to consist of the claimant's future income benefits only and not to create a bar to claims for workers' compensation medical benefits subsequent to a lump

sum award. *Atha v. Jackson Atlanta, Inc.*, 159 Ga. App. 433, 283 S.E.2d 654 (1981).

Legislature intended through O.C.G.A. § 34-9-222 to remove its predecessor's bar to recovery of subsequent medical benefits by providing that after July 1, 1978, a lump sum award should consist only of a claimant's "future income benefits." *Atha v. Jackson Atlanta, Inc.*, 159 Ga. App. 433, 283 S.E.2d 654 (1981).

Purpose of requiring weekly payments is to enable the employee to provide for the employee and the employee's family during the employee's period of incapacity, and the law wisely recognizes that its very purpose would be defeated if in all cases the employer should be permitted to commute a future liability to a lump sum, which might

soon be expended, leaving the injured employee and the employee's dependents without a means of support. *United States Fid. & Guar. Co. v. Nash*, 116 Ga. App. 123, 156 S.E.2d 550 (1967).

O.C.G.A. § 34-9-222 did not create "substantive right" to medical benefits under workers' compensation law because that "right" existed before that section was enacted. It merely provides a procedure whereby the claimant could receive a lump sum award of income benefits while leaving claimant's right to subsequent medical benefits intact. *Atha v. Jackson Atlanta, Inc.*, 159 Ga. App. 433, 283 S.E.2d 654 (1981).

Scope of board's authority. — The board was without jurisdiction to apply any formula for determining the present worth of future payments other than that prescribed by this section. *Tillman v. Moody*, 181 Ga. 530, 182 S.E. 906 (1935) (see O.C.G.A. § 34-9-222).

The only authority vested in the board to approve lump sum settlements was that conferred by this section. *Tillman v. Moody*, 181 Ga. 530, 182 S.E. 906 (1935) (see O.C.G.A. § 34-9-222).

The board was without jurisdiction or authority to approve any lump sum settlement not made in conformity with this section; and such a settlement was contrary to public policy and void. *Tillman v. Moody*, 181 Ga. 530, 182 S.E. 906 (1935) (see O.C.G.A. § 34-9-222).

In determining whether to award a lump sum payment to a claimant: (1) the board must decide whether the grant meets the criteria of O.C.G.A. § 34-9-222; (2) the board's finding must be based on competent evidence; and (3) except in extraordinary circumstances, no formal hearing is required. *Johnson v. Atlanta Dairies Coop.*, 172 Ga. App. 403, 323 S.E.2d 185 (1984).

Circumstances justifying lump sum award. — Only exceptional circumstances justify a departure from the general rule of periodical payments of compensation. In addition there should be evidence that the money, if awarded in a lump sum, will be properly safeguarded. *United States Fid. & Guar. Co. v. Nash*, 116 Ga. App. 123, 156 S.E.2d 550 (1967).

Hearing is prerequisite to lump sum award. — It is a condition precedent to the award of a lump sum payment on the application of a claimant that a hearing be had on

the question and evidence be presented sufficient to authorize a finding of fact by the board that the lump sum award will be to the best interest of the employee or the employee's dependents. *Travelers Ins. Co. v. Williams*, 109 Ga. App. 719, 137 S.E.2d 391 (1964).

Adjudication of permanent disability not prerequisite. — It is not a condition precedent to lump sum payment that it first be adjudicated that the disability is permanent and that a definite amount of compensation be fixed. *Lumbermens Mut. Cas. Co. v. McIntyre*, 67 Ga. App. 666, 21 S.E.2d 446 (1942), criticized, *Hartford Accident & Indem. Co. v. Fuller*, 102 Ga. App. 384, 116 S.E.2d 628 (1960).

Lump sum awards to be sparingly granted. — In view of all of the contingencies which could cause the cessation of payments either for death benefits or for temporary or total permanent disability, injustice will less likely occur if the award of lump sum payments be sparingly granted, since, obviously, they may be paid in full in cases where the amount paid under the order might never accrue. *Hartford Accident & Indem. Co. v. Fuller*, 102 Ga. App. 384, 116 S.E.2d 628 (1960).

Award relates to medical as well as wage benefits. — A lump sum award under this section related not only to wage benefits but also to medical benefits, since in this state, when a claimant filed for benefits under the Workers' Compensation Law (see O.C.G.A. § 34-9-1), claimant was entitled to a claim not only to benefit for lost wages but also for specified medical benefits. *Jackson v. Georgia Bldg. Auth.*, 144 Ga. App. 275, 241 S.E.2d 54 (1977) (see O.C.G.A. § 34-9-222).

There was no provision for indemnification of the employer and the employer's insurer and no provision for taking into consideration the probable death of the employee in this section. *Lumbermens Mut. Cas. Co. v. McIntyre*, 67 Ga. App. 666, 21 S.E.2d 446 (1942) (see O.C.G.A. § 34-9-222).

Credit is allowed against any future income benefit due, including permanent partial disability, once a permanent impairment rating has been made. *Edgeman v. Organic Chem. Corp.*, 173 Ga. App. 4, 325 S.E.2d 400 (1984).

Discretion of board — It is a matter within the discretion of the board whether or not

an award shall be paid in a lump sum. *Bryant v. Fidelity & Cas. Co.*, 114 Ga. App. 853, 152 S.E.2d 759 (1966); *United States Fid. & Guar. Co. v. Nash*, 116 Ga. App. 123, 156 S.E.2d 550 (1967); *West Point Pepperell, Inc. v. Luallen*, 147 Ga. App. 135, 248 S.E.2d 287 (1978).

The board's discretion will not be controlled unless it is apparent from the record that the board abused its discretion in refusing to order the award paid in a lump sum. *Bryant v. Fidelity & Cas. Co.*, 114 Ga. App. 853, 152 S.E.2d 759 (1966); *West Point Pepperell, Inc. v. Luallen*, 147 Ga. App. 135, 248 S.E.2d 287 (1978).

No findings of fact are necessary in awarding a lump sum payment. — The provisions of former Code 1933, § 114-707 (see O.C.G.A. § 34-9-102), insofar as they required that awards of the board must be accompanied by findings of fact, related only to such awards which grant or deny compensation, or change the amount of compensation to be paid the employee, and it was simply a matter within the discretion of the State Board as to whether or not such award be paid in a lump sum. Accordingly, no definite findings of fact need be set out other than the findings of the board where they hold the opinion that a lump sum settlement would be in the best interest of the claimant and would not work a hardship on the employer/insurer. *West Point Pepperell, Inc. v. Luallen*, 147 Ga. App. 135, 248 S.E.2d 287 (1978).

Showing of best interest required. — The board was without authority to make an award in a lump sum in the absence of evidence showing that it was in the best interest of the parties and in the absence of any evidence as to the probable future payments. *Lumbermens Mut. Cas. Co. v. McIntyre*, 67 Ga. App. 666, 21 S.E.2d 446 (1942).

Before the board may grant a lump sum award, there must be sufficient evidence in the record that it is in the best interest of the employee or the employee's dependents. *Mayor of Athens v. Cook*, 104 Ga. App. 136, 121 S.E.2d 82 (1961); *United States Fid. & Guar. Co. v. Nash*, 116 Ga. App. 123, 156 S.E.2d 550 (1967).

Withdrawal of acceptance of offer of settlement. — Any settlement that may be reached between an employer and an em-

ployee represents no more than their proposed mutual offer to settle, which offer must be accepted and approved by the board before a binding settlement agreement between them is created. Where the claimants withdrew their consent to the mutual offer before the board could accept and approve it, the board correctly refused to enforce the settlement agreement. *Justice v. Davidson Kennedy Co.*, 194 Ga. App. 585, 391 S.E.2d 414 (1990).

Attorneys' fees. — The board is not precluded from making a lump sum award of attorneys' fees although it is possible, upon the condition of termination of dependency of those entitled to receive payments, that counsel will have received money that the employer and insurer would never have been required to pay in the absence of the lump-sum award. This factor should, however, be afforded weighty consideration in determining whether the award should be made. *Boston Ins. Co. v. Sharpton*, 111 Ga. App. 16, 140 S.E.2d 302 (1965).

Before the board may lawfully make an award of a lump sum payment of contingent attorney's fees in a death case, there must be: (a) a specific finding that such an award is in the best interest of the dependents, or that it will prevent undue hardship on the employer without prejudicing the interests of the dependents; and (b) sufficient evidence in the record upon which such a finding might be based. *Boston Ins. Co. v. Sharpton*, 111 Ga. App. 16, 140 S.E.2d 302 (1965).

The board was without authority, under this section, to make a lump sum award of attorney's fees with credit to be taken by the employer or insurer at the end of the maximum compensation period, where the previous award was given for temporary total disability only. *Hartford Accident & Indem. Co. v. Fuller*, 102 Ga. App. 384, 116 S.E.2d 628 (1960) (see O.C.G.A. § 34-9-222).

It is error for the board to treat an award for temporary total disability as though it were for permanent total disability and to award as attorney's fees in a lump sum the final one-third of the maximum benefits which could possibly accrue. Since the award was for temporary disability, it is quite possible that the compensation awarded as attorney's fees might never become due. Conformably, this court must hold that the

award of attorney's fees in the lump sum was without evidence to support it. *Hartford Accident & Indem. Co. v. Fuller*, 102 Ga. App. 384, 116 S.E.2d 628 (1960).

Appellate review. — Where the evidence, although contradictory, is sufficient to authorize the essential finding of fact that a lump sum award will be in the best interest of the employee or the employee's dependents, the lump sum award will not be reversed by the courts as the findings of fact made by the board within its power, in the absence of fraud, are conclusive. *Travelers Ins. Co. v. Williams*, 109 Ga. App. 719, 137 S.E.2d 391 (1964), overruled on other grounds, *Johnson v. Atlanta Dairies Coop.*, 172 Ga. App. 403, 323 S.E.2d 185 (1984).

The lump sum award must be affirmed by the courts where there is evidence which authorizes the board to find that a lump sum payment would be in the best interest of the claimant. *Fireman's Fund Ins. Co. v. Cox*, 125 Ga. App. 357, 187 S.E.2d 580 (1972).

Res judicata. — This section did not provide that a lump sum settlement was res judicata. However, there are many decisions of the appellate courts to the effect that all facts of an agreement or award are res judicata except the condition of the claimant. *Miller v. Independent Life & Accident Ins. Co.*, 86 Ga. App. 538, 71 S.E.2d 705 (1952) (see O.C.G.A. § 34-9-222).

Cited in *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939); *Employers Liab. Assurance Corp. v. Pruitt*, 190 Ga. 479, 9 S.E.2d 641 (1940); *Hartford Accident & Indem. Co. v. Black*, 72 Ga. App. 182, 33 S.E.2d 278 (1945); *Chevrolet, Atlanta Div., GMC v. Dickens*, 86 Ga. App. 18, 70 S.E.2d 515 (1952); *Fulton Bag & Cotton Mills v. Speaks*, 90 Ga. App. 685, 83 S.E.2d 872 (1954); *Travelers Ins. Co. v. Haney*, 92 Ga. App. 319, 88 S.E.2d 492 (1955); *Borden Co. v. Fuerlinger*, 95 Ga. App. 556, 98 S.E.2d 410 (1957); *Cardin v. Riegel Textile Corp.*, 217 Ga. 797, 125 S.E.2d 62 (1962); *Coates & Clark, Inc. v. Thomason*, 107 Ga. App. 133, 129 S.E.2d 360 (1962); *GMC v. Harrison*, 107 Ga. App. 667, 131 S.E.2d 234 (1963); *American Mut. Liab. Ins. Co. v. Stephens*, 109 Ga. App. 634, 137 S.E.2d 95 (1964); *Pittsburgh Plate Glass Co. v. Bailey*, 111 Ga. App. 609, 142 S.E.2d 388 (1965); *Proctor v. Dixie Bell Mills, Inc.*, 222 Ga. 4, 148 S.E.2d 385 (1966); *Connecticut Indem. Co. v. Gaudio*, 116 Ga. App. 672, 158 S.E.2d 680 (1967); *Williams v. Bituminous Cas. Co.*, 121 Ga. App. 175, 173 S.E.2d 250 (1970); *Mull v. Aetna Cas. & Sur. Co.*, 226 Ga. 462, 175 S.E.2d 552 (1970); *Waycross Coca-Cola Bottling Co. v. Hiott*, 141 Ga. App. 600, 234 S.E.2d 111 (1977); *General Ins. Co. of Am. v. Bradley*, 152 Ga. App. 600, 263 S.E.2d 446 (1979); *Georgia Mental Health Inst. v. Padgett*, 171 Ga. App. 353, 319 S.E.2d 524 (1984).

RESEARCH REFERENCES

ALR. — *Workers' compensation: reopening lump-sum compensation payment*, 26 ALR5th 127.

34-9-223. Lump sum payments to trustees.

Whenever the board deems it expedient, any lump sum, subject to the provisions of Code Section 34-9-222, shall be paid by the employer to some suitable person or corporation appointed by the superior court of the county wherein the accident occurred or the original hearing was held as trustee to administer such payment for the benefit of the person or persons entitled thereto in the manner provided by the board. The receipt by such trustees of the amount so paid shall discharge the employer or anyone else who is liable therefor. (Ga. L. 1920, p. 167, § 44; Code 1933, § 114-418.)

JUDICIAL DECISIONS

Cited in Department of Indus. Relations v. Travelers' Ins. Co., 177 Ga. 669, 170 S.E. 883 (1933).

34-9-224. Payment of compensation to employees in service of more than one employer.

Whenever any employee whose injury or death is compensable under this chapter shall at the time of the injury be in the joint service of two or more employers subject to this chapter, such employers shall contribute to the payment of such compensation in proportion to their wage liability to such employee; provided, however, that nothing in this Code section shall prevent any reasonable arrangement between such employers for a different distribution as between themselves of the ultimate burden of compensation. (Ga. L. 1920, p. 167, § 49; Code 1933, § 114-419.)

Law reviews. — For article surveying developments in Georgia workers' compensa-

tion law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981).

JUDICIAL DECISIONS

Legislative intent. — This section demonstrated an intention on the part of the legislature to apportion the loss where an employee was in the joint service of two or more employers. *United States Fid. & Guar. Co. v. Murray*, 140 Ga. App. 708, 231 S.E.2d 502 (1976) (see O.C.G.A. § 34-9-224).

Jurisdiction of board. — If more than one compensation-insurance carrier was liable for compensation in the case of a single injury to an employee, the State Board had jurisdiction to prorate such compensation in the award when originally made. *Glens Falls Indem. Co. v. Liberty Mut. Ins. Co.*, 202 Ga. 752, 44 S.E.2d 543 (1947).

Necessity of wage liability. — This section was not directly applicable where there was no wage liability on the part of the "employers." *United States Fid. & Guar. Co. v. Murray*, 140 Ga. App. 708, 231 S.E.2d 502 (1976) (see O.C.G.A. § 34-9-224).

Employee may be servant of multiple employers. — It is well settled that the fact that an employee is the general servant of one employer does not prevent the employee from becoming the particular servant of another under special circumstances. *Scott v. Savannah Elec. & Power Co.*, 84 Ga. App. 553, 66 S.E.2d 179 (1951).

Employee may collect from one of two

joint venture partners. — O.C.G.A. § 34-9-224 does not prevent an injured employee from collecting workers' compensation benefits from one partner in a joint venture where the other partner, from whom the employee received all the employee's wages, is unable to pay any workers' compensation benefits. *Seckinger & Co. v. Foreman*, 252 Ga. 540, 314 S.E.2d 891 (1984).

No liability found. — Where the record affords no basis for a holding that a county incurred any liability for payment of wages, there can be no liability on the county and its insurer for payment of workers' compensation to claimants as the statute expressly imposes proration of liability in proportion to wage liability. *Argonaut Ins. Co. v. Head*, 149 Ga. App. 528, 254 S.E.2d 747 (1979).

Award prorated. — Where a police officer was killed in disbanding a disturbance while performing an authorized, independent security job, the officer was also performing a police function, on duty in an emergency, and the city was required to bear its share of the compensation award under this section. *United States Fire Ins. Co. v. City of Atlanta*, 135 Ga. App. 390, 217 S.E.2d 647 (1975) (see O.C.G.A. § 34-9-224).

Cited in *Aetna Cas. & Sur. Co. v. Daniel*, 80 Ga. App. 383, 55 S.E.2d 854 (1949); Georgia

Cas. & Sur. Co. v. Moore, 142 Ga. App. 191, 235 S.E.2d 591 (1977); Bennett v. Browning, 196 Ga. App. 158, 395 S.E.2d 333 (1990).

RESEARCH REFERENCES

ALR. — Workmen's compensation: one employed concurrently or jointly by several, 158 ALR 1395.

Right as between employer primarily responsible under Workmen's Compensation Act and employer secondarily liable under the act (or their insurers) where injury was due to latter's negligence, 117 ALR 571.

Right to indemnity or contribution as

between insurance carriers under workmen's compensation laws of different states, 126 ALR 881.

Modern status of effect of State Workmen's Compensation Act on right of third-person tort-feasor to contribution or indemnity from employer of injured or killed workman, 100 ALR3d 350.

34-9-225. Effect of written receipt of widow or widower, minor, or guardian upon liability of employer; determination of obligation of employer to rival claimants.

(a) Whenever payment of compensation, in accordance with the terms of this chapter, is made to a widow or widower for her or his use or for her or his use and the use of the child or children, the written receipt thereon of such widow or widower shall release and discharge the employer.

(b) Whenever payment in accordance with the terms of this chapter is made to any employee 18 years of age or over, the written receipt of such person shall release and discharge the employer. In cases where a person under the age of 18 years shall be entitled to receive a sum or sums amounting in the aggregate to not more than \$300.00 as compensation for injuries or as a distributive share by virtue of this chapter, the father or mother as natural guardian or the legally appointed guardian of such person shall be authorized and empowered to receive such moneys for the use and benefit of such person and to receipt therefor; and the release or discharge by such father or mother as natural guardian or by the legally appointed guardian shall be in full and complete discharge of all claims or demands of such person thereunder.

(c) Whenever payment of over \$300.00, in accordance with the terms of this chapter, is provided for a person under 18 years of age or for a person over 18 who is physically or mentally incapable of earning, the payment shall be made to his duly and legally appointed guardian or to some suitable person or corporation appointed as trustee by the superior court as provided in Code Section 34-9-223; and the receipt of such guardian or such trustee shall release and discharge the employer.

(d) Payment of death benefits by an employer in good faith to a dependent having a claim inferior to that of another or other dependents shall release and discharge the employer unless such dependent or dependents having a superior claim shall have given notice of his or their

claim. In case the employer is in doubt as to the respective rights of rival claimants, he may apply to the board to decide between them. (Ga. L. 1920, p. 167, § 46; Code 1933, § 114-420; Ga. L. 2004, p. 631, § 34.)

Law reviews. — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969).

JUDICIAL DECISIONS

Provisions of subsection (b) and (c) of this section, by their express terms, apply only to payments to be made to a natural or legal guardian of a minor under 18 years of age, or to a minor child over 18 physically or mentally incapable of earning. *Porter v. Liberty Mut. Ins. Co.*, 46 Ga. App. 86, 166 S.E. 675 (1932) (see O.C.G.A. § 34-9-225).

Minors working in violation of other laws. — Payment to a guardian relieves the employer of all liability. This is true although the minor employee may have been working in violation of some “child-labor law or other similar statute,” and although the employer at the time of the inquiry did not have ten or more employees. *Griggs v. Zimmerman*, 50 Ga. App. 24, 177 S.E. 86 (1934).

There was a necessary implication from the language of this section that the parents of an injured minor employee were deprived of their common-law right to recover for the loss of the minor’s services where the duly constituted guardian of the minor previously received compensation under an award by the board for the injuries sustained by the minor. *Griggs v. Zimmerman*, 50 Ga. App. 24, 177 S.E. 86 (1934) (see O.C.G.A. § 34-9-225).

Cited in *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939); *Webb v. General Accident, Fire & Life Ins. Co.*, 72 Ga. App. 127, 33 S.E.2d 273 (1945); *McDonald v. Travelers Ins. Co.*, 81 Ga. App. 614, 59 S.E.2d 537 (1950).

RESEARCH REFERENCES

ALR. — Survival of right to compensation under Workmen’s Compensation Acts upon the death of the person entitled to the award, 15 ALR 821; 24 ALR 441; 29 ALR 1426; 51 ALR 1446; 87 ALR 864; 95 ALR 254. Rights and remedies of persons in de-

ferred or secondary class of beneficiaries of death benefits under Workmen’s Compensation Acts as affected by acts or omissions of one in primary class of beneficiaries, 105 ALR 1232.

34-9-226. Appointment of guardian for minor or incompetent claimant.

(a) Except as provided in this Code section, the only person capable of representing a minor or legally incompetent claimant entitled to workers’ compensation benefits shall be a guardian duly appointed and qualified by the probate court of the county of residence of such minor or legally incompetent person or by a court of competent jurisdiction outside the State of Georgia. Said guardian shall be required to file with the board a copy of the guardianship returns filed annually with the probate court or with a court of competent jurisdiction outside the State of Georgia and give notice to all parties within 30 days of any change in status.

(b) The board shall have authority in and shall establish procedures for appointing temporary guardians for purposes of administering workers’ compensation rights and benefits without such guardian becoming the

legally qualified guardian of any other property, without such guardian's actions being approved by a court of record, and without the posting of a bond, in only the following circumstances:

(1) The board may, in its discretion, authorize and appoint a temporary guardian of a minor or legally incompetent person to receive and administer weekly income benefits on behalf of and for the benefit of said minor or legally incompetent person for a period not to exceed 52 weeks unless renewed or extended by order of the board;

(2) The board may, in its discretion, authorize and appoint a temporary guardian of a minor or legally incompetent person to compromise and terminate any claim and receive any sum paid in settlement for the benefits and use of said minor or legally incompetent person where the net settlement amount approved by the board is less than \$50,000.00; and

(3) If a minor or legally incompetent person does not have a duly appointed representative or guardian, the board may, in its discretion, appoint a guardian ad litem to bring or defend an action under this chapter in the name of and for the benefit of said minor or legally incompetent person to serve for a period not to exceed 52 weeks, unless renewed or extended by order of the board. However, no guardian ad litem appointed pursuant to this Code section shall be permitted to receive the proceeds from any such action except as provided in this Code section and the board shall have the authority to determine compensation, if any, for any guardian ad litem appointed pursuant to this Code section. (Code 1933, § 114-421, enacted by Ga. L. 1952, p. 271, § 2; Ga. L. 1963, p. 141, § 11; Ga. L. 1987, p. 396, § 1; Ga. L. 1996, p. 1291, § 9; Ga. L. 1999, p. 817, § 5; Ga. L. 2000, p. 136, § 34; Ga. L. 2004, p. 382, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2000, “the” was deleted following “action under” in paragraph (b)(3).

Pursuant to Code Section 28-9-5, in 2004,

“State” was substituted for “state” in subsection (a).

Law reviews. — For annual survey of law of worker's compensation, see 56 Mercer L. Rev. 479 (2004).

JUDICIAL DECISIONS

Legislative intent. — It must be assumed that the General Assembly, in conferring the power of appointing guardians for minor claimants upon the board, intended that this power should be exercised in the same fashion or according to the same procedure as the orderly scheme of the compensation law. *Utica Mut. Ins. Co. v. Rolax*, 87 Ga. App. 733, 75 S.E.2d 205 (1953).

Duties of guardian. — A guardian appointed by the board to the administration

of workers' compensation benefits alone should exercise in respect to those benefits the same duties which any other regularly qualified guardian would be required to exercise in the guardian's administration of a minor's estate. *Utica Mut. Ins. Co. v. Rolax*, 87 Ga. App. 733, 75 S.E.2d 205 (1953).

Guardian, as provided by this section, was a necessary party on appeal to the Court of Appeals from a decision of a superior court affirming the award of the director granting

compensation. *Utica Mut. Ins. Co. v. Rolax*, 87 Ga. App. 733, 75 S.E.2d 205 (1953) (see O.C.G.A. § 34-9-226).

Time of appointment. — While the special guardian appointed in a workers' compensation proceeding was not appointed until the time of the award, the guardian's appointment at the time cured the defect and made such guardian a party to the case. *Utica Mut. Ins. Co. v. Rolax*, 87 Ga. App. 733, 75 S.E.2d 205 (1953).

Appointment by single director. — Where, in a proceeding for compensation, a single director finding that the claimant was a minor within the meaning of the workers'

compensation laws, and, in making an award granting compensation, appointed a guardian to receive the compensation for the use and benefit of such minor, and no such appeal as was provided for in former Code 1933, § 114-708 (see O.C.G.A. § 34-9-103) was entered, but an appeal was entered to the superior court, such appointment was valid, binding, and conclusive. *Utica Mut. Ins. Co. v. Rolax*, 87 Ga. App. 733, 75 S.E.2d 205 (1953).

Cited in *St. Paul-Mercury Indem. Co. v. Robinson*, 88 Ga. App. 217, 76 S.E.2d 512 (1953); *Ross v. Brown*, 121 Ga. App. 39, 172 S.E.2d 475 (1970).

RESEARCH REFERENCES

ALR. — Protection of interest or rights of minor in proceedings for, or award of, compensation under provisions of Workmen's Compensation Act, 120 ALR 395.

PART 3

LIMITATIONS ON PAYMENT

JUDICIAL DECISIONS

Benefits terminated upon probation revocation hearing and determination. — Just as an adjudication of guilt is necessary before benefits may be properly terminated when a claimant is charged with a crime, a probation revocation hearing must be held and a determination made that a probation violation has in fact occurred before a claimant's benefits may be terminated. Where the record evidence, consisting primarily of the

claimant's testimony, indicates that such a hearing was never held and that the claimant was simply held on the probation violation until it was determined that the charges against claimant were false, and the basis for revoking claimant's probation evaporated, the claimant was entitled to receive benefits for the entire period of claimant's incarceration. *Sargent v. Brown*, 186 Ga. App. 890, 368 S.E.2d 826 (1988).

RESEARCH REFERENCES

ALR. — Workers' compensation: incarceration as terminating benefits, 54 ALR4th 241.

34-9-240. Effect of refusal of suitable employment by injured employee; attempting or refusing to attempt work with restrictions.

(a) If an injured employee refuses employment procured for him or her and suitable to his or her capacity, such employee shall not be entitled to any compensation, except benefits pursuant to Code Section 34-9-263, at any time during the continuance of such refusal unless in the opinion of the board such refusal was justified.

(b) Notwithstanding the provisions of subsection (a) of this Code section, if the authorized treating physician releases an employee to return to work with restrictions and the employer tenders a suitable job to the employee within those restrictions, then:

(1) If the employee attempts the proffered job and is unable to perform the job for more than 15 working days, then weekly benefits shall be immediately reinstated, and the burden shall be upon the employer to prove that the employee is not entitled to continuing benefits; or

(2) If the employee refuses to attempt the proffered job, then the employer may unilaterally suspend benefits upon filing with the board the appropriate form with supporting documentation of the release to return to work with restrictions by the authorized treating physician, the tender of a suitable job within those restrictions, and a statement that the employee did not attempt the proffered job. Under those circumstances, the burden shall shift to the employee to prove continuing entitlement to benefits. (Ga. L. 1920, p. 167, § 33; Code 1933, § 114-407; Ga. L. 1994, p. 887, § 13; Ga. L. 2003, p. 364, § 5.)

Law reviews. — For article surveying Georgia cases in the area of workers' compensation from June 1979 through May 1980, see 32 Mercer L. Rev. 261 (1980). For annual survey of workers' compensation, see 38 Mercer L. Rev. 431 (1986). For annual survey of law of workers' compensation, see 56 Mercer L. Rev. 479 (2004). For annual

survey of workers' compensation law, see 57 Mercer L. Rev. 419 (2005). For annual survey of workers' compensation law, see 58 Mercer L. Rev. 453 (2006).

For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 204 (1994).

JUDICIAL DECISIONS

Section meaningless if termination of compensation based on ex post facto statements. — O.C.G.A. § 34-9-240, requiring proof that the claimant was unjustified in refusing work offered by the employer before compensation can be terminated, is meaningless if, ex post facto, the employer can terminate compensation by merely stating that suitable work was available or is now available; in every such case, the employer could terminate compensation merely on news that the claimant's condition had improved. *Peterson/Puritan, Inc. v. Day*, 157 Ga. App. 827, 278 S.E.2d 674 (1981).

Refusal does not forever ban receipt of future compensation should the availability of suitable light work cease. *Liberty Mut. Ins. Co. v. Neal*, 140 Ga. App. 585, 231 S.E.2d 574 (1976); *Argonaut Ins. Co. v. Marshall*, 144 Ga. App. 217, 240 S.E.2d 767 (1977); *Universal Ceramics, Inc. v. Watson*, 177 Ga. App. 345, 339 S.E.2d 304 (1985).

Liability suspended. — If an employee should refuse employment procured for the employee suitable to the employee's capacity, the employer's liability for the payment of compensation is suspended during the continuance of the refusal and none accrues. *Complete Auto Transit, Inc. v. Davis*, 106 Ga. App. 369, 126 S.E.2d 909 (1962).

Compensation suspended only during continuance of refusal. — When an employer procured a light job which an injured employee can perform and the employee refused the job, this section required that compensation be suspended only "during the continuance of such refusal." *Argonaut Ins. Co. v. Marshall*, 144 Ga. App. 217, 240 S.E.2d 767 (1977) (see O.C.G.A. § 34-9-240).

Reduction of compensation upon employee's refusal of work. — It must appear that the injured employee has refused employment procured for the employee suitable to

the employee's then existing capacity, before an employer can claim a reduction of compensation under the provisions of this section. *Lumbermens Mut. Cas. Co. v. Cook*, 69 Ga. App. 131, 25 S.E.2d 67 (1943) (see O.C.G.A. § 34-9-240).

Liability suspended only during availability of work despite initial refusal. — Where an employee is injured while at work, is released by a doctor to do light work, is offered light work but refuses to do it and is fired, but the work offered later becomes unavailable, compensation should be paid as of that time, since the reason for the employer's refusal to pay benefits no longer exists. *Coats & Clark, Inc. v. Thompson*, 166 Ga. App. 669, 305 S.E.2d 415 (1983).

Acceptance of lighter work before employer offers suitable work. — This section was not applicable where, after the injury, an employee is ordered by the employee's physician to change to lighter work, and the employee finds such work suitable to the employee's impaired capacity before the employer offers suitable work. *St. Paul Fire & Marine Ins. Co. v. White*, 103 Ga. App. 607, 120 S.E.2d 144 (1961) (see O.C.G.A. § 34-9-240).

Proving inability to perform light-duty job. — Testimony of claimant may establish that claimant was incapable of performing light-duty job. *Young v. Columbus Consol. Gov't*, 263 Ga. 172, 430 S.E.2d 7 (1993).

Employment offered not suitable. — Where there was absolutely no evidence that the employment offered defendant was suitable to defendant's injured capacity, the mere refusal of an employee to continue in the employment of the employer after having received an injury does not bar defendant from compensation. *DeKalb County Merit Sys. v. Johnson*, 151 Ga. App. 405, 260 S.E.2d 506 (1979).

Generalized statements by counsel do not suffice to carry burden placed on employer/insurer to show availability of work and, indeed, generalized statements by the employer itself do not carry that burden. *Peterson/Puritan, Inc. v. Day*, 157 Ga. App. 827, 278 S.E.2d 674 (1981).

Refusal not justified. — Refusal of a "light work" job by an employee receiving workers' compensation benefits because the employee did not want to work on the second shift is not justified refusal. *McDaniel v.*

Roper Corp., 149 Ga. App. 864, 256 S.E.2d 146 (1979).

Injured worker's refusal to accept a suitable job based on a legal inability to perform the job resulting from the worker's voluntary conduct, rather than a lack of skill or physical capacity, was not justified as a matter of law under O.C.G.A. § 34-9-240, and the worker was not entitled to workers' compensation benefits. *Martines v. Worley & Sons Constr.*, 278 Ga. App. 26, 628 S.E.2d 113 (2006).

Incarceration pending adjudication of claimant's guilt justifies a claimant's refusal of suitable employment which is offered to claimant while incarcerated but before claimant is adjudicated guilty, since the claimant's refusal of suitable employment is justified as a matter of law. *Howard v. Scott Hous. Sys.*, 180 Ga. App. 690, 350 S.E.2d 27 (1986), *aff'd*, 256 Ga. 675, 353 S.E.2d 2 (1987).

Refusal of employer's offer and acceptance of different position. — The claimant was not entitled to partial disability benefits where the claimant refused the employer's offer of full-time suitable work at the claimant's pre-injury wage and, instead, accepted part-time work from another employer. *Wal-Mart Stores, Inc. v. Harris*, 234 Ga. App. 401, 506 S.E.2d 908 (1998).

Suitability of job shown. — There was ample record evidence to show the suitability of the job offered to claimant by the employer. *Howard v. Scott Hous. Sys.*, 180 Ga. App. 690, 350 S.E.2d 27 (1986), *aff'd*, 256 Ga. 675, 353 S.E.2d 2 (1987).

Discretion afforded the board under O.C.G.A. § 34-9-240 to determine that an employee's refusal of proffered work is justified must relate to the physical capacity of the employee to perform the job, the employee's ability or skill to perform the job, or factors such as geographic relocation or travel conditions which would disrupt the employee's life. *City of Adel v. Wise*, 261 Ga. 53, 401 S.E.2d 522 (1991).

Potential loss of a part-time job may not be considered as a factor in determining whether a job offered by an employer is "suitable to the capacity" of an employee. *City of Adel v. Wise*, 261 Ga. 53, 401 S.E.2d 522 (1991).

Cited in *Keel v. American Employers' Ins. Co.*, 44 Ga. App. 773, 162 S.E. 847 (1932);

Armour & Co. v. Price, 73 Ga. App. 676, 37 S.E.2d 634 (1946); *American Mut. Liab. Ins. Co. v. Gunter*, 74 Ga. App. 534, 40 S.E.2d 394 (1946); *Rutland v. Vaughn*, 96 Ga. App. 499, 100 S.E.2d 609 (1957); *Owensby v. Riegel Textile Corp.*, 104 Ga. App. 800, 123 S.E.2d 147 (1961); *Davis v. Fireman's Fund Ins. Co.*, 106 Ga. App. 519, 127 S.E.2d 481 (1962); *Collins v. Kiker*, 106 Ga. App. 513, 127 S.E.2d 489 (1962); *Turner v. American Mut. Liab. Ins. Co.*, 111 Ga. App. 565, 142 S.E.2d 329

(1965); *Cameron v. American Can Co.*, 120 Ga. App. 236, 170 S.E.2d 267 (1969); *Employers Fire Ins. Co. v. Walraven*, 130 Ga. App. 41, 202 S.E.2d 461 (1973); *Poulnot v. Dundee Mills Corp.*, 173 Ga. App. 799, 328 S.E.2d 228 (1985); *Clark v. Georgia Kraft Co.*, 178 Ga. App. 884, 345 S.E.2d 61 (1986); *Carod Bldg. Servs. v. Williams*, 182 Ga. App. 340, 355 S.E.2d 723 (1987); *Goswick v. Murray County Bd. of Educ.*, 281 Ga. App. 442, 636 S.E.2d 133 (2006).

RESEARCH REFERENCES

ALR. — Workmen's compensation: duty of injured employee to submit to operation or to take other measures to restore earning capacity, 6 ALR 1260; 18 ALR 431; 73 ALR 1303; 105 ALR 1470.

Workmen's compensation: statutory phrase "incapacity for work" or the like, as including inability to obtain work following an injury, 33 ALR 115.

Workmen's compensation: right to compensation as affected by refusal to accept, or

failure to seek, other employment, or by entering into business for oneself after injury, 63 ALR 1241.

Specific grounds for commutation of payments under Workmen's Compensation Acts, 69 ALR 547.

Necessity and sufficiency of showing that "substantial and gainful activity" is available to disability claimant under federal Social Security Act, 22 ALR3d 440.

34-9-241. Effect of subsequent injury on compensation.

(a) *Limitation on simultaneous compensation.* If an employee received an injury for which income benefits are payable while still entitled to or receiving income benefits for a previous injury, the employee shall not be entitled to income benefits at the same time for both injuries unless because of the later injury the employee is entitled to income benefits for a permanent partial disability under Code Section 34-9-263; but the employee shall be entitled to income benefits for that injury and from the time of that injury which will cover the longest period and the largest amount of income benefits payable. Compensation for other than income benefits shall be apportioned upon a determination of whether the need for such is attributable to the first or second injury.

(b) *Limitation on compensation for permanent partial disability.* If an employee received an injury for which income benefits are payable under Code Section 34-9-263 and has a preexisting bodily loss or loss of use as described under Code Section 34-9-263 which was increased by reason of the injury, the employee shall be entitled to income benefits under Code Section 34-9-263 only for the loss or loss of use as increased by the injury. This limitation, however, shall not prevent the employee from continuing to receive income benefits for the preexisting loss or loss of use to which the employee is otherwise entitled under Code Section 34-9-263.

(c) *Total disability by subsequent injury.*

(1) An employee who has a prior disability as described in Article 9 of this chapter and who sustains a subsequent injury which combines with the prior injury to produce total disability shall be entitled to income benefits as provided in Code Section 34-9-261. The loss of both hands, feet, arms, legs, or the loss of any two of them or the total loss of vision of both eyes shall be presumed to be total disability, subject to rebuttal.

(2) An employer who makes payment under this subsection shall be entitled to reimbursement as determined under Article 9 of this chapter. (Ga. L. 1920, p. 167, § 34; Code 1933, § 114-408; Ga. L. 1978, p. 2220, § 6.)

Law reviews. — For note discussing compensation under the Georgia Workers' Compensation Act of original injuries aggravated

by subsequent injury, continued employment or ordinary activity, see 31 Mercer L. Rev. 325 (1979).

JUDICIAL DECISIONS

Legislative intent. — It was not the intention of the legislature by enacting this section to provide a means by which an employee might collect compensation just as if the employee had never been injured or a previous disability had never existed, and thereby receive compensation just as if the prior injury had never been sustained. *Georgia Ins. Serv. v. Lord*, 83 Ga. App. 28, 62 S.E.2d 402 (1950) (see O.C.G.A. § 34-9-241).

This section showed a legislative intent to subject an employer to liability only for an accident, misfortune, or injury during the time of service or employment. *Argonaut Ins. Co. v. Wilson*, 119 Ga. App. 121, 166 S.E.2d 641 (1969) (see O.C.G.A. § 34-9-241).

Rule for injuries in different employments is set out in this section. *Fox v. Hartford Accident & Indem. Co.*, 130 Ga. App. 104, 202 S.E.2d 568 (1973) (see O.C.G.A. § 34-9-241).

"Earlier disability or injury" referred to was in the terms of this section, a "permanent disability" or injury which the employee had sustained elsewhere. *Federated Mut. Implement & Hdwe. Ins. Co. v. Whiddon*, 88 Ga. App. 12, 75 S.E.2d 830 (1953) (see O.C.G.A. § 34-9-241).

Former Code 1933, § 114-408 (see O.C.G.A. § 34-9-241) dealt with second specific member injuries stated in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263)

and not to injuries to the body as a whole which come within the provisions of the former provisions. *Minter Naval Stores v. Bell*, 133 Ga. App. 114, 210 S.E.2d 331 (1974).

This section provided if a claimant, prior to claimant's accident arising out of claimant's employment, has suffered a partial permanent loss of use of one of claimant's specific members claimant may only recover workers' compensation benefit for that portion of the permanent loss of use of the specific member which resulted from the employment connected injury. The compensation benefits for an injury to the body as a whole are determined by the claimant's loss of earning capacity and not the percent of physical disability. *Minter Naval Stores v. Bell*, 133 Ga. App. 114, 210 S.E.2d 331 (1974) (see O.C.G.A. § 34-9-241).

Former Code 1933, § 114-408 (see O.C.G.A. § 34-9-241) applied to prior injuries which were not specified handicaps under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263). *Hunt v. State*, 133 Ga. App. 548, 211 S.E.2d 601 (1974).

Apportionment of benefits required when claimant has preexisting degeneration infirmity. — Apportionment of permanent partial disability benefits is required by O.C.G.A. § 34-9-241 when a claimant has a preexisting degeneration infirmity described in O.C.G.A. § 34-9-263; thus, denial of benefits was authorized where medical records

showed that claimant had a preexisting hearing loss and claimant failed to show the percentage of disability, if any, attributable to claimant's compensable injury. *Metro Interiors, Inc. v. Cox*, 218 Ga. App. 396, 461 S.E.2d 570 (1995).

This section did not apply to determine whether an injury was entirely separate or an aggravation of a previous injury on a claim brought on a second injury by an employee in the same employment. *Argonaut Ins. Co. v. Wilson*, 119 Ga. App. 121, 166 S.E.2d 641 (1969) (see O.C.G.A. § 34-9-241).

If an employee has sustained two permanent injuries superimposed one upon the other, and the injuries have been sustained in different employments, in determining the extent of the employee's disability attributable to the injury received during the employee's last (current) employment, the board should first determine the total disability found to exist after the last injury, determine the disability found to exist after the earlier injury sustained elsewhere and subtract the latter from the former, thereby arriving at the extent of disability to be attributed to the last injury and compensated by the last employer. *Dunn v. Hartford Accident & Indem. Co.*, 81 Ga. App. 283, 58 S.E.2d 245 (1950), overruled on other grounds, *Lee Connell Constr. Co. v. Swann*, 172 Ga. App. 305, 322 S.E.2d 736 (1984); *Barry v. Aetna Life & Cas. Co.*, 133 Ga. App. 527, 211 S.E.2d 595 (1974).

Limitation on recovery. — No matter how

many times a specific member is injured, the claimant cannot recover a total of more than 100 percent disability, nor charge the employer with a greater percentage of disability than that attributable to the injury for which an award is sought. *Georgia Cas. & Sur. Co. v. Speller*, 122 Ga. App. 459, 177 S.E.2d 491 (1970).

Evidence sufficient for award. — Where claimant insisted that claimant experienced no trouble with claimant's wrist during the time between the initial fracture and the later injury, and a physician, who estimated that claimant had a 12 percent disability of the left arm, testified, "I would think he probably had some symptoms, I don't think that you could attribute more than half of his figured disability or impairment to the operation of the air gun," this was evidence of disability resulting from the prior injury which, if relied upon by the board, would have authorized an award only for a second injury under this section. *GMC v. Hargis*, 114 Ga. App. 143, 150 S.E.2d 303 (1966) (see O.C.G.A. § 34-9-241).

Cited in *Wisham v. Employers Liab. Assurance Corp.*, 55 Ga. App. 778, 191 S.E. 489 (1937); *Miller v. Independent Life & Accident Ins. Co.*, 86 Ga. App. 538, 71 S.E.2d 705 (1952); *Maryland Cas. Co. v. Smith*, 122 Ga. App. 262, 176 S.E.2d 666 (1970); *Liberty Mut. Ins. Co. v. Williams*, 129 Ga. App. 354, 199 S.E.2d 673 (1973); *Reliance Ins. Co. v. Cushing*, 132 Ga. App. 179, 207 S.E.2d 664 (1974).

RESEARCH REFERENCES

ALR. — Workmen's compensation: injury or death to which preexisting physical condition of employee causes or contributes, 19 ALR 95; 28 ALR 204; 60 ALR 1299.

Workmen's compensation: aggravation by particular condition or equipment of plant of injury which in its inception was not connected with the employment, 37 ALR 771.

Extraterritorial operation of Workmen's Compensation Acts; conflict of laws, 59 ALR 735, 82 ALR 709; 90 ALR 119.

Workmen's compensation: construction and effect of provisions in relation to new or

new and further disability, 72 ALR 1125.

Workmen's compensation: computation of compensation as affected by compensation allowed for previous injury, 96 ALR 1080.

Workmen's Compensation Act as affecting liability of or remedy against employer for injury due to medical or surgical treatment of employee after injury, 127 ALR 1108.

Workers' compensation: compensability of injuries incurred traveling to or from medical treatment of earlier compensable injury, 83 ALR4th 110.

34-9-242. Compensation for injury outside of state.

In the event an accident occurs while the employee is employed elsewhere than in this state, which accident would entitle him or his dependents to compensation if it had occurred in this state, the employee or his dependents shall be entitled to compensation if the contract of employment was made in this state and if the employer's place of business or the residence of the employee is in this state unless the contract of employment was expressly for service exclusively outside of this state. If an employee shall receive compensation or damages under the laws of any other state, nothing contained in this Code section shall be construed so as to permit a total compensation for the same injury greater than is provided for in this chapter. (Ga. L. 1920, p. 167, § 37; Code 1933, § 114-411.)

Law reviews. — For comment on *McDonald-Haynes v. Minyard*, 69 Ga. App. 479, 26 S.E.2d 138 (1943), see 6 Ga. B.J. 252

(1944). For comment on *Martin v. Bituminous Cas. Corp.*, 215 Ga. 476, 111 S.E.2d 53 (1959), see 22 Ga. B.J. 580 (1960).

JUDICIAL DECISIONS

Full faith and credit to decisions in other states. — The full faith and credit clause in U.S. Const., Art. 4, Sec. 1 does not require that the decision in another state that a person is no longer entitled to benefits is a bar to an award under Georgia law when jurisdiction is invoked under O.C.G.A. § 34-9-242. *Roadway Express, Inc. v. Warren*, 163 Ga. App. 759, 295 S.E.2d 743 (1982).

Conflicts of laws principles. — An award under the compensation law of one state will not bar an award under Georgia law when jurisdiction is invoked under O.C.G.A. § 34-9-242, general principles of conflicts of law notwithstanding. *Roadway Express, Inc. v. Warren*, 163 Ga. App. 759, 295 S.E.2d 743 (1982).

No independent right of action for employee injured out of state. — Under Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., employee has no independent right of action for injury against an employer or any other person who is statutorily insulated from suit, even where the employee is injured outside of the state and benefits for that injury are recoverable pursuant to O.C.G.A. § 34-9-242. *Karimi v. Crowley*, 172 Ga. App. 761, 324 S.E.2d 583 (1984).

Either execution of a contract or actual work within the state, is sufficient within itself to bring the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) into opera-

tion. *Slaten v. Travelers Ins. Co.*, 197 Ga. 1, 28 S.E.2d 280, answer conformed to, 70 Ga. App. 665, 29 S.E.2d 98 (1943), cert. dismissed, 197 Ga. 856, 30 S.E.2d 822 (1944).

Jurisdiction in general. — This section provided that for Georgia to have jurisdiction of an injury which occurred outside of the state, the contract must be entered into in Georgia, and the claimant must reside in Georgia or the employer have a place of business in Georgia. *Home Ins. Co. v. Burnett*, 146 Ga. App. 355, 246 S.E.2d 394 (1978) (see O.C.G.A. § 34-9-242).

An employee can invoke jurisdiction for workers' compensation either: (1) where the injury occurred; (2) where the employment was principally located; or (3) where the contract of employment was entered. *Guinn v. Conwood Corp.*, 185 Ga. App. 41, 363 S.E.2d 271 (1987).

Dual jurisdiction of claim. — Where the work injury at issue occurred in Florida to a Florida resident employee and the employer was based in Georgia, it is uncontroverted that both Georgia and Florida would have jurisdiction of the claim for the incident at issue. *Lumber Transp., Inc. v. International Indemn. Co.*, 203 Ga. App. 588, 417 S.E.2d 365, cert. denied, 203 Ga. App. 906, 417 S.E.2d 365 (1992).

Determination of principal locality. — In deciding whether the State of Georgia has

jurisdiction to award workers' compensation benefits to an employee who is injured outside of the state, a determination must first be made whether the principal locality of the employment relationship is in Georgia; if so, O.C.G.A. § 34-9-242 does not apply; if not, the contract for employment must be made within the state in order for jurisdiction to exist. *Guinn v. Conwood Corp.*, 185 Ga. App. 41, 363 S.E.2d 271 (1987).

As to employees who have agreed to be bound by the act by the method prescribed in former Code 1933, § 114-110 (see O.C.G.A. § 34-9-7), and who have not engaged in any work within this state, it was essential that the contract of employment be executed within this state in order that such employees may receive compensation for injuries sustained while employed outside of the state. *Slaten v. Travelers Ins. Co.*, 197 Ga. 1, 28 S.E.2d 280, answer conformed to, 70 Ga. App. 665, 29 S.E.2d 98 (1943), cert. dismissed, 197 Ga. 856, 30 S.E.2d 822 (1944); *Fidelity & Cas. Co. v. Swain*, 90 Ga. App. 615, 83 S.E.2d 345 (1954).

Word "damages" as used in this section was synonymous with "compensation." *Maryland Cas. Co. v. Pitman*, 70 Ga. App. 670, 29 S.E.2d 102 (1944) (see O.C.G.A. § 34-9-242).

"Damages" does not refer to damages recovered in tort action. — The word "damages" as used in this section did not refer to damages recovered in an action for damages against a third-party tort-feasor and damages received from such a third party as compensation for an injury, whether resulting from a mere claim, an action or a judgment. *Maryland Cas. Co. v. Pitman*, 70 Ga. App. 670, 29 S.E.2d 102 (1944) (see O.C.G.A. § 34-9-242).

Deduction of other state's award from Georgia award. — The meaning of the second sentence is that if under the Workers' Compensation Laws of another state an employee receives compensation as the result of an award, for an injury for which the Georgia Compensation Law may also award compensation, the Georgia board must deduct the amount awarded in such other state

from the maximum amount found to be due under the laws of Georgia. *Maryland Cas. Co. v. Pitman*, 70 Ga. App. 670, 29 S.E.2d 102 (1944).

Jurisdiction held to exist. — Where claimant and all the employees of a partnership and their employers lived in Georgia, the partnership had a store in Georgia which furnished supplies to the employees of the partnership engaged in cutting, sawing, and hauling timber in South Carolina, and the contract of employment of the deceased by the partnership was entered into in Georgia, there being no evidence as to any contract between the parties stipulating that the deceased was to work exclusively outside of Georgia, the board had jurisdiction to render the award complained of. *McDonald-Haynes v. Minyard*, 69 Ga. App. 479, 26 S.E.2d 138 (1943), for comment, see 6 Ga. B.J. 252 (1944).

The board had jurisdiction to award compensation in a case in which a Georgia employer employed a Georgia resident in Ohio through an agent of the Georgia employer, to drive a truck loaded with freight from Ohio to Georgia, and the employee was killed in the course of employment in Kentucky while en route to Georgia. *Martin v. Bituminous Cas. Corp.*, 215 Ga. 476, 111 S.E.2d 53 (1959), for comment, see 22 Ga. B.J. 580 (1960).

Cited in *Aetna Life Ins. Co. v. Menees*, 46 Ga. App. 289, 167 S.E. 335 (1932); *Murphey v. American Mut. Liab. Inc. Co.*, 70 Ga. App. 598, 28 S.E.2d 876 (1944); *Slaten v. Travelers Ins. Co.*, 70 Ga. App. 665, 29 S.E.2d 98 (1944); *New Amsterdam Cas. Co. v. Thompson*, 100 Ga. App. 677, 112 S.E.2d 273 (1959); *Johnson v. Great S. Trucking Co.*, 101 Ga. App. 472, 114 S.E.2d 209 (1960); *Fenster v. Liberty Mut. Ins. Co.*, 107 Ga. App. 821, 131 S.E.2d 564 (1963); *Security Ins. Group v. Plank*, 133 Ga. App. 815, 212 S.E.2d 471 (1975); *Brown v. Travelers Ins. Co.*, 141 Ga. App. 71, 232 S.E.2d 609 (1977); *Aetna Cas. & Sur. Co. v. Suits*, 150 Ga. App. 35, 256 S.E.2d 645 (1979); *Ramirez v. Bradley Constr. Co.*, 161 Ga. App. 753, 288 S.E.2d 742 (1982).

RESEARCH REFERENCES

ALR. — Extraterritorial operation of workmen's compensation statutes; conflict of laws, 18 ALR 292; 28 ALR 1345; 35 ALR 1414; 45 ALR 1234; 59 ALR 735; 82 ALR 709; 90 ALR 119.

Workmen's compensation: death or injury while traveling as arising out of and in the course of employment, 20 ALR 319; 49 ALR 454; 63 ALR 469; 100 ALR 1053.

Workmen's Compensation Act: applicability of state compensation act to injury within admiralty jurisdiction, 31 ALR 518; 56 ALR 352.

Application of state Workmen's Compensation Act to injury occurring on Federal property within the state or in connection

with contracts in relation to such property, 86 ALR 289; 92 ALR 1263; 153 ALR 1050.

Implied consent of nonresident or foreign corporation to jurisdiction in proceedings under Workmen's Compensation Act as predicable upon facts which subject him or it to the substantive provisions of the act, 110 ALR 1426.

Constitutionality of provisions of Workmen's Compensation Acts which are limited to residents of state, 147 ALR 925.

Award under Workmen's Compensation Act as bar to, or ground for reduction of, claim under act of another state, 169 ALR 1185.

34-9-243. Effect of payments made when not due; employer credit or reduction for employer funded payments pursuant to disability plan.

(a) The payment by the employer or the employer's workers' compensation insurance carrier to the employee or to any dependent of the employee of any benefit when not due or of salary or wages or any benefit paid under Chapter 8 of this title, the "Employment Security Law," during the employee's disability shall be credited against any payments of weekly benefits due; provided, however, that such credit shall not exceed the aggregate amount of weekly benefits due under this chapter.

(b) Except as otherwise provided in this Code section or in a collective bargaining agreement, the employer's obligation to pay or cause to be paid weekly benefits under Code Section 34-9-261 or 34-9-262 shall be reduced by the employer funded portion of payments received or being received by the employee pursuant to a disability plan, a wage continuation plan, or from a disability insurance policy established or maintained by the same employer from whom benefits under Code Section 34-9-261 or 34-9-262 are claimed if the employer did contribute directly to such a plan or policy. The employer funded portion shall be based upon the ratio of the employer's contributions to the total contributions to such plan or policy.

(c) The credit or reduction of benefits provided in subsection (b) of this Code section shall only be made for those amounts which the employee is entitled to, has received, or is receiving during any period in which benefits under Code Section 34-9-261 or 34-9-262 are claimed.

(d) The State Board of Workers' Compensation shall promulgate rules for establishing proof of the existence of other benefits. The employer, its insurance carrier, and the employee shall freely release information to each other and the State Board of Workers' Compensation that is material and relevant to the existence of benefits which may be coordinated with entitlements and obligations under this chapter.

(e) The employer or insurance carrier taking a credit or making a reduction as provided in this Code section shall immediately report to the State Board of Workers' Compensation the amount of any credit or reduction and, as requested by the board, furnish to the board satisfactory proof of the basis for a credit or reduction.

(f) Subsections (a) and (b) of this Code section shall not apply to payments made to an employee under Code Section 34-9-263 for any permanent partial disability. (Ga. L. 1920, p. 167, § 41; Ga. L. 1931, p. 7, § 108; Code 1933, § 114-415; Ga. L. 1978, p. 2220, § 7; Ga. L. 1990, p. 1409, § 12; Ga. L. 1992, p. 1942, § 20; Ga. L. 1996, p. 1291, § 10; Ga. L. 1998, p. 1508, § 7.)

Law reviews. — For review of 1998 legislation relating to labor and industrial relations, see 15 Ga. St. U. L. Rev. 185 (1998). For annual survey article discussing workers' compensation law, see 52 Mercer L. Rev. 505 (2000). For article, "Workers' Compensa-

tion," see 53 Mercer L. Rev. 521 (2001). For annual survey of workers' compensation law, see 57 Mercer L. Rev. 419 (2005).

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992).

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Credit allowed for payments made either before or after award. — This section did not limit the credit allowable to payments made to an employee only after an award had been made. It clearly allows credit for payments made to an employee during the period of the employee's disability, whether made before or after an award. *Sprayberry v. Commercial Union Ins. Co.*, 140 Ga. App. 758, 232 S.E.2d 111 (1976) (see O.C.G.A. § 34-9-243).

Overpayments made outside two-year period of § 34-9-245. — The State Board of Workers' Compensation properly held that an employer was entitled to a credit for overpayments made to a claimant, but only for those made within the two years prior to the employer's request for reimbursement; O.C.G.A. § 34-9-245 was intended as a statute of repose, and thus giving the employer credit for overpayments made more than two years before its request for reimbursement would allow offsets against future payments when there was no legally cognizant basis for reimbursement. *Renu Thrift Store, Inc. v. Figueroa*, 286 Ga. App. 455, 649 S.E.2d 528 (2007), cert. dismissed, 2007 Ga. LEXIS 812 (Ga. 2007).

Payments made pursuant to other state's law. — An insurer may receive credit for payments made to an injured employee pur-

suant to the laws of another state which state did not have jurisdiction to authorize such payments. *Sprayberry v. Commercial Union Ins. Co.*, 140 Ga. App. 758, 232 S.E.2d 111 (1976).

Calculation of the credit under O.C.G.A. § 34-9-243(b) should be based on the net amount of disability benefits which the employee receives, not on the gross amount of disability benefits which the employer has paid. *Georgia Forestry Comm'n v. Taylor*, 241 Ga. App. 151, 526 S.E.2d 373 (1999).

An employer and insurance carrier are entitled to credit for any payments of compensation made in excess of the amount due the claimant under the original award on an award made to a claimant on the bases of disability of claimant on date application filed for hearing on a change of condition. *Ingram v. Bituminous Cas. Corp.*, 109 Ga. App. 87, 134 S.E.2d 861 (1964).

Board action in giving credit for wages paid to claimant during claimant's disability is authorized. *Liberty Mut. Ins. Co. v. Thomas*, 145 Ga. App. 303, 243 S.E.2d 694 (1978).

Credit for salary. — The employer was entitled to credit for the salary received by the claimant after the claimant stopped working to be applied against the compensation award. *Walton County Bd. of*

Comm'rs v. Williams, 171 Ga. App. 779, 320 S.E.2d 846 (1984).

Employer's benefit plan payments. — One-time payment under employer's employment benefit plan could not be credited against workers' compensation benefits under O.C.G.A. § 34-9-243. *Southern Bell Tel. & Tel. Co. v. Hodges*, 164 Ga. App. 757, 298 S.E.2d 570 (1982).

Credit for a "disability retirement" plan is not allowed under O.C.G.A. § 34-9-243(b). *City of Waycross v. Holmes*, 272 Ga. 488, 532 S.E.2d 90 (2000).

Res judicata on disability credits. — Because the employer did not raise the issue of credit for disability plan payments and did not appeal from the award of benefits by an administrative law judge at a workers' compensation hearing, the award was res judicata on the issue of credit for disability plan payments. *Webb v. City of Atlanta*, 228 Ga. App. 278, 491 S.E.2d 492 (1997).

Superior court properly upheld a second ALJ's ruling that an employer was foreclosed from raising a claim for a credit for 20 weeks of wages already paid to the claimant, under O.C.G.A. § 34-9-243, as the employer was entitled to raise the issue no later than ten days prior to the original compensation hearing, and the issue could and should have been adjudicated, but was not, making it res judicata. *Vought Aircraft Indus. v. Faulds*, 281 Ga. App. 338, 636 S.E.2d 75 (2006).

Burden on employer. — Because an employee used the employee's vacation, per-

sonal, and sick leave time because the employee was unable to work due to a compensable injury, and the employee was unaware that the employee was entitled to workers' compensation benefits, after determining that the employee was entitled to temporary total disability income benefits, a credit to the employer was denied under O.C.G.A. § 34-9-243(b), as the employer failed to meet its burden of showing that it was entitled to such a credit for employer-funded payments under a disability plan, wage continuation plan, or disability insurance policy, or that the employee was paid the employee's regular wages pursuant to O.C.G.A. § 34-9-220. *Glisson v. Rooms To Go*, 270 Ga. App. 689, 608 S.E.2d 50 (2004).

Cited in *Fidelity & Cas. Co. v. Leckie*, 52 Ga. App. 591, 183 S.E. 642 (1935); *Davis v. Cobb County*, 106 Ga. App. 336, 126 S.E.2d 710 (1962); *Fireman's Fund Ins. Co. v. Crowder*, 123 Ga. App. 469, 181 S.E.2d 530 (1971); *Mason v. City of Atlanta*, 124 Ga. App. 849, 186 S.E.2d 285 (1971); *Dodgen v. St. Paul Fire & Marine Ins. Co.*, 138 Ga. App. 499, 227 S.E.2d 64 (1976); *GMC v. Dover*, 143 Ga. App. 819, 240 S.E.2d 201 (1977); *Seaboard Fire & Marine Ins. Co. v. Smith*, 146 Ga. App. 893, 247 S.E.2d 607 (1978); *Howard v. Alfrey*, 697 F.2d 1006 (11th Cir. 1983); *K-Mart Corp. v. Anderson*, 166 Ga. App. 421, 304 S.E.2d 526 (1983); *Caldwell v. Perry*, 179 Ga. App. 682, 347 S.E.2d 286 (1986); *Horizon Indus., Inc. v. Carter*, 188 Ga. App. 194, 372 S.E.2d 301 (1988).

RESEARCH REFERENCES

ALR. — Workmen's compensation: right to credit for amounts paid under invalid settlement or compromise, 10 ALR 1016.

34-9-244. Reimbursement of provider of disability benefits to person who subsequently files claim.

(a) Any party to a claim under this chapter, a group insurance company, or other disability benefits provider who provides disability benefits for a person who subsequently files a claim under this chapter may give notice in writing to the board at any time during the pendency of the claim that such provider is or should be a party at interest as a result of such disability benefits paid to the employer.

(b) In cases where a group insurance company or other disability benefits provider pays disability benefits to a person pursuant to an employer paid plan who subsequently files a claim and is entitled to benefits under this chapter, the board shall be authorized to order the employer or its workers' compensation insurance carrier to repay the group insurance company or other disability benefits provider the funds it has expended for such disability benefits and take credit for that amount against income benefits due under this chapter, provided that:

(1) Such employer or its workers' compensation insurance carrier is liable under this chapter for income benefits;

(2) Such other provider has become or should be a party at interest pursuant to the provisions of subsection (a) of this Code section; and

(3) The disability benefits paid are pursuant to a plan funded in whole or in part by the employer or workers' compensation carrier. (Code 1981, § 34-9-244, enacted by Ga. L. 1990, p. 1409, § 13.)

34-9-245. Repayment of overpayment by claimant.

Should the board find that a claimant has received an overpayment of income benefits from the employer, for any reason, the board shall have the authority to order repayment on terms acceptable to the parties or within the discretion of the board. No claim for reimbursement shall be allowed where the application for reimbursement is filed more than two years from the date such overpayment was made. (Code 1981, § 34-9-245, enacted by Ga. L. 1999, p. 817, § 6.)

Law reviews. — For annual survey of workers' compensation law, see 58 Mercer L. Rev. 453 (2006).

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De novo standard of review. — In reviewing a decision by the State Board of Workers' Compensation (board), the trial court correctly employed a de novo standard of review when determining whether O.C.G.A. § 34-9-245 was a statute of repose rather than a statute of limitation, as that matter involved a legal interpretation of a statute; the court was obligated to employ the "any evidence" standard when determining whether the findings by the board that an award of attorney fees to an insurer, a civil penalty assessment to an employee, and a referral of the matter to the Enforcement Division of the board were proper. *Trax-Fax,*

Inc. v. Hobba, 277 Ga. App. 464, 627 S.E.2d 90 (2006).

Applicability. — The State Board of Workers' Compensation properly held that an employer was entitled to a credit for overpayments made to a claimant, but only for those made within the two years prior to the employer's request for reimbursement; O.C.G.A. § 34-9-245 was intended as a statute of repose, and thus giving the employer credit for overpayments made more than two years before its request for reimbursement would allow offsets against future payments when there was no legally cognizant basis for reimbursement. *Renu Thrift Store,*

Inc. v. Figueroa, 286 Ga. App. 455, 649 S.E.2d 528 (2007), cert. dismissed, 2007 Ga. LEXIS 812 (Ga. 2007).

Statute of repose retroactively applied. — O.C.G.A. § 34-9-245 is a statute of repose, rather than a statute of limitations, and can be applied retroactively, pursuant to the legislative intent and the wording of the statute; accordingly, an award of reimburse-

ment of benefits paid to an employee was proper where the employee's accident occurred one year prior to the enactment of § 34-9-245, and preclusion of reimbursement for any overpayments made prior to the two-year period was proper. *Trax-Fax, Inc. v. Hobba*, 277 Ga. App. 464, 627 S.E.2d 90 (2006).

ARTICLE 7

COMPENSATION SCHEDULES

Law reviews. — For note on 2000 amendments of O.C.G.A. §§ 34-9-261, 34-9-262, 34-9-265, see 17 Ga. St. U.L. Rev. 231 (2000).

JUDICIAL DECISIONS

It is extent of injury received by employee which determines compensation which the employee shall receive. *Travelers' Ins. Co. v. Hurt*, 176 Ga. 153, 167 S.E. 175 (1932).

Cited in *Glynn County Bd. of Comm'rs v. Mimbs*, 161 Ga. App. 350, 291 S.E.2d 62 (1982).

OPINIONS OF THE ATTORNEY GENERAL

Word "wages" is not synonymous with retirement or disability benefits or other monthly pensions. 1971 Op. Att'y Gen. No. 71-136.

Loss-of-earnings award reduced when earnings increase. — When an award is

made based upon a percentage of loss-of-earnings, the benefit may be reduced when the employee subsequently receives an increase in earnings. 1960-61 Op. Att'y Gen. p. 589.

RESEARCH REFERENCES

ALR. — Workmen's compensation: deductions allowable in computing earnings as basis of compensation, 22 ALR 864.

Survival of right to compensation under workmen's compensation acts upon the death of the person entitled to the award, 24 ALR 441; 29 ALR 1426; 51 ALR 1446; 87 ALR 864; 95 ALR 254.

Previous loss or mutilation of member as affecting amount or basis of compensation under Workmen's Compensation Act, 30 ALR 979.

Retroactive effort of provision for reduction or increase of award under Workmen's Compensation Act, 40 ALR 1473.

Workmen's compensation: double compensation to dependents in case of death of two or more, 45 ALR 894.

Specific grounds for commutation of payments under Workmen's Compensation Acts, 69 ALR 547.

Tips or gratuities as factor in determining amount of compensation under Workmen's Compensation Act, 75 ALR 1223.

Board and lodging as a factor in determining the amount of compensation under Workmen's Compensation Act, 84 ALR 188.

Time as of which earnings are to be considered in computing compensation for an injury or incapacity ultimately resulting from causes not immediately operative, 86 ALR 524.

Marriage as terminating right to future payments of workmen's compensation to injured female employee, 96 ALR 976.

Settlement of claim or recovery against

physician or surgeon or one responsible for his malpractice on account of aggravation of injury as affecting right to compensation under Workmen's Compensation Act, 98 ALR 1392.

Workmen's compensation: payment, or period of payment, for separate compensable injuries as concurrent or consecutive, 99 ALR 896.

Workmen's compensation: compensation for loss or impairment of eyesight, 142 ALR 822.

Workmen's compensation: right to compensation as affected by fact that injured employee earns or is offered, as much as, or more than, before the injury, 149 ALR 413.

Workmen's compensation: right to compensation as for a total or partial disability in case of abnormal condition of body or member which results from or is incident to specific injury for which the act makes special allowance, 156 ALR 1344.

What constitutes "salary," "wages," "pay," or the like, within pension law basing benefits thereon, 14 ALR2d 634.

Workmen's compensation: crediting employer or insurance carrier with earnings of employee reemployed, or continued in employment, after injury, 84 ALR2d 1108.

Workers' compensation: tips or gratuities as factor in determining amount of compensation, 16 ALR5th 191.

34-9-260. Basis and method for computing compensation generally.

Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined, subject to limitations as to the maximum and minimum amounts provided for in Code Sections 34-9-261 and 34-9-265, as follows:

(1) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of 13 weeks immediately preceding the injury, his average weekly wage shall be one-thirteenth of the total amount of wages earned in such employment during the 13 weeks;

(2) If the injured employee shall not have worked in such employment during substantially the whole of 13 weeks immediately preceding the injury, the wages of a similar employee in the same employment who has worked substantially the whole of such 13 weeks shall be used in making the determination under the preceding paragraph;

(3) If either of the foregoing methods cannot reasonably and fairly be applied, the full-time weekly wage of the injured employee shall be used;

(4) If compensation is due for a fractional part of the week, the compensation for such fractional part shall be determined by dividing the weekly compensation rate by the number of days employed per week to compute the amount due for each day;

(5) If the injured employee is a volunteer firefighter included under this chapter for volunteer fire-fighting services rendered to a county or municipality of this state or a volunteer law enforcement officer included under this chapter for volunteer law enforcement services rendered to a county or municipality of this state, such firefighter's or volunteer law

enforcement officer's average weekly wage shall be deemed to be the Georgia average weekly earnings of production workers in manufacturing industries for the immediately preceding calendar year, as published by the Georgia Department of Labor;

(6) The average weekly wage of a member of the Georgia National Guard or State Defense Force serving on state active duty pursuant to an order by the Governor shall be the greater of:

(A) Seven-thirtieths of the monthly pay and allowances of the individual at the time of the injury, computed in accordance with Code Section 38-2-250, adjusted from time to time for appropriated increases in such monthly pay and allowances, excluding longevity increases; or

(B) If the injured member of the Georgia National Guard or the State Defense Force worked at the time of the injury in any employment other than serving as a member of the Georgia National Guard or the State Defense Force, the average weekly wage of the individual in such other employment as determined pursuant to paragraphs (1) through (5) of this Code section or, if such individual worked at the time of the injury for more than one employer, the average combined weekly wage of the individual in such multiple employment as determined pursuant to paragraphs (1) through (5) of this Code section. (Ga. L. 1920, p. 167, § 2; Ga. L. 1922, p. 185, § 1; Code 1933, § 114-402; Ga. L. 1945, p. 486, § 1; Ga. L. 1981, p. 842, § 2; Ga. L. 1981, p. 1585, § 2; Ga. L. 1984, p. 816, § 2; Ga. L. 1998, p. 264, § 1; Ga. L. 2000, p. 794, § 2.)

Cross references. — State defense force, § 38-2-50 et seq.

Code Commission notes. — Pursuant to § 28-9-5, in 1986, "member" was substituted for "number" in paragraph (6).

Pursuant to § 28-9-5, in 1988, "amount" was substituted for "amounts" near the end of paragraph (1).

Law reviews. — For article surveying developments in Georgia local government law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 187 (1981). For article surveying developments in Georgia workers'

compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981). For annual survey of workers' compensation, see 38 Mercer L. Rev. 431 (1986). For annual survey article discussing workers' compensation law, see 52 Mercer L. Rev. 505 (2000).

For comment on *St. Paul-Mercury Indem. Co. v. Idov*, 210 Ga. 256, 78 S.E.2d 799 (1953), see 16 Ga. B.J. 457 (1954). For comment on *Atlantic Co. v. Moseley*, 215 Ga. 530, 111 S.E.2d 239 (1959), see 23 Ga. B.J. 132 (1960).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

INJURIES ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

PAYMENT OF WAGES

THIRD PARTIES

DETERMINATION OF COMPENSATION

1. CASES DECIDED PRIOR TO 1945 AMENDMENT
2. WORKING IN SAME EMPLOYMENT

3. NOT WORKING IN SAME EMPLOYMENT

4. FULL-TIME WEEKLY WAGE

PROCEDURE

ILLUSTRATIVE CASES

General Consideration

Workers' compensation provisions constitutional. — Georgia's basis of computing workers' compensation does not violate the equal protection clause of U.S. Const., amend. 14, either facially or in the application thereof to blacks or low income segments of the state's employed population. *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668 (S.D. Ga. 1973).

Nature of right to compensation. — Right to statutory compensation is part of the compensation of the employee for services rendered. *Continental Cas. Co. v. Haynie*, 51 Ga. App. 650, 181 S.E. 126 (1935), *aff'd*, 182 Ga. 608, 186 S.E. 683 (1936).

Limitation on recovery. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) puts a limit upon the amount that may be recovered for injuries to or the death of one of its employees that may be far less than the actual value of the life destroyed. *Athens Ry. & Elec. Co. v. Kinney*, 160 Ga. 1, 127 S.E. 290 (1925).

Cited in *McBrayer v. Columbia Cas. Co.*, 44 Ga. App. 59, 160 S.E. 556 (1931); *Metropolitan Cas. Ins. Co. v. Maloney*, 56 Ga. App. 74, 192 S.E. 320 (1937); *Maryland Cas. Co. v. Morris*, 68 Ga. App. 639, 22 S.E.2d 627 (1942); *Fidelity & Cas. Co. v. Windham*, 209 Ga. 592, 74 S.E.2d 835 (1953); *St. Paul Mercury Indem. Co. v. Idov*, 210 Ga. 256, 78 S.E.2d 799 (1953); *Bennett v. Rewis*, 212 Ga. 800, 96 S.E.2d 257 (1957); *Atlanta Million Coop. Cab Co. v. Wilson-Acomb*, 108 Ga. App. 465, 133 S.E.2d 437 (1963); *American Fire & Cas. Co. v. Davidson*, 116 Ga. App. 255, 157 S.E.2d 55 (1967); *Westbrook v. Travelers Ins. Co.*, 117 Ga. App. 361, 160 S.E.2d 650 (1968); *Ferrera v. Fireman's Fund Ins. Co.*, 138 Ga. App. 797, 227 S.E.2d 443 (1976); *United States Asbestos v. Hammock*, 140 Ga. App. 378, 231 S.E.2d 792 (1976); *Aetna Cas. & Sur. Co. v. Caldwell*, 143 Ga. App. 397, 238 S.E.2d 759 (1977); *Masterpiece Finishing Co. v. Gallahan*, 180 Ga. App. 216, 348 S.E.2d 586 (1986).

Injuries Arising Out of and in the Course of Employment

Terms not synonymous. — Terms "in course of employment" and "out of employment" are not synonymous; both must concur in order for the case to be compensable. *Chadwick v. White Provision Co.*, 82 Ga. App. 249, 60 S.E.2d 551 (1950).

Injury arising "out of employment." — Injury arises "out of the employment" if after the event it appears to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence, such as when it is inflicted on an employee who is engaged in the employee's regular employment by an insane fellow employee whose insanity is unknown to the employer. *Chadwick v. White Provision Co.*, 82 Ga. App. 249, 60 S.E.2d 551 (1950).

An accident "arises out of employment" when it is apparent to the rational mind, upon a consideration of all the circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. *General Accident, Fire & Life Ins. Co. v. Sturgis*, 136 Ga. App. 260, 221 S.E.2d 51 (1975).

Employee found dead in expected place. — The employee is aided in the employee's burden by the well-established presumption that when an employee is found dead in a place where the employee might reasonably have been expected to be in the performance of the employee's duties, it is presumed that the death arose out of the employee's employment. *General Accident, Fire & Life Ins. Co. v. Sturgis*, 136 Ga. App. 260, 221 S.E.2d 51 (1975).

Employee becoming ill on job and dying later in hospital. — The presumption that death arose from employment applied where an employee, although the employee did not actually die on the job, became ill and comatose on the job and remained unconscious until the employee died three

days later in the hospital. *General Accident, Fire & Life Ins. Co. v. Sturgis*, 136 Ga. App. 260, 221 S.E.2d 51 (1975).

Injury arising "in the course of employment." — Injury arises "in the course of employment" when it occurs while the worker is doing the duty which the worker is employed to perform. *Chadwick v. White Provision Co.*, 82 Ga. App. 249, 60 S.E.2d 551 (1950).

Concurrent similar work doctrine. — The concurrent similar employment doctrine is applied only where the accident arises out of and in the course of the employment while the employee is engaged for an employer subject to these provisions, and the employee's concurrent work must be similar in character to the work in the course of which the accident was sustained. *St. Paul Mercury Indem. Co. v. Idov*, 88 Ga. App. 697, 77 S.E.2d 327, cert. dismissed, 210 Ga. 256, 78 S.E.2d 799 (1953).

Payment of Wages

Paying wages necessary to bring one within provisions. — While the paying of wages is not necessary to render one a master, paying is necessary to bring one within the workers' compensation provisions. The entire workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) contemplates that the compensation of the injured employee shall be fixed in proportion to the employee's wages as applied to the particular injury. *Georgia Ry. & Power Co. v. Middlebrooks*, 34 Ga. App. 156, 128 S.E. 777, cert. denied, 34 Ga. App. 836 (1925).

The payment of wages, although not necessary to render one a master, is necessary to bring one within the workers' compensation provisions, which contemplate that compensation shall be fixed in proportion to the employee's wages as applied to the particular injury. *Atlantic Co. v. Moseley*, 215 Ga. 530, 111 S.E.2d 239 (1959), for comment, see 23 Ga. B.J. 132 (1960).

"Wage" means payment by employer to employee for services rendered in the course of employment that constitutes a net economic gain to the employee. *Atlanta Journal & Constitution v. Sims*, 200 Ga. App. 236, 407 S.E.2d 464 (1991).

Tips are considered as a portion of the remuneration an employee receives for the employee's services. *Employers Com. Union*

Ins. Co. v. Bryant, 130 Ga. App. 596, 203 S.E.2d 896 (1974).

Tips a claimant receives as a part of the claimant's wages are computed with the claimant's salary to determine the compensation to which an employee is entitled. *Gulf Ins. Co. v. Williamson*, 137 Ga. App. 79, 222 S.E.2d 885 (1975), overruled on other grounds, *Burkhart v. Argonaut Insurance Co.*, 239 Ga. 608, 238 S.E.2d 400 (1977).

The fact that a claimant's tips were not listed on the claimant's W-2 form did not preclude the inclusion of tips in the calculation of the claimant's average weekly wages. *Pizza Hut Delivery v. Blackwell*, 204 Ga. App. 112, 418 S.E.2d 639 (1992).

Food subsidy properly considered in determining wage. — Because an employer stipulated that the meal subsidy provided its employee a net economic benefit, the State Board of Workers' Compensation did not err in concluding that such benefit should be included in calculating the employee's average weekly wage; moreover, food furnished to an employee without charge conformed to the definition of the word "wage" because an employee's receipt of such benefits, whether in cash or another form, constituted real economic gain to the employee resulting from the employment. *Caremore, Inc./Wooddale Nursing Home v. Hollis*, 283 Ga. App. 681, 642 S.E.2d 375 (2007).

Fringe benefits such as an employer's payment of insurance premiums are not encompassed in the term "average weekly wage." *Groover v. Johnson Controls World Serv.*, 241 Ga. App. 791, 527 S.E.2d 639 (2000).

Earnings of peddler not "wages." — The workers' compensation provisions do not vest in the board, or any director thereof, authority to classify the earnings of a peddler as "wages" so as to extend liability or coverage under the law. *Atlantic Co. v. Moseley*, 215 Ga. 530, 111 S.E.2d 239 (1959), for comment, see 23 Ga. B.J. 132 (1960).

Federal wage and hour provisions have no bearing upon compensation for injury, except that because of it the employee may have been receiving a different wage. *Bituminous Cas. Corp. v. Sapp*, 196 Ga. 431, 26 S.E.2d 724, answer conformed to, 69 Ga. App. 669, 26 S.E.2d 726 (1943).

Third Parties

Employer not entitled to subrogation to

Third Parties (Cont'd)

claimant's rights against third person. — When an employee receives an injury for which compensation is payable under the workers' compensation provisions, and the injury is caused by a third person, neither the employer nor the insurance carrier would be entitled to have the amount of compensation awarded the employee reduced by subtracting therefrom either the total or the net amount of the sum received by the employee in the settlement of a suit against the third person for damages for personal injury. *American Mut. Liab. Ins. Co. v. Wigley*, 179 Ga. 764, 177 S.E. 568, answer conformed to, 50 Ga. App. 258, 177 S.E. 815 (1934).

An employer liable to pay compensation was not entitled to a subrogation of the claimant's rights against a railroad company, and was not entitled to have any of the sum collected by the claimant from the railroad company in a settlement set off against the amount of compensation awarded. *Lumbermen's Mut. Cas. Co. v. Babb*, 67 Ga. App. 161, 19 S.E.2d 550 (1942).

Georgia law does not permit subrogation in workers' compensation cases. *Butler v. Super Valu Stores, Inc.*, 633 F. Supp. 1164 (N.D. Ga. 1986).

Third-party tortfeasor may recover setoff of workers' compensation benefits paid by employer if the employer's negligence contributed to the employee's injury. *Butler v. Super Valu Stores, Inc.*, 633 F. Supp. 1164 (N.D. Ga. 1986).

Determination of Compensation**1. Cases Decided Prior to 1945 Amendment**

Regular wage on date of accident. — The compensation of an injured person shall be computed on the basis of the regular wage received by the employee on the date of the accident. *Georgia Power Co. v. McCook*, 48 Ga. App. 138, 172 S.E. 78 (1933); *New Amsterdam Cas. Co. v. Davis*, 67 Ga. App. 518, 21 S.E.2d 256 (1942); *Lumbermens Mut. Cas. Co. v. Cook*, 69 Ga. App. 131, 25 S.E.2d 67 (1943).

Prior to 1945 amendment to this section, the regular wage received by the employee on the date of the accident was the basis

upon which compensation had to be computed, and there was no authorization for using an average weekly wage. *Googe v. United States Fid. & Guar. Co.*, 63 Ga. App. 678, 11 S.E.2d 803 (1940) (see O.C.G.A. § 34-9-260).

Definition of "regular wage" does not involve continuity of employment, but regularity of wage. *Aetna Cas. & Sur. Co. v. Prather*, 59 Ga. App. 797, 2 S.E.2d 115 (1939).

Regular wage computed upon basis of 40-hour work week. — Where claimant was ready at all times to work during a week, and at 75¢ per hour for a period weekly not to exceed 40 hours, unless prevented from so doing by the weather or lack of material, the wage upon which the claimant's compensation would be computed was \$30.00, despite the fact that for a period of 11 months prior to the accident the claimant made an average earning of only \$19.03 per week. *Googe v. United States Fid. & Guar. Co.*, 63 Ga. App. 678, 11 S.E.2d 803 (1940).

If employee works fractional part of week, regular daily wage multiplied by six work-days. — Under the former provisions, providing that the compensation of an injured person under the workers' compensation provisions should be computed on the basis of the "regular wage received by the employee on the date of the accident," where an employee had for ten months before the accident worked only three days per week, at \$5.00 per day, the employee's "regular wage" was \$5.00 per day, and to obtain a weekly basis the employee's daily wage would be multiplied by six, the number of workdays per week, rather than by three. *Carter v. Ocean Accident & Guarantee Corp.*, 190 Ga. 857, 11 S.E.2d 16 (1940).

Payment for operating expenses of automobile counted as salary. — Where the claimant-salesman at the time of the injury received from the claimant's employer a salary of \$100.00 per month, plus \$15.00 as operating expenses for the claimant's automobile, which the claimant used in the discharge of the claimant's duties, this was a payment to the claimant of \$115.00 for the services rendered by claimant to the employer, and was all to be counted as salary in determining the amount of compensation. *Lumbermen's Mut. Cas. Co. v. Babb*, 67 Ga. App. 161, 19 S.E.2d 550 (1942).

Less than one month's earnings in commissions insufficient to support compensation award. — An award of compensation which is based upon evidence relating solely to the qualifications of the employee as a salesman, the employee's earnings in commissions during a period of less than one month, and the prospect of an increase in the employee's earnings had the employee lived is without sufficient competent evidence to support it. *New Amsterdam Cas. Co. v. Sumrell*, 30 Ga. App. 682, 118 S.E. 786 (1923).

For case illustrating applicability of federal wage and hours provisions to determine regular weekly wage, see *Bituminous Cas. Corp. v. Sapp*, 196 Ga. 431, 26 S.E.2d 724, answer conformed to, 69 Ga. App. 669, 26 S.E.2d 726 (1943).

2. Working in Same Employment

"Employment" defined. — "Employment" as used in this section meant the type or kind of employment, such as that of janitor, baker, truck driver, etc.; it referred to the particular calling or kind of employment in which the claimant was engaged at the time of claimant's injury. *Black v. American & Foreign Ins. Co.*, 123 Ga. App. 133, 179 S.E.2d 679 (1970) (see O.C.G.A. § 34-9-260).

Application of concurrent similar employment doctrine. — Where the employee had not worked "substantially the whole of 13 weeks" prior to the employee's injury and there was no "similar employee," as required by paragraph (2), under the doctrine of concurrent similar employment, the employee's "full-time weekly wage" included both the full-time wages the employee earned with one employer and the part-time wages earned at another job. *O'Kelley v. Hall County Bd. of Educ.*, 243 Ga. App. 522, 532 S.E.2d 427 (2000).

Paragraph (2) refers to similar employee of same employer. — Although not explicit, the phrase "a similar employee in the same employment" in O.C.G.A. § 34-9-260(2) refers to a similar employee of the same employer. *Richards v. Wilkinson Shaving Co.*, 198 Ga. App. 45, 400 S.E.2d 344 (1990).

In determining a workers' compensation claimant's average weekly wage, there was no evidence to support an administrative law judge's finding that there were no "similar

employees"; thus, the case would be remanded for an evidentiary hearing on this issue. *Rheem Mfg. Co. v. Jackson*, 254 Ga. App. 454, 562 S.E.2d 524 (2002).

Evidence of the wages earned by similar employees of another employer was admissible and probative as circumstantial evidence of the wages that had been earned by the employer's similar employee, where the employer, whose records had been destroyed in a fire, did not counter the circumstantial evidence by some evidence showing that its similar employee had actually earned wages which would authorize an award of less than the maximum benefits. *Richards v. Wilkinson Shaving Co.*, 198 Ga. App. 45, 400 S.E.2d 344 (1990).

One-thirteenth of wages earned in 13 immediately preceding weeks constitutes average weekly wage. — The amount of compensation due under the workers' compensation provisions, where the claimant is entitled thereto, is to be calculated upon the average weekly wages of the employee, the average weekly wage being one-thirteenth of the wages earned in the 13 weeks immediately preceding the injury. *Atlantic Co. v. Moseley*, 215 Ga. 530, 111 S.E.2d 239 (1959), for comment, see 23 Ga. B.J. 132 (1960).

Employee must work substantially 13 full work weeks. — It must be shown that the employee worked during a calendar period of substantially 13 weeks. But it cannot be said that the employee worked during substantially 13 weeks when the record shows that out of that period there were three weeks in which the employee did not work at all, one week in which the employee worked one day, two weeks in which the employee worked two days each, and so on. *New Amsterdam Cas. Co. v. Brown*, 81 Ga. App. 790, 60 S.E.2d 245 (1950).

Wages paid by all similar, concurrent employers shall be included in calculating average weekly wages; the amount is not limited to wages earned in covered employment. *St. Paul Fire & Marine Ins. Co. v. Walters*, 141 Ga. App. 579, 234 S.E.2d 157 (1977).

Fact that total weekly hours worked represent incredibly long working day of no significance. — Where the employee may be said to have been steadily and concurrently engaged in three jobs, the total of which represented one employment, that of retail salesman, and the sum of the employee's salaries in these three positions constituted the employee's average weekly wages and

Determination of Compensation (Cont'd)
2. Working in Same Employment (Cont'd)

established the employee's total earning capacity at that time, the mere fact that the total hours worked per week — double the time of the average worker — represent an incredibly long working day has no significance. *St. Paul-Mercury Indem. Co. v. Idov*, 88 Ga. App. 697, 77 S.E.2d 327, cert. dismissed, 210 Ga. 256, 78 S.E.2d 799 (1953).

3. Not Working in Same Employment

Employee showing similar employee's wages cannot complain that award not based on own wages. — Where the evidence showed that the claimant did not work in claimant's employment during substantially the whole of 13 weeks immediately preceding the injury, and the claimant personally introduced evidence showing the wages of a similar employee in the same employment, who had worked substantially the whole of the 13 weeks, the claimant cannot complain that the superior court erred in affirming the board's award, basing the claimant's average weekly wages on that of the similar employee as prescribed by paragraph (2) of this section, instead of using the formula prescribed in paragraph (3) of this section. *Crowe v. St Paul-Mercury Indem. Co.*, 88 Ga. App. 482, 76 S.E.2d 848 (1953) (see O.C.G.A. § 34-9-260).

4. Full-time Weekly Wage

Full-time weekly wage used where other formulas inapplicable. — Since paragraphs (1) and (2) of this section were inapplicable in arriving at the average weekly wage under the provisions of that section, the director had no alternative but to apply the provisions of paragraph (3), so as to use the full-time weekly wage of the injured employee as the employee's average weekly wage; where wages are paid on an hourly basis, the full-time weekly wage is the wage per hour multiplied by the number of hours shown by the evidence to constitute a full-time work week for such employee under the employee's contract of employment. *Federated Mut. Implement & Hdwe. Ins. Co. v. Elliott*, 88 Ga. App. 266, 76 S.E.2d 568 (1953) (see O.C.G.A. § 34-9-260).

Stipulation by parties not binding. — Neither the administrative law judge, full board

nor superior court were bound by the parties' stipulation that O.C.G.A. § 34-9-260(3) was the applicable statutory provision for determining the average weekly wage. *Fran's Escort Serv. v. Strickland*, 208 Ga. App. 294, 430 S.E.2d 389 (1993).

Independent contractor who regularly had premiums deducted from the contractor's gross, rather than net, receipts was entitled to full-time wage benefits without deduction of production costs because it was not mandated by definition or otherwise that deductions be made before calculating an independent contractor's wage. *Little Suwannee Lumber Co. v. Fitzgerald*, 172 Ga. App. 144, 322 S.E.2d 347 (1984).

Procedure

Burden of proof is on the claimant to establish by sufficient competent evidence the basis upon which claimant's compensation is to be computed. *Hood v. Jackson*, 81 Ga. App. 465, 59 S.E.2d 45 (1950).

The burden of proof in a workers' compensation case is upon the claimant to show that the employee suffered an accidental injury which arose out of and in the course of claimant's employment. *General Accident, Fire & Life Ins. Co. v. Sturgis*, 136 Ga. App. 260, 221 S.E.2d 51 (1975).

Illegally precluding evidence authorizing contrary result harmful error. — Where an award is based on an erroneous legal theory which precludes the consideration of evidence that would authorize a contrary result, it is harmful error. *Insurance Co. of N. Am. v. Schwandt*, 151 Ga. App. 842, 261 S.E.2d 755 (1979).

Illustrative Cases

Compensation was based upon average weekly wage which claimant received for several months prior to the date of claimant's injury, without regard to any average based upon a full calendar year, even though claimant followed a practice of working only until claimant had earned \$5,000, rather than working a full year. *Thomaston Mills, Inc. v. Kierbow*, 177 Ga. App. 368, 339 S.E.2d 361 (1985).

Year-end bonus included in computation. — A minor employee's workers' compensation benefits were properly computed on the basis of the employee's hourly wages and a

year-end bonus, even though the bonus was admittedly given for income tax purposes. *United States Fid. & Guar. Co. v. Branch*, 178 Ga. App. 853, 344 S.E.2d 714 (1986).

Testimony sufficient for award based upon wages of similar employees. — Where the claimant had no knowledge or record of earnings sufficient to form any basis for calculating an award under this section, but there was testimony from other drivers for the cab company the worker worked for, to the effect that for a period of 13 weeks prior to the injury of the claimant they earned from \$20.00 to \$30.00 per week, this testimony was sufficient under paragraph (2) of that section for an award. *Fidelity & Cas. Co. v. Windham*, 87 Ga. App. 198, 73 S.E.2d 517 (1952), rev'd on other grounds, 209 Ga. 592, 74 S.E.2d 835 (1953) (see O.C.G.A. § 34-9-260).

Loss of earning capacity on account of partial disability not authorized by evidence. — Where the finding of fact of the hearing

director, approved by the board, to the effect that the claimant's average weekly wages were \$80.00 prior to the accident, was not authorized by the evidence and the law applicable thereto, but where the claimant's average weekly wages for the period of 13 weeks immediately prior to the accident were in fact \$52.02, and where the finding of fact of the hearing director, approved by the board, was authorized under the evidence, to the effect that the claimant had been able to earn as much as \$60.00 per week in claimant's employment since recovering from total disability, there was no compensable loss of earning capacity on account of partial disability under the provisions of former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262). *Lumbermen's Mut. Cas. Co. v. Cowart*, 81 Ga. App. 423, 59 S.E.2d 15 (1950).

RESEARCH REFERENCES

ALR. — Right to take rise or fall in wages since date of accident into account in fixing workmen's compensation, 2 ALR 1642; 92 ALR 1188.

Workmen's compensation: civil and criminal consequences of failure to insure, or otherwise secure compensation, 21 ALR 1428.

Workmen's compensation: anticipation of increase in wages of minor as an element in fixing compensation, 21 ALR 1531.

Workmen's compensation: deductions allowable in computing earnings as basis of compensation, 22 ALR 864.

Workmen's compensation: statutory phrase "incapacity for work" or the like, as including inability to obtain work following an injury, 33 ALR 115.

Accident and disability insurance: when insured deemed to be totally and continuously unable to transact all business duties, 37 ALR 151; 39 ALR3d 1026.

Workmen's compensation: rights and remedies where employee was injured by a third person's negligence, 37 ALR 838; 67 ALR 249; 88 ALR 665; 106 ALR 1040.

Workmen's compensation: illness or injury due to artificial temperature as compensable, 41 ALR 1124; 53 ALR 1095; 61 ALR 218.

Tips or gratuities as factor in determining amount of compensation under Workmen's Compensation Act, 75 ALR 1223.

Deduction for lost time in computing wages as basis for workmen's compensation, 82 ALR 889.

Board and lodging as a factor in determining the amount of compensation under Workmen's Compensation Act, 84 ALR 188.

Injured employee's capital interest in business conducted or served by him after injury as affecting amount of his compensation under Workmen's Compensation Act, 88 ALR 633.

Expense money as a factor in computing one's earnings, salary, or compensation as regards his status as an employee within the Workmen's Compensation Act or the amount of compensation under the act in event of his injury or death, 94 ALR 763.

Marriage as terminating right to future payments of workmen's compensation to injured female employee, 96 ALR 976.

Award under Workmen's Compensation Act as bar to or ground for reduction of claim under act of another state, 101 ALR 1445; 150 ALR 431; 169 ALR 1185.

Rate of discount to be considered in computing present value of future earnings or

benefits lost on account of death or personal injury, 105 ALR 234.

Basis for computation of compensation in case of employees who have been intermittently but not continuously employed prior to the injury, 112 ALR 1094.

Workmen's compensation: compensation for disfigurement, 116 ALR 712.

Workmen's compensation: crediting employer or insurance carrier with earnings of employee reemployed, or continued in employment, after injury, 175 ALR 725; 84 ALR2d 1108.

Workmen's compensation: crediting employer or insurance carrier with earnings of employee reemployed, or continued in employment, after injury, 84 ALR2d 1108.

Validity and construction of accident insurance policy provision making benefits

conditional on disability occurring immediately, or at once, or within specified time of accident, 39 ALR3d 1026.

Workers' compensation: bonus as factor in determining amount of compensation, 84 ALR4th 1055.

Workers' compensation: recovery for carpal tunnel syndrome, 14 ALR5th 1.

Workers' compensation: tips or gratuities as factor in determining amount of compensation, 16 ALR5th 191.

Presumption or inference that accidental death of employee engaged in occupation of manufacturing or processing arose out of and in course of employment, 47 ALR5th 801.

Excessiveness of adequacy of damages awarded for injuries to trunk or torso, or internal injuries, 48 ALR5th 129.

34-9-261. Compensation for total disability.

While the disability to work resulting from an injury is temporarily total, the employer shall pay or cause to be paid to the employee a weekly benefit equal to two-thirds of the employee's average weekly wage but not more than \$500.00 per week nor less than \$50.00 per week, except that when the weekly wage is below \$50.00, the employer shall pay a weekly benefit equal to the average weekly wage. The weekly benefit under this Code section shall be payable for a maximum period of 400 weeks from the date of injury; provided, however, that in the event of a catastrophic injury as defined in subsection (g) of Code Section 34-9-200.1, the weekly benefit under this Code section shall be paid until such time as the employee undergoes a change in condition for the better as provided in paragraph (1) of subsection (a) of Code Section 34-9-104. (Ga. L. 1920, p. 167, § 30; Ga. L. 1922, p. 185, § 3; Ga. L. 1923, p. 92, § 3; Code 1933, § 114-404; Ga. L. 1937, p. 528; Ga. L. 1949, p. 1357, § 1; Ga. L. 1955, p. 210, § 1; Ga. L. 1963, p. 141, § 5; Ga. L. 1968, p. 3, § 1; Ga. L. 1973, p. 232, § 3; Ga. L. 1974, p. 1143, § 3; Ga. L. 1975, p. 190, § 4; Ga. L. 1978, p. 2220, § 3; Ga. L. 1981, p. 842, § 2.1; Ga. L. 1982, p. 2485, §§ 1, 7; Ga. L. 1985, p. 727, § 8; Ga. L. 1990, p. 1409, § 14; Ga. L. 1992, p. 1942, § 21; Ga. L. 1994, p. 887, § 14; Ga. L. 1996, p. 1291, § 11; Ga. L. 1997, p. 1367, § 8; Ga. L. 1999, p. 817, § 7; Ga. L. 2000, p. 1321, § 6; Ga. L. 2001, p. 748, § 6; Ga. L. 2003, p. 364, § 6; Ga. L. 2005, p. 1210, § 7/HB 327; Ga. L. 2007, p. 616, § 6/HB 424.)

The 2007 amendment, effective July 1, 2007, in the first sentence, substituted "\$500.00" for "\$450.00" and substituted "\$50.00" for "\$45.00" twice; and inserted "that" in the middle of the second sentence.

Law reviews. — For article surveying de-

velopments in Georgia workers' compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981). For annual survey of workers' compensation, see 38 Mercer L. Rev. 431 (1986). For article, "Workers' Compensation," see 53 Mercer L.

Rev. 521 (2001). For survey article on workers' compensation law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For annual survey of law of worker's compensation, see 56 Mercer L. Rev. 479 (2004). For annual survey of workers' compensation law, see 57 Mercer L. Rev. 419 (2005).

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992). For note on the 1994 amendments of Code Sections 34-9-261 to 34-9-262 of this article, see 11 Ga. St. U.L. Rev. 204 (1994).

For comment criticizing Hartford Accident & Indem. Co. v. Braswell, 85 Ga. App. 487, 69 S.E.2d 385 (1952), see 4 Mercer L. Rev. 215 (1952). For comment on Hartford Accident & Indem. Co. v. Braswell, 85 Ga. App. 487, 69 S.E.2d 385 (1952), see 15 Ga. B.J. 229 (1952). For comment on Bethlehem Steel Co. v. Dempsey, 94 Ga. App. 408, 94 S.E.2d 749 (1956), see 20 Ga. B.J. 267 (1957). For comment discussing constitutional amendment to establish a subsequent injury fund under workers' compensation, see 13 Ga. St. B.J. 50 (1976).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

TOTAL DISABILITY

1. SCOPE OF SECTION
2. DEFINITIONS
3. COMPENSABLE INJURIES
4. TOTAL INCAPACITY FOR WORK
5. PERMANENCY
6. DETERMINATION OF COMPENSATION
7. EFFECT OF CLAIMANT'S DEATH

TEMPORARY PARTIAL DISABILITY

1. SCOPE OF SECTION
2. INCAPACITY FOR WORK
3. PERMANENCY
4. IMPAIRMENT OF EARNING CAPACITY

PERMANENT PARTIAL DISABILITY

1. SPECIFIC OR GENERAL DISABILITY
2. COMPENSABLE INJURIES
3. BENEFITS AWARDED

General Consideration

Editor's notes. — Many of the following notes were taken from Ga. L. 1937, p. 806, and former versions of Code 1933, §§ 114-404, 114-405, 114-406, and 114-408, which contained different language and provisions.

Term "weekly benefits" under O.C.G.A. § 34-9-82(a) does not refer to only those weekly benefits provided under O.C.G.A. §§ 34-9-261 and 34-9-262, which compensate for income loss, but also includes permanent partial disability benefits paid pursuant to O.C.G.A. § 34-9-263 so as to extend the statute of limitation period for filing a claim to two years after the date of the last such payment. *Mickens v. Western Prob. Det. Ctr.*, 244 Ga. App. 268, 534 S.E.2d 927 (2000).

Except for member loss, only actual total or partial disability compensated. — Except in cases involving the loss of or loss of use of a member, the workers' compensation provisions do not contemplate the payment of compensation to an employee except in cases of actual total or partial disability. *Pacific Employers Ins. Co. v. Shoemaker*, 105 Ga. App. 432, 124 S.E.2d 653 (1962).

Method of crediting overpayment not specifically set forth. — Claimant was not entitled to temporary total disability and temporary partial disability benefits where claimant had already collected a lump sum payment for permanent partial disability, and the method of crediting the overpayment was not set forth with sufficient specificity. *Universal Ceramics, Inc. v. Watson*, 177 Ga. App. 345, 339 S.E.2d 304 (1985).

General Consideration (Cont'd)

Provision of handicap-accessible housing. — O.C.G.A. § 34-9-200.1 permits the Workers' Compensation Board to require the employer to provide handicap-accessible housing to an injured employee. *Pringle v. Mayor of Savannah*, 223 Ga. App. 751, 478 S.E.2d 139 (1996).

Statute of limitations. — Administrative law judge correctly ruled that the statute of limitations did not begin to run until the last day on which income benefits were actually paid to the employee, including the penalty payments as income payments for such purposes. *Tube v. Hurston*, 261 Ga. App. 525, 583 S.E.2d 198 (2003).

Employer's burden of proof. — Where an employer failed to carry its burden of showing that the combination of workers' compensation benefits and a personal injury claim settlement fully and completely compensated an injured person for injuries sustained in a work related auto accident, a trial court's ruling that the employer was not entitled to recover on its subrogation lien for the workers' compensation benefits paid was affirmed. *Ga. Elec. Mbrshp. Corp. v. Garnto*, 266 Ga. App. 452, 597 S.E.2d 527 (2004).

Findings conclusive when supported by evidence. — Employee's weekly amount of temporary total disability benefits was properly increased to the amount that reflected two-thirds of what was deemed the weekly wage, pursuant to O.C.G.A. § 34-9-261, and the employee failed to show entitlement to more than that amount; accordingly, pursuant to the standard of review of the State Board of Workers' Compensation's appellate division, pursuant to O.C.G.A. § 34-9-103(a), and the substantial evidence standard to be applied on judicial review, the wage amount required affirmance. *Dallas v. Flying J, Inc.*, 279 Ga. App. 786, 632 S.E.2d 389 (2006).

Cited in *McBrayer v. Columbia Cas. Co.*, 44 Ga. App. 59, 160 S.E. 556 (1931); *Whitfield v. American Mut. Liab. Ins. Co.*, 44 Ga. App. 478, 162 S.E. 297 (1932); *Home Accident Ins. Co. v. McNair*, 44 Ga. App. 659, 162 S.E. 635 (1932); *Keel v. American Employers' Ins. Co.*, 44 Ga. App. 773, 162 S.E. 847 (1932); *Maryland Cas. Co. v. Smith*, 45 Ga. App. 82, 163 S.E. 247 (1932); *Travelers' Ins. Co. v. Reid*, 178 Ga. 399, 173 S.E. 376

(1934); *United States Fid. & Guar. Co. v. Edmondson*, 50 Ga. App. 157, 177 S.E. 352 (1934); *Columbia Cas. Co. v. Whiten*, 51 Ga. App. 42, 179 S.E. 630 (1935); *Tillman v. Moody*, 181 Ga. 530, 182 S.E. 906 (1935); *Fralish v. Royal Indem. Co.*, 53 Ga. App. 557, 186 S.E. 567 (1936); *London Guarantee & Accident Co. v. Boynton*, 54 Ga. App. 419, 188 S.E. 265 (1936); *Liberty Mut. Ins. Co. v. Holloway*, 58 Ga. 542, 199 S.E. 334 (1938); *Bituminous Cas. Co. v. Dyer*, 62 Ga. App. 279, 7 S.E.2d 415 (1940); *Castle v. Imperial Laundry & Dry Cleaning Co.*, 62 Ga. App. 184, 8 S.E.2d 547 (1940); *Googe v. United States Fid. & Guar. Co.*, 63 Ga. App. 678, 11 S.E.2d 803 (1940); *Dunn v. American Mut. Liab. Ins. Co.*, 64 Ga. App. 509, 13 S.E.2d 902 (1941); *City of Hapeville v. Preston*, 67 Ga. App. 350, 20 S.E.2d 202 (1942); *New Amsterdam Cas. Co. v. Davis*, 67 Ga. App. 518, 21 S.E.2d 256 (1942); *Maryland Cas. Co. v. Morris*, 68 Ga. App. 639, 22 S.E.2d 627 (1942); *London Guarantee & Accident Co. v. Pittman*, 69 Ga. App. 146, 25 S.E.2d 60 (1943); *Mays v. Glens Falls Ins. Co.*, 81 Ga. App. 478, 59 S.E.2d 286 (1950); *National Sur. Corp. v. Martin*, 86 Ga. App. 77, 71 S.E.2d 666 (1952); *Miller v. Hartford Accident & Indem. Co.*, 86 Ga. App. 503, 71 S.E.2d 782 (1952); *Refrigerated Transp. Co. v. Shirley*, 93 Ga. App. 334, 92 S.E.2d 26 (1956); *Rutland v. Vaughn*, 96 Ga. App. 499, 100 S.E.2d 609 (1957); *Yates v. United States Rubber Co.*, 100 Ga. App. 583, 112 S.E.2d 182 (1959); *St. Paul Fire & Marine Ins. Co. v. White*, 103 Ga. App. 607, 120 S.E.2d 144 (1961); *General Accident, Fire & Life Assurance Corp. v. Titus*, 104 Ga. App. 85, 121 S.E.2d 196 (1961); *Employers Mut. Liab. Ins. Co. v. Carlan*, 104 Ga. App. 170, 121 S.E.2d 316 (1961); *Travelers Ins. Co. v. Boyer*, 105 Ga. App. 830, 126 S.E.2d 280 (1962); *Surmiak v. Standard Accident Ins. Co.*, 106 Ga. App. 479, 127 S.E.2d 334 (1962); *Complete Auto Transit, Inc. v. Baggett*, 107 Ga. App. 415, 130 S.E.2d 271 (1963); *GMC v. Boggs*, 109 Ga. App. 839, 137 S.E.2d 569 (1964); *Hackel v. Fidelity & Cas. Co.*, 111 Ga. App. 190, 140 S.E.2d 923 (1965); *Pittsburgh Plate Glass Co. v. Bailey*, 111 Ga. App. 609, 142 S.E.2d 388 (1965); *Travelers Ins. Co. v. Floyd*, 114 Ga. App. 487, 151 S.E.2d 816 (1966); *Smith v. Liberty Mut. Ins. Co.*, 114 Ga. App. 755, 152 S.E.2d 782 (1966); *Turner v. Travelers Ins. Co.*, 114 Ga. App. 729, 152

S.E.2d 783 (1966); *Noles v. Mills*, 116 Ga. App. 560, 158 S.E.2d 261 (1967); *McMullen v. Liberty Mut. Ins. Co.*, 119 Ga. App. 410, 167 S.E.2d 360 (1969); *Mauldin v. Georgia Cas. Sur. Co.*, 119 Ga. App. 406, 167 S.E.2d 371 (1969); *Mull v. Aetna Cas. & Sur. Co.*, 226 Ga. 462, 175 S.E.2d 552 (1970); *Hopper v. Continental Ins. Co.*, 121 Ga. App. 850, 176 S.E.2d 109 (1970); *National Union Fire Ins. Co. v. Johnston*, 122 Ga. App. 332, 177 S.E.2d 125 (1970); *Home Indem. Co. v. Tanksley*, 123 Ga. App. 435, 181 S.E.2d 390 (1971); *Argonaut Ins. Co. v. Allen*, 123 Ga. App. 741, 182 S.E.2d 508 (1971); *Employers Mut. Liab. Ins. Co. v. Carter*, 125 Ga. App. 407, 188 S.E.2d 146 (1972); *Employers Mut. Liab. Ins. Co. v. Turner*, 126 Ga. App. 24, 189 S.E.2d 862 (1972); *New Hampshire Ins. Co. v. Riddle*, 126 Ga. App. 96, 190 S.E.2d 100 (1972); *Employers Commercial Union Ins. Co. v. Palmer*, 127 Ga. App. 54, 192 S.E.2d 439 (1972); *Continental Ins. Cos. v. Johnson*, 127 Ga. App. 826, 195 S.E.2d 284 (1973); *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668 (S.D. Ga. 1973); *Allstate Ins. Co. v. Prance*, 130 Ga. App. 735, 202 S.E.2d 832 (1974); *American Mut. Liab. Ins. Co. v. Williams*, 133 Ga. App. 257, 211 S.E.2d 193 (1974); *West Point Pepperell, Inc. v. Baggett*, 139 Ga. App. 813, 229 S.E.2d 666 (1976); *Florida Plywood, Inc. v. Boyette*, 140 Ga. App. 383, 231 S.E.2d 79 (1976); *Emory Univ. v. Cannup*, 144 Ga. App. 607, 241 S.E.2d 482 (1978); *Argonaut Ins. Co. v. Stephens*, 146 Ga. App. 601, 247 S.E.2d 126 (1978); *West Point Pepperell v. Green*, 148 Ga. App. 625, 252 S.E.2d 55 (1979); *Insurance Co. of N. Am. v. Hartl*, 149 Ga. App. 859, 256 S.E.2d 153 (1979); *Harrison v. Southern Talc Co.*, 245 Ga. 212, 264 S.E.2d 2 (1980); *Hart v. Owens-Illinois, Inc.*, 161 Ga. App. 831, 289 S.E.2d 544 (1982); *Coosa Baking Co. v. Thomas*, 165 Ga. App. 313, 299 S.E.2d 145 (1983); *GMC v. Summerous*, 170 Ga. App. 338, 317 S.E.2d 318 (1984); *Georgia Mental Health Inst. v. Padgett*, 171 Ga. App. 353, 319 S.E.2d 524 (1984); *J & M Transp. Co. v. Crowe*, 173 Ga. App. 13, 325 S.E.2d 412 (1984); *Price v. Lithonia Lighting Co.*, 256 Ga. 49, 343 S.E.2d 688 (1986); *Howard v. Superior Contractors*, 180 Ga. App. 68, 348 S.E.2d 563 (1986); *Smith v. Lockheed-Georgia Co.*, 185 Ga. App. 869, 366 S.E.2d 178 (1988); *Collins v. Grafton, Inc.*, 263 Ga. 441, 435 S.E.2d 37 (1993).

Total Disability

1. Scope of Section

Ga. L. 1920, p. 167, § 30 (see O.C.G.A. § 34-9-261) covered all total capacities, whether permanent or temporary, except total incapacity arising from the loss of one of the members enumerated in Ga. L. 1920, p. 167, § 32 (see O.C.G.A. § 34-9-263); in such case that section was exclusively applicable. *Georgia Cas. Co. v. Jones*, 156 Ga. 664, 119 S.E. 721 (1923); *Jones v. Georgia Cas. Co.*, 31 Ga. App. 196, 120 S.E. 558 (1923).

Duration of receipt of benefits. — An injured employee is entitled to receive maximum workers' compensation benefits in the form of income disability benefits until such time as there is a change in the employee's condition. *Hensel Phelps Constr. Co. v. Manigault*, 167 Ga. App. 599, 307 S.E.2d 79 (1983).

Section limits compensation paid as result of one injury. — The limit referred to in this section was the limit for which compensation may be paid as the result of one injury and not the limit that an employee can draw regardless of the number of injuries the employee may be unfortunate enough to suffer. *Bethlehem Steel Co. v. Dempsey*, 94 Ga. App. 408, 94 S.E.2d 749 (1956), for comment, see 20 Ga. B.J. 267 (1957). (see O.C.G.A. § 34-9-261).

O.C.G.A. § 34-9-263(b)(2) merely provides that an employee who suffers a single compensable injury shall not be entitled to permanent partial disability benefits for that injury, so long as the employee would be entitled to receive temporary total disability or temporary partial disability benefits as the result of that same injury. *Cedartown Nursing Home v. Dunn*, 174 Ga. App. 720, 330 S.E.2d 905 (1985).

Superior court erred in affirming the finding of the State Board of Workers' Compensation Appellate Division that a worker had suffered a change of condition for the worse, under O.C.G.A. § 34-9-104, not a new injury, and that the worker's change of condition claim against the employer was not time-barred by § 34-9-104(b); in fact, the worker's claim for additional TTD benefits was time-barred because the claim was filed more than two years after the employer last paid the worker TTD benefits. *Mech. Maint.*,

Total Disability (Cont'd)**1. Scope of Section (Cont'd)**

Inc. v. Yarbrough, 264 Ga. App. 181, 590 S.E.2d 148 (2003).

Compensation for separate injuries. — An injured employee is not precluded from receipt of compensation for a permanent partial physical disability, while at the same time receiving compensation for a temporary total or partial economic disability which results from an entirely separate injury. *Cedartown Nursing Home v. Dunn*, 174 Ga. App. 720, 330 S.E.2d 905 (1985).

2. Definitions

“Disability” means impairment of earning capacity. — Loss of earning power is the basis for an allowance of compensation. Incapacity has been said to exist by reason of inability to procure employment, as well as incapacity to perform the service. Compensation under the workers’ compensation provisions depends on diminution of earning capacity. The word “disability,” as used in the workers’ compensation law (see O.C.G.A. § 34-9-1 et seq.), means impairment of earning capacity. *Lumbermens Mut. Cas. Co. v. Cook*, 69 Ga. App. 131, 25 S.E.2d 67 (1943).

Change in condition. — If the injury comes within former Code 1933, § 114-404 or § 114-405 (see O.C.G.A. § 34-9-261 or O.C.G.A. § 34-9-262), a change in condition meant solely an economic change in condition occasioned by the employee’s return or ability to return to work for the same or any other employer. *Morrison Assurance Co. v. Hodges*, 130 Ga. App. 436, 203 S.E.2d 629 (1973).

“Disability” defined. — Word “disability,” as used in the workers’ compensation law (see O.C.G.A. § 34-9-1 et seq.), means the impairment of earning capacity. *Blue Bell Globe Mfg. Co. v. Baird*, 61 Ga. App. 298, 6 S.E.2d 83 (1939).

Under former Code 1933, § 114-404 or § 114-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262), “disability” meant not percentage of physical impairment but percentage of impairment of earning capacity. *Employers Liab. Assurance Corp. v. Hollifield*, 93 Ga. App. 51, 90 S.E.2d 681 (1955); *Hall v. Saint Paul-Mercury Indem. Co.*, 96 Ga. App. 567, 101 S.E.2d 94 (1957).

3. Compensable Injuries

Specific disability related to general disability. — Compensation may be awarded for a disability resulting from an injury to a specific member of the body as a change in condition from a related general disability stemming from an accident. There may be a change in condition from a specific to a general disability or vice versa, provided, of course, that the claimant’s total compensation did not exceed the limit prescribed by this section. *GMC, Fisher Body Div. v. Bowman*, 107 Ga. App. 335, 130 S.E.2d 163 (1963) (see O.C.G.A. § 34-9-261).

General disability related to specific disability. — If there was a causal relationship between claimant’s original specific disability under former Code 1933, § 114-709 (see O.C.G.A. § 34-9-104) and a later general disability, the claimant was entitled to compensation for total incapacity under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), irrespective of the fact that the result of the injury at first amounted merely to a specific disability. *Waters v. NABISCO*, 113 Ga. App. 170, 147 S.E.2d 676 (1966).

This section did not say in what part of body the injury must be located to produce total incapacity for work. *Travelers Ins. Co. v. Reid*, 54 Ga. App. 13, 186 S.E. 887 (1936) (see O.C.G.A. § 34-9-261).

No maximum disability benefits for injury to leg alone. — A disability and an injury to claimant’s leg alone, although serious and apparently permanent, would not entitle claimant to disability benefits for the maximum period or until a change of condition. *Globe Indem. Co. v. Brooks*, 84 Ga. App. 687, 67 S.E.2d 176 (1951).

Injury affecting other portions of body as well as specific member. — Where an employee suffers an injury involving a specific member which also affects other portions of the body and results in an incapacity to labor, the employee is entitled to compensation for the general disability. *Liberty Mut. Ins. Co. v. Hayes*, 117 Ga. App. 500, 160 S.E.2d 902 (1968).

Existing diabetic condition aggravated by leg injury. — Where a person received an injury which was confined solely to the leg and where, because of this injury, an existing diabetic condition was aggravated and there was a relation between this injury to the leg and the diabetic state, and from such a

condition the person was totally disabled, an award for total incapacity to work under this section was proper. *American Employers' Ins. Co. v. Haygood*, 48 Ga. App. 663, 173 S.E. 377 (1934) (see O.C.G.A. § 34-9-261).

Award proper where specific member injury disability cannot be determined. — Where the claimant had not been able to return to work, and hence was temporarily totally incapacitated to work, and the extent of claimant's disability could not be determined at that time in order to make a specific member injury award under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), the award was properly based on the provisions of former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261). *Blackwell v. Liberty Mut. Ins. Co.*, 128 Ga. App. 614, 197 S.E.2d 404 (1973).

Finding of multiple or superadded injuries authorized by evidence. — A finding that the disability of the claimant resulted from multiple or superadded injuries and was not confined entirely to a leg injury was authorized by the evidence. *Globe Indem. Co. v. Brooks*, 84 Ga. App. 687, 67 S.E.2d 176 (1951).

Psychological disability. — Psychological disability as a result of injuries received in an accident is compensable. *Liberty Mut. Ins. Co. v. Archer*, 108 Ga. App. 563, 134 S.E.2d 204 (1963).

Sufficiently disabling pain compensable. — While it is true that pain alone is not compensable, where the pain is so severe that the human mechanism must cease rather than bear the pain, a compensable loss occurs. *Bouldware v. Delta Corp.*, 160 Ga. App. 100, 286 S.E.2d 333 (1981).

Skin graft disability. — Claimant underwent an operation known as a cross leg flap grafting procedure in which tissue is taken from the healthy leg by raising a flap and suturing it onto the defective area; pins are placed in both legs, and the pins are connected with metal bolts such that both legs are immobilized. Where there was uncontradicted evidence of total disability to the right leg for this period, the board erred in finding no disability or incapacity to the leg. *Sanders v. Georgia-Pacific Corp.*, 181 Ga. App. 757, 353 S.E.2d 849 (1987).

Stroke. — Court did not err in affirming the denial of workers' compensation benefits because the evidence linking stress to the

employee's stroke was conflicting; the evidence supported the conclusion that stress—whether job-related or otherwise—did not contribute to the employee's condition. *Pitts v. City of Rome*, 256 Ga. App. 278, 568 S.E.2d 167 (2002).

4. Total Incapacity for Work

"Total incapacity" defined. — Incapacity for work resulting from an injury is total, not only so long as the injured employee is unable to do any work of any character, but also while the employee remains unable, as a result of the employee's injury, either to resume the employee's former occupation or to procure remunerative employment at a different occupation suitable to the employee's impaired capacity. *Austin Bros. Bridge Co. v. Whitmire*, 31 Ga. App. 560, 121 S.E. 345 (1924); *Lumbermens Mut. Cas. Co. v. Cook*, 69 Ga. App. 131, 25 S.E.2d 67 (1943); *United States Fid. & Guar. Co. v. Brazier*, 96 Ga. App. 743, 101 S.E.2d 625 (1957), later appeal, 99 Ga. App. 588, 109 S.E.2d 309 (1959); *Travelers Ins. Co. v. Boyer*, 102 Ga. App. 248, 116 S.E.2d 6 (1960); *GMC v. Harrison*, 107 Ga. App. 667, 131 S.E.2d 234 (1963).

Disability dependent on capacity to work. — One may have a physical disability which was less than 100 percent but which resulted in a total incapacity to work, thus constituting total disability under this section. *Brazier v. United States Fid. & Guar. Co.*, 99 Ga. App. 588, 109 S.E.2d 309 (1959) (see O.C.G.A. § 34-9-261).

Regardless of the percentage of an employee's physical disability, so long as the employee suffers a total impairment of the employee's earning capacity the employee is "totally disabled" and entitled to income compensation benefits under O.C.G.A. § 34-9-261. *Hensel Phelps Constr. Co. v. Manigault*, 167 Ga. App. 599, 307 S.E.2d 79 (1983); *Holt's Bakery v. Hutchinson*, 177 Ga. App. 154, 338 S.E.2d 742 (1985).

Inability to find any suitable work determining factor. — It is not the ability to perform the particular job in which one was engaged at the time of injury which is the determining factor, but rather whether the claimant's inability to find any work for which claimant is suited by training and experience is a result of the injury suffered. *United States Fid. & Guar. Ins. Co. v. Giles*,

Total Disability (Cont'd)**4. Total Incapacity for Work (Cont'd)**

177 Ga. App. 684, 340 S.E.2d 284 (1986).

Partially disabled employee unable to obtain work. — Where an employee has received an injury compensable under the compensation law, but is not thereby rendered totally unable to perform the work for which the employee was employed, but because of such partial incapacity the employee is not employed and is unable to obtain work, the employee has not suffered total incapacity compensable under that law. *GMC v. Harrison*, 107 Ga. App. 667, 131 S.E.2d 234 (1963).

Intention to retire from work. — Employee was entitled to continue to receive temporary total disability payments for a legitimate job-related injury past the employee's voluntary retirement date, even though the employee stated that the employee no longer intended to work after retirement even if the employee were able to. *Thomaston Mills, Inc. v. Kierbow*, 185 Ga. App. 57, 363 S.E.2d 276 (1987).

Total disability is the antithesis of partial disability. *Travelers' Ins. Co. v. Hurt*, 176 Ga. 153, 167 S.E. 175 (1932).

5. Permanency

Limitations in workers' compensation law are intended to apply only in cases where total incapacity is permanent, and the legislature never intended that an employee should continue to be compensated thereunder after the employee's disability has terminated and the employee has gone back to work. *Atlanta Coca Cola Bottling Co. v. Gates*, 225 Ga. 824, 171 S.E.2d 723 (1969).

Where claimant may be capable of holding certain positions, total incapacity not permanent. — Where the finding that the claimant was "totally incapacitated" was demanded, but a finding that the incapacity was permanent was not demanded, since it appeared from the evidence that there were certain positions that the claimant may have been capable of holding, the superior court erred in reversing the award of the full board, which found only temporary total incapacity. *United States Fid. & Guar. Co. v. Brazier*, 96 Ga. App. 743, 101 S.E.2d 625 (1957).

Award subject to modification. — Compensation for total disability is necessarily

open-ended according to the terms of O.C.G.A. § 34-9-261, which sets no ceiling on the number of weeks such benefits may be required to be paid. Such an award is, however, subject to modification on the application of either party based on a change in condition. *Diers v. House of Hines, Inc.*, 168 Ga. App. 282, 308 S.E.2d 611 (1983).

6. Determination of Compensation

Dependents' benefits computed by provisions in effect when deceased sustained accident. — The compensation benefits payable to dependents should be computed by the provisions which were in effect at the time the deceased sustained an accident. *Zurich Ins. Co. v. Spence*, 122 Ga. App. 464, 177 S.E.2d 503 (1970).

Incapacity referred to in O.C.G.A. § 34-9-261 is loss of earning capacity due to the injury and not due to the employee's unwillingness to work or to economic conditions of unemployment. *Scandrett v. Talmadge Farms, Inc.*, 174 Ga. App. 547, 330 S.E.2d 772 (1985); *Dasher v. City of Valdosta*, 217 Ga. App. 351, 457 S.E.2d 259 (1995).

Change in the employee's physical condition does not authorize a change in an employee's benefits from temporary total to permanent partial. In order to change an employee's benefits from those already being received under O.C.G.A. § 34-9-261 to those authorized under O.C.G.A. § 34-9-263, it is necessary to show that the employee's earning capacity has changed and that the employee no longer suffers a total impairment of the employee's earning capacity as the result of the employee's work-related injury. *Hensel Phelps Constr. Co. v. Manigault*, 167 Ga. App. 599, 307 S.E.2d 79 (1983).

Illegally precluded evidence authorizing contrary result harmful error. — Where an award is based on an erroneous legal theory which precludes the consideration of evidence that would authorize a contrary result, it is harmful error. *Insurance Co. of N. Am. v. Schwandt*, 151 Ga. App. 842, 261 S.E.2d 755 (1979).

Case remanded where evidence not considered in light of correct and applicable law. — Where it appears affirmatively that an award by the board is based upon an erroneous legal theory, and that for this reason the board has not considered all of the

evidence in the light of correct and applicable legal principles, the case would be remanded to the board for further findings. *Bouldware v. Delta Corp.*, 160 Ga. App. 100, 286 S.E.2d 333 (1981).

Findings conclusive when supported by evidence. — Where there is any evidence to support the conclusion of the administrative law judge of total disability in a workers' compensation proceeding, trial or appellate courts cannot substitute findings of fact. *Rains v. Ford Motor Co.*, 158 Ga. App. 808, 282 S.E.2d 346 (1981).

Burden on employer ceasing payments under unreversed award to show "change in condition." — Where a claimant, under a previous unreversed award, was, as a matter of law, totally incapacitated and entitled to compensation under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), and the employer ceased to make compensation payments, any hearing requested by the claimant was under former Code 1933, § 114-706 (see O.C.G.A. § 34-9-100), and the burden of showing a "change in condition" was on the employer. *Complete Auto Transit, Inc. v. Davis*, 101 Ga. App. 849, 115 S.E.2d 482 (1960).

Res adjudicata. — This section does not provide that a lump-sum settlement is res adjudicata. However, there are many decisions of the appellate courts to the effect that all facts of an agreement or award are res adjudicata except the condition of the claimant. *Miller v. Independent Life & Accident Ins. Co.*, 86 Ga. App. 538, 71 S.E.2d 705 (1952) (see O.C.G.A. § 34-9-261).

Any present adjudication under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) was not res judicata and binding on the parties in case of an alleged change in condition subsequently arising under former Code 1933, § 114-709 (see O.C.G.A. § 34-9-104). *Brazier v. United States Fid. & Guar. Co.*, 99 Ga. App. 588, 109 S.E.2d 309 (1959).

An approved agreement or an award of the board providing for the payment of compensation on account of total disability is res judicata as to the existence of such disability and the compensation due thereunder, until such time as it is set aside either by an approved final settlement receipt or by a subsequent award finding a change in condition. *Pacific Employers Ins. Co. v.*

Shoemake, 105 Ga. App. 432, 124 S.E.2d 653 (1962).

Federal wage and hour provisions. — For case illustrating applicability of federal wage and hour provisions to determine compensation for disability, see *Bituminous Cas. Corp. v. Sapp*, 196 Ga. 431, 26 S.E.2d 724, answer conformed to, 69 Ga. App. 669, 26 S.E.2d 726 (1943).

7. Effect of Claimant's Death

Surviving spouse allowed to receive payment for compensation deceased entitled to.

— Where a surviving spouse may properly be allowed to continue the prosecution of a claim originally filed by the deceased, and it is shown by the evidence and the law that on the day of death the deceased was entitled to compensation, the surviving spouse is entitled to receive the payment for such an award as the representative of the deceased's estate. *Hartford Accident & Indem. Co. v. Braswell*, 85 Ga. App. 487, 69 S.E.2d 385 (1952), for comment, see 4 Mercer L. Rev. 215 (1952); 15 Ga. B.J. 229 (1952).

If death results from causes other than injury sustained, benefits cease. — Practically all workers' compensation awards are contingent upon one or more of many varying conditions. Thus, an award for permanent total disability under this section was contingent upon the continuance of "total incapacity," and if death resulted from causes other than the injury sustained by the worker, the benefits cease. *Hartford Accident & Indem. Co. v. Fuller*, 102 Ga. App. 384, 116 S.E.2d 628 (1960) (see O.C.G.A. § 34-9-261).

Temporary Partial Disability

1. Scope of Section

If injury not to specific member, compensation determined by § 34-9-261 or § 34-9-262. — If the injury was not to a specific member, compensation must be determined under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) when the incapacity to work resulting from an injury was total, or under former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262), if the incapacity for work resulting from the injury was partial. *Employers Liab. Assurance Corp. v. Hollifield*, 93 Ga. App. 51, 90 S.E.2d 681 (1955).

Temporary Partial Disability (Cont'd)

1. Scope of Section (Cont'd)

Subsequent modification for partial incapacity following total incapacity final award.

— Where an award of the maximum amount for total incapacity was made under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), a subsequent modification for partial incapacity under former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262) was the later, and therefore the final, award. *Neal v. Insurance Co. of N. Am.*, 134 Ga. App. 854, 216 S.E.2d 626 (1975).

“Partial incapacity” defined. — A period of total incapacity may be followed by a period of “partial incapacity,” during which the injured employee is able both to procure and to perform work at some occupation suitable to the employee’s then existing capacity, but less remunerative than the work in which the employee was engaged at the time of the employee’s injury; that situation constitutes “partial incapacity.” *Austin Bros. Bridge Co. v. Whitmire*, 31 Ga. App. 560, 121 S.E. 345 (1924).

Worker receiving compensation for partial disability disqualified to receive unemployment compensation. — While under the provisions of Ga. L. 1937, p. 806 (see O.C.G.A. § 34-8-158) a worker who was receiving remuneration in the form of compensation for temporary partial disability under the workers’ compensation act was disqualified to receive unemployment compensation, there was no prohibition against the receipt by a worker of unemployment compensation for “total disability” within the meaning of the workers’ compensation law (see O.C.G.A. § 34-9-1 et seq.). *Utica Mut. Ins. Co. v. Pioda*, 90 Ga. App. 593, 83 S.E.2d 627 (1954) (decided under Ga. L. 1937, p. 806, as amended, prior to amendment by Ga. L. 1956, pp. 481, 485).

Estimate of future extent of disability cannot affect compensation payable. — Neither the estimate of the witnesses nor the conclusion of the director as to the time in the future to which the disability may extend affects the compensation payable. *Brazier v. United States Fid. & Guar. Co.*, 99 Ga. App. 588, 109 S.E.2d 309 (1959).

Finding of continuous disability not authorized where maximum period of compensation exhausted. — Where an employee was

injured in 1926 and received full compensation for total disability until February, 1927, and, until May, 1927, partial compensation due to a change in condition, the employee’s application for additional compensation in October, 1935, could not authorize a finding of continuous disability since October, 1934, since under the workers’ compensation law (see O.C.G.A. § 34-9-1 et seq.) the employee’s maximum period of compensation was exhausted prior to that date. *Travelers Ins. Co. v. Anderson*, 185 Ga. 105, 194 S.E. 193 (1937).

Total loss of use of both legs requires compensation as for total, not partial, incapacity; further, where the claimant suffered only a 60 percent loss of use to each of claimant’s legs, the award of compensation for “incapacity,” rather than for an “industrial handicap,” was not error. *Armour & Co. v. Walker*, 99 Ga. App. 64, 107 S.E.2d 691 (1959).

2. Incapacity for Work

If employee not rendered totally unable to perform work, compensation for partial, not total, disability. — If the evidence demanded a finding that the employee was not by reason of the employee’s physical impairment totally disabled from engaging in remunerative employment, compensation should be based on former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262) for partial disability, rather than on former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) for total disability. *GMC v. Harrison*, 107 Ga. App. 667, 131 S.E.2d 234 (1963).

Employee physically able to perform remunerative labor. — If the employee, while physically able to perform remunerative labor at an occupation different from that in which the employee was injured, fails to accept employment suitable to such impaired condition when it is offered the employee, or does not obtain such employment by reason of the employee’s unwillingness so to do, or by reason of economic or other conditions in no way chargeable to or occasioned by the employee’s injury, the employee is not to be considered as totally disabled, and the amount of compensation payable to the employee is limited to two-thirds of the difference between the employee’s average weekly wages before the injury, and the average weekly wages which

the employee is capacitated to earn thereafter. *General Accident Fire & Life Assurance Corp. v. McDaniel*, 44 Ga. App. 40, 160 S.E. 554 (1931).

Where there was no evidence that the plaintiff's condition worsened after plaintiff's job terminated at the close of the season so that plaintiff could not resume plaintiff's former or similar employment, plaintiff was entitled only to an award for partial disability. *City of Augusta v. Rosier*, 119 Ga. App. 192, 166 S.E.2d 378 (1969).

Total disability cannot be due to unwillingness or inability to find different employment. — In order for disability to be accounted total, the inability of an employee to procure and to perform work at a different occupation suitable to the employee's impaired physical condition must not be due merely to a lack of diligent effort on the part of the employee to obtain such other employment, or to the employee's unwillingness to accept such different employment, or to conditions of general unemployment which are disconnected with the employee's injury, such as might render the employee unable to find any such different employment. *General Accident Fire & Life Assurance Corp. v. McDaniel*, 44 Ga. App. 40, 160 S.E. 554 (1931).

Total disability results from inability to do any work or to procure any suitable remunerative employment. — The incapacity for work resulting from injury is total not only so long as the injured employee is unable to do any work of any character, but also while the employee remains unable, as a result of the employee's injury, either to resume the employee's former occupation or to procure remunerative employment at a different occupation suitable to the employee's impaired capacity. *Employers Liab. Assurance Corp. v. Hollifield*, 93 Ga. App. 51, 90 S.E.2d 681 (1955).

The incapacity is total so long as the injured employee, by reason of and on account of the employee's injury, is unable to do any work of any character, and so long as the employee remains, for such reason, unable either to resume the employee's former occupation or to procure any other sort of remunerative employment suitable to the employee's impaired physical condition. *City of Augusta v. Rosier*, 119 Ga. App. 192, 166 S.E.2d 378 (1969).

Claimant losing job because of plant closing, not injury, cannot apply for increased compensation. — Where the claimant applied for an increase in compensation on account of an alleged change in conditions, and where it appeared, without dispute, that the claimant had been engaged in remunerative labor up to a few days before the application, and had lost the employee's position because of the closing down of the plant in which the employee was employed, and not by reason of the employee's previous injury, this finding did not authorize an award of compensation as for total disability. *General Accident Fire & Life Assurance Corp. v. McDaniel*, 44 Ga. App. 40, 160 S.E. 554 (1931).

Partial incapacity terminates when employee again becomes capable of earning same wage. — Except as specifically provided in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), partial incapacity terminated when the employee again becomes capable of earning the same wage the employee earned before the employee's injury, whether at the same or at a different occupation, and without regard to personal inconveniences as may result to the employee solely from the employee's injury and which are not caused or aggravated by the employee's new employment. *Austin Bros. Bridge Co. v. Whitmire*, 31 Ga. App. 560, 121 S.E. 345 (1924).

Temporary partial disability when claimant accepted lesser paying work. — Administrative law judge (ALJ) should have considered a claimant's entitlement to temporary partial disability benefits in a case where the claimant was fired from the job at which the disabling injury was incurred and, after a diligent job search, the claimant took a lesser paying job as a waitress for a continuing disability incident to the compensable one; the ALJ improperly imposed an additional burden of proof on the claimant by requiring the claimant to prove that the acceptance of lower-paying employment was proximately caused by the compensable work-related injury. *Roberts v. Jones Co.*, 277 Ga. App. 517, 627 S.E.2d 139 (2006).

3. Permanency

Use of words "temporary" or "permanent" have no legal significance in determining amount of award in either former Code

Temporary Partial Disability (Cont'd)**3. Permanency (Cont'd)**

1933, § 114-404 or § 114-405 (see O.C.G.A. § 34-9-261 or O.C.G.A. § 34-9-262). *Brazier v. United States Fid. & Guar. Co.*, 99 Ga. App. 588, 109 S.E.2d 309 (1959).

Question of whether maximum improvement is reached at time of hearing has no effect on the award at that time; the award goes into effect and is res judicata until the condition changes and a new agreement, or a request for a hearing based on a change of condition is made. *Brazier v. United States Fid. & Guar. Co.*, 99 Ga. App. 588, 109 S.E.2d 309 (1959).

4. Impairment of Earning Capacity

Incapacity is loss of earning capacity due to injury. — The incapacity referred to in former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262) was loss of earning capacity due to the injury and not due to the employee's unwillingness to work or to the economic conditions of unemployment. *Federated Mut. Implement & Hdwe. Ins. Co. v. Whiddon*, 88 Ga. App. 12, 75 S.E.2d 830 (1953).

Provisions allow compensation based on impairment. — Former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262) allowed compensation for any injury by an accident arising out of and in the course of the employment of the injured employee, based on the extent of the impairment of the employee's earning capacity, whether partial or total, caused by the injury. *Blue Bell Globe Mfg. Co. v. Baird*, 61 Ga. App. 298, 6 S.E.2d 83 (1939).

A physical disability not specified in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), resulting in total or partial loss of earning capacity, was compensable under former Code 1933, § 114-404 or § 114-405 (see O.C.G.A. § 34-9-261 or O.C.G.A. § 34-9-262). *United States Cas. Co. v. Young*, 104 Ga. App. 373, 121 S.E.2d 680 (1961).

Measurement of economic disability. — It has been held that the disability for which compensation is payable under former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262) was the economic disability which the employee suffered as the result of an injury; this economic disability was to be measured solely by the difference

in the earning capacity of the employee before and after the injury. *Ocean Accident & Guar. Co. v. Hulsey*, 105 Ga. App. 479, 125 S.E.2d 115 (1962).

Impairment total where claimant unable to procure any work. — Where the hearing director found as a fact that the claimant sustained an injury resulting in a 30 percent disability for performing any regular gainful employment involving stooping or bending, and the record failed to show that the claimant was fitted for, was offered, or could have procured, any work other than the claimant's previous work which did involve stooping and bending, a finding was authorized and was made by the board that a disability for this type of work existed, and a finding was demanded under the evidence that the disability, if it existed, resulted in a total impairment of earning capacity. *Employers Liab. Assurance Corp. v. Hollifield*, 93 Ga. App. 51, 90 S.E.2d 681 (1955).

Pain itself was not compensable; disability was not compensable under this section regardless of pain except where there was a decrease in monetary return. *Williamson v. Aetna Cas. & Sur. Co.*, 101 Ga. App. 220, 113 S.E.2d 208 (1960); *Davis v. Fireman's Fund Ins. Co.*, 106 Ga. App. 519, 127 S.E.2d 481 (1962) (see O.C.G.A. § 34-9-261).

Treatment of outside income not attributable to earning capacity. — Income received by the employee from outside sources and in no way attributable to the employee's earning capacity is not to be taken into account in fixing the amount of compensation for the period of disability which the employee suffers. *Ocean Accident & Guar. Co. v. Hulsey*, 105 Ga. App. 479, 125 S.E.2d 115 (1962).

Error to shift payments to partial disability where wages employee able to earn not determined. — It was error to shift payments from total disability under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) to partial disability under former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262) where there had been no finding or determination made as to the weekly wages which the claimant was able to earn upon which an intelligent calculation can be made of the compensation to be paid, even though the evidence on a change of condition showed an amelioration of the employee's condition and that the employee was no longer totally

disabled. *Hardeman v. Liberty Mut. Ins. Co.*, 124 Ga. App. 710, 185 S.E.2d 789 (1971).

Permanent Partial Disability

1. Specific or General Disability

Section distinguished from § 34-9-263. — The compensation allowable under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) for a total incapacity was distinguished from a disability, such as the loss of a member for which compensation was allowed under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263). *Bethlehem Steel Co. v. Dempsey*, 94 Ga. App. 408, 94 S.E.2d 749 (1956), for comment, see 20 Ga. B.J. 267 (1957).

Former Code 1933, §§ 114-404 and 114-406 (see O.C.G.A. §§ 34-9-261 and 34-9-263) were not mutually exclusive. *Employers Mut. Liab. Ins. Co. v. Derwael*, 105 Ga. App. 54, 123 S.E.2d 345 (1961).

Under Ga. L. 1923, p. 92, § 3 (see O.C.G.A. § 34-9-263), permanent partial industrial handicaps shall be compensated by payments for periods specified. — The compensation for permanent partial industrial handicaps shall be as specified, and the compensation shall be in lieu of all other compensation. *Home Accident Ins. Co. v. McNair*, 173 Ga. 566, 161 S.E. 131 (1931), answer conformed to, 44 Ga. App. 659, 162 S.E. 635 (1932).

Former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) was inapplicable to any injury included in schedule of specific injuries in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), compensation for which, in the amounts provided therein, was in lieu of any other compensation. *New Amsterdam Cas. Co. v. Brown*, 81 Ga. App. 790, 60 S.E.2d 245 (1950).

Compensation for specific members determined by § 34-9-263. — Where an employee suffers an injury which results in a partial or total disability (industrial handicap) to one member of the employee's body only, the employee is entitled only to compensation for an industrial handicap. *Armour & Co. v. Walker*, 99 Ga. App. 64, 107 S.E.2d 691 (1959).

When an agreement showed that the claimant's injury was to a specific member, the period for which compensation was pay-

able was determined by former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263). *Nation v. Pacific Employers Ins. Co.*, 112 Ga. App. 380, 145 S.E.2d 265 (1965).

Superadded injury or disease. — Where an employee received an injury only to a specific member, as specified in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), and there was no superadded injury or disease affecting other portions of the employee's body, as a result of which the employee becomes totally disabled, the employee's compensation was determined by that section, and the employee was not entitled to receive the compensation for total incapacity to work allowed by former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), for other injuries in addition to the specific compensation for total or partial loss of use of the member. *London Guarantee & Accident Co. v. Ritchey*, 53 Ga. App. 628, 186 S.E. 863 (1936).

A disability resulting from loss or loss of use of a specific member, where there was no superadded injury or disease affecting other portions of the body, should be computed under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), providing schedules of compensation relating to loss of specific members, rather than former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), providing for total incapacity to work, and this was true even though the claimant is totally incapacitated at the time. *Globe Indem. Co. v. Brooks*, 84 Ga. App. 687, 67 S.E.2d 176 (1951).

Where an employee suffers an injury to a specific member which causes a superadded incapacity due to some cause produced by the injury to the specific member, resulting in an incapacity to labor, compensation is not so limited. *Armour & Co. v. Walker*, 99 Ga. App. 64, 107 S.E.2d 691 (1959).

Where one sustains a disabling injury to a specific member of the body and thereafter the condition of other parts of the body change because of the accident so that there is a generalized disability, as contrasted with a specific disability to a body member such as an arm or leg, upon an application for compensation based upon such a change in condition from a specific to a general disability, additional compensation may be awarded. *GMC, Fisher Body Div. v. Bowman*,

Permanent Partial Disability (Cont'd)**1. Specific or General Disability (Cont'd)**

107 Ga. App. 335, 130 S.E.2d 163 (1963).

Where there is a permanent loss of use, either total or partial, resulting from an injury to a specific member, compensation may be had under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), and this was exclusive of compensation under former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262), unless in consequence of the injury to the member the claimant suffered a superadded injury or disease affecting other portions of claimant's body, as a result of which claimant was either totally or partially disabled to work at gainful employment, in which event compensation was payable under those previous provisions. *Clark v. Liberty Mut. Ins. Co.*, 108 Ga. App. 806, 134 S.E.2d 534 (1963).

A superadded injury or disease is one which occurs to a specific member of the body subsequent to a job-related injury and affects other portions of the body, resulting in the claimant's total disability and, thus, eligibility for compensation under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) for total incapacity to work, rather than under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) relating to specific member injuries. *Bond v. Employers Ins. Co.*, 154 Ga. App. 244, 268 S.E.2d 354 (1980).

Former Code 1933, § 114-408 (see O.C.G.A. § 34-9-241) dealt with second specific member injuries stated in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) and not to injuries to the body as a whole, which come within the provisions. *Minter Naval Stores v. Bell*, 133 Ga. App. 114, 210 S.E.2d 331 (1974) (decided under former Code 1933, § 114-408, prior to revision by Ga. L. 1978, p. 2220, § 6).

Employer must have notice before issuing award. — Although employee had applied for temporary total disability, the administrative law judge awarded permanent partial disability, which was in error and properly reversed, as the employer was not given notice that the employee was seeking permanent partial disability benefits. *Holliday v. Jacky Jones Lincoln-Mercury*, 251 Ga. App. 493, 554 S.E.2d 286 (2001).

2. Compensable Injuries

Related injuries from identical accident compensable. — Two related injuries, such as an injury to the back which first became disabling, and an injury to the leg, which stems from the back injury but was not disabling at first, may properly be held to result from the identical accident and may be compensated for, even though the disability from both does not develop, arise, or become known at the same time. *GMC, Fisher Body Div. v. Bowman*, 107 Ga. App. 335, 130 S.E.2d 163 (1963).

Injury to leg compensated under § 34-9-263. — Where an injury sustained by an employee is confined solely to the employee's leg, the employee was entitled, under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) to compensation. *Travelers' Ins. Co. v. Reid*, 49 Ga. App. 317, 175 S.E. 414 (1934), later appeal, 54 Ga. App. 13, 186 S.E. 887 (1936).

Where an injury is sustained by an employee under the provisions of the workers' compensation provisions which results in total loss of use of a leg and total incapacity to work at the time, the injury is scheduled under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263). *National Sur. Corp. v. Nelson*, 99 Ga. App. 95, 107 S.E.2d 718 (1959).

Disability confined to two fingers. — Where disability was confined to two fingers of the left hand, claimant was entitled to receive compensation based only on a specific member injury. *Nance v. Argonaut Ins. Co.*, 143 Ga. App. 537, 239 S.E.2d 156 (1977).

Loss to trumpet part of ear. — Compensation payable to a claimant who lost the trumpet part of claimant's ear in an accident under the workers' compensation provisions was not governed by former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), inasmuch as that section related to loss of bodily members and loss of hearing in both ears, and it has been held that an ear was not embraced in the term "member," but whatever compensation the claimant was entitled to must be determined by former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), relating to total incapacity, and former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262), relating to partial incapacity. *Lumbermens Mut. Cas. Co. v. Cook*, 69 Ga. App. 131, 25

S.E.2d 67 (1943) (decided under former Code 1933, § 114-406, prior to revision by Ga. L. 1971, p. 795, § 1).

3. Benefits Awarded

Provisions provide for different bases for compensation. — Former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262) provide for compensation on the basis of a decrease in earnings; former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) provided compensation for the loss, or loss of use, of a member, irrespective of the earning ability of a claimant after an accident was sustained. *Roddy v. Hartford Accident & Indem. Co.*, 65 Ga. App. 632, 16 S.E.2d 81 (1941).

Care should be taken in construing the word "disability," which in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) was specifically measured by the specific physical impairment, while in former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262) it was measured by the decreased economic return resulting from a general physical impairment. *Brazier v. United States Fid. & Guar. Co.*, 99 Ga. App. 588, 109 S.E.2d 309 (1959).

Claimant suffering from physical impairment not entitled to compensation for member loss. — If the claimant is suffering physical impairment resulting from claimant's injury claimant is not entitled to compensation for loss of use of any member, but is entitled to compensation for whatever loss of earning capacity claimant has sustained as a permanent result of the accident. *Employers Liab. Assurance Corp. v. Hollifield*, 93 Ga. App. 51, 90 S.E.2d 681 (1955).

Compensation for injury to body as whole is determined by claimant's loss of earning capacity and not the percent of physical disability. *Minter Naval Stores v. Bell*, 133 Ga. App. 114, 210 S.E.2d 331 (1974).

Compensation paid for specific member injury considered in total disability award. — Where the employee is totally disabled, the employee may not receive an award of compensation for total disability under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) without any consideration for the weeks during which compensation had theretofore been paid for specific member injury under former Code 1933, § 114-406

(see O.C.G.A. § 34-9-263). *Benton v. United States Cas. Co.*, 118 Ga. App. 804, 165 S.E.2d 473 (1968).

Compensation paid for specific member injury considered in temporary partial disability award. — Where, on the application of the claimant, the board makes an award finding a change in the claimant's condition from an industrial handicap, as provided for in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), to a partial incapacity to work, as provided by former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262), the board was authorized to order compensation paid under the former provisions during the partial incapacity, even though the benefits previously awarded under the preceding provision had been paid in a lump-sum settlement, and the period represented had not expired; and the board properly deducted from the maximum period allowed for the partial disability the period during which the claimant was paid for total incapacity, and the time during which claimant had no incapacity, as found by the board, and the interval for which claimant was paid the lump-sum settlement on account of the industrial handicap under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263). *Hardware Mut. Cas. Co. v. Wilson*, 72 Ga. App. 574, 34 S.E.2d 634 (1945).

Award for total disability res judicata. — An award based on an agreement between an employer and an employee for maximum weekly payments "until terminated in accordance with the provisions of the Workers' Compensation Act," showing on its face that the employee received multiple injuries, must be construed as an award under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) for total disability, rather than one under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) for an injury to a specific member, and such an award is res judicata. Accordingly, where a later award is made for permanent disability of a specific member, the employer is not entitled to credit against the later award for weekly payments made under the original award, even though at the hearing there is no evidence that there has been any disability from any injury other than that to the specific member. *St. Paul Fire & Marine Ins. Co. v. Durden*, 104 Ga. App. 541, 122 S.E.2d 262 (1961).

OPINIONS OF THE ATTORNEY GENERAL

Injured employee receiving additional benefits not ineligible for total incapacity rating. — The fact that an injured employee is receiving additional benefits would not make the employee ineligible for a total incapacity rating under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), and switch the employee to eligibility for partial

disability under former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262), since partial incapacity was determined by the difference between the wages which an employee earned before the employee's injury and those wages which the employee was able to earn thereafter. 1971 Op. Att'y Gen. No. 71-136.

RESEARCH REFERENCES

ALR. — Accident and disability insurance: when insured deemed to be totally and continuously unable to transact all business duties, 37 ALR 151; 39 ALR3d 1026.

What amounts to total incapacity within Workmen's Compensation Acts, 67 ALR 785; 98 ALR 729.

Workmen's compensation: right to compensation for temporary total disability in addition to compensation for permanent partial disability, 88 ALR 385.

Workmen's compensation: right of employer or insurance carrier to discontinue, without an order or ruling in that regard, payments provided for by agreement, 129 ALR 418.

What constitutes total or permanent disability within the coverage of disability insurance coverage issued to farmer or agricultural worker, 26 ALR3d 714.

Validity and construction of accident insurance policy provision making benefits conditional on disability occurring immediately, or at once, or within specified time of accident, 39 ALR3d 1026.

Admissibility of opinion evidence as to employability on issue of disability in health and accident insurance and workers' compensation cases, 89 ALR3d 783.

Compensability of specially equipped van or vehicle under workers' compensation statutes, 63 ALR5th 163.

34-9-262. Compensation for temporary partial disability.

Except as otherwise provided in Code Section 34-9-263, where the disability to work resulting from the injury is partial in character but temporary in quality, the employer shall pay or cause to be paid to the employee a weekly benefit equal to two-thirds of the difference between the average weekly wage before the injury and the average weekly wage the employee is able to earn thereafter but not more than \$334.00 per week for a period not exceeding 350 weeks from the date of injury. (Ga. L. 1920, p. 167, § 31; Code 1933, § 114-405; Ga. L. 1949, p. 1357, § 2; Ga. L. 1955, p. 210, § 2; Ga. L. 1963, p. 141, § 6; Ga. L. 1968, p. 3, § 2; Ga. L. 1973, p. 232, § 4; Ga. L. 1974, p. 1143, § 4; Ga. L. 1975, p. 190, § 2; Ga. L. 1978, p. 2220, § 4; Ga. L. 1985, p. 727, § 9; Ga. L. 1990, p. 1409, § 15; Ga. L. 1992, p. 1942, § 22; Ga. L. 1994, p. 887, § 15; Ga. L. 1997, p. 1367, § 9; Ga. L. 1999, p. 817, § 8; Ga. L. 2000, p. 1321, § 6; Ga. L. 2001, p. 748, § 7; Ga. L. 2003, p. 364, § 7; Ga. L. 2005, p. 1210, § 8/HB 327; Ga. L. 2007, p. 616, § 7/HB 424.)

The 2007 amendment, effective July 1, 2007, deleted a comma following "thereafter" and substituted "\$334.00" for "\$300.00" near the end of this Code section.

Law reviews. — For article surveying Georgia cases in the area of workers' compensation from June 1979 through May 1980, see 32 Mercer L. Rev. 261 (1980). For

article, "Workers' Compensation," see 53 Mercer L. Rev. 521 (2001). For survey article on workers' compensation law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For annual survey of law of worker's compensation, see 56

Mercer L. Rev. 479 (2004). For annual survey of workers' compensation law, see 57 Mercer L. Rev. 419 (2005).

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SCOPE OF SECTION

DEFINITIONS

INCAPACITY FOR WORK

PERMANENCY

IMPAIRMENT OF EARNING CAPACITY

General Consideration

Editor's notes. — Many of the following notes were taken from former versions of Code 1933, §§ 114-404, 114-405, and 114-406, which contained different language and provisions.

Term "weekly benefits" under O.C.G.A. § 34-9-82(a) does not refer to only those weekly benefits provided under O.C.G.A. §§ 34-9-261 and 34-9-262, which compensate for income loss, but also includes permanent partial disability benefits paid pursuant to O.C.G.A. § 34-9-263 so as to extend the statute of limitation period for filing a claim to two years after the date of the last such payment. *Mickens v. Western Prob. Det. Ctr.*, 244 Ga. App. 268, 534 S.E.2d 927 (2000).

Different compensation for separate injuries. — An injured employee may receive compensation for a permanent partial physical disability, while at the same time receiving compensation for a temporary partial economic disability for separate injuries to the same part of the body. *City of Atlanta v. Gentry*, 184 Ga. App. 8, 360 S.E.2d 611 (1987).

O.C.G.A. § 34-9-262 is midway between "total disability" (O.C.G.A. § 34-9-261) and "permanent partial disability" (O.C.G.A. § 34-9-263) and involves both economic and medical evaluation. *Blevins v. Atlantic Steel Co.*, 172 Ga. App. 557, 323 S.E.2d 861 (1984); *Holt's Bakery v. Hutchinson*, 177 Ga. App. 154, 338 S.E.2d 742 (1985).

Claimant was not entitled to temporary total disability and temporary partial disability benefits where claimant had already col-

lected a lump sum payment for permanent partial disability, and the method of crediting the overpayment was not set forth with sufficient specificity. *Universal Ceramics, Inc. v. Watson*, 177 Ga. App. 345, 339 S.E.2d 304 (1985).

Superior court erred in affirming the finding of the state board of workers' compensation appellate division that a worker suffered a change of condition for the worse, under O.C.G.A. § 34-9-104, not a new injury, and that the worker's change of condition claim against the employer was not time-barred by § 34-9-104 (b); in fact, the worker's claim for additional TTD benefits was time-barred because the claim was filed more than two years after the employer last paid the worker TTD benefits. *Mech. Maint., Inc. v. Yarbrough*, 264 Ga. App. 181, 590 S.E.2d 148 (2003).

Statute of limitations. — Administrative law judge correctly ruled that the statute of limitations did not begin to run until the last day on which income benefits were actually paid to the employee, including the penalty payments as income payments for such purposes. *Tube v. Hurston*, 261 Ga. App. 525, 583 S.E.2d 198 (2003).

Surviving spouse properly awarded benefits. — Because sufficient evidence supported a finding that the decedent's tinnitus resulted from an automobile accident which occurred in the course of employment, and that such deprived the decedent of normal judgment, the trial court did not err in awarding the surviving spouse both outstanding TTD and statutory death benefits based on the decedent's suicide. Moreover:

General Consideration (Cont'd)

(1) the question of whether the decedent's suicide was a reasonably foreseeable result of the automobile accident was irrelevant; and (2) any finding that the decedent's suicide constituted an unforeseeable intervening cause would serve only to relieve the tortfeasor of liability, but would not bear on the question of whether the death was compensable. *Bayer Corp. v. Lassiter*, 282 Ga. App. 346, 638 S.E.2d 812 (2006).

Cited in *Maryland Cas. Co. v. Smith*, 45 Ga. App. 82, 163 S.E. 247 (1932); *Wilkins v. Travelers Ins. Co.*, 52 Ga. App. 142, 182 S.E. 628 (1935); *London Guarantee & Accident Co. v. Boynton*, 54 Ga. App. 419, 188 S.E. 265 (1936); *Moore v. American Liab. Ins. Co.*, 67 Ga. App. 259, 19 S.E.2d 763 (1942); *London Guarantee & Accident Co. v. Pittman*, 69 Ga. App. 146, 25 S.E.2d 60 (1943); *United States Fid. & Guar. Co. v. Garner*, 76 Ga. App. 87, 45 S.E.2d 109 (1947); *Hartford Accident & Indem. Co. v. Brennan*, 85 Ga. App. 163, 68 S.E.2d 170 (1951); *Allstate Ins. Co. v. Starnes*, 95 Ga. App. 274, 97 S.E.2d 624 (1957); *Yates v. United States Rubber Co.*, 100 Ga. App. 583, 112 S.E.2d 182 (1959); *Sears, Roebuck & Co. v. Wilson*, 215 Ga. 746, 113 S.E.2d 611 (1960); *St. Paul Fire & Marine Ins. Co. v. White*, 103 Ga. App. 607, 120 S.E.2d 144 (1961); *United States Fid. & Guar. Co. v. Wilson*, 103 Ga. App. 674, 120 S.E.2d 198 (1961); *Cardin v. Riegel Textile Corp.*, 217 Ga. 797, 125 S.E.2d 62 (1962); *Travelers Ins. Co. v. Boyer*, 105 Ga. App. 830, 126 S.E.2d 280 (1962); *Complete Auto Transit, Inc. v. Davis*, 106 Ga. App. 369, 126 S.E.2d 909 (1962); *Collins v. Kiker*, 106 Ga. App. 513, 127 S.E.2d 489 (1962); *Employers Mut. Liab. Ins. Co. v. Dyer*, 108 Ga. App. 623, 134 S.E.2d 49 (1963); *Liberty Mut. Ins. Co. v. Archer*, 108 Ga. App. 563, 134 S.E.2d 204 (1963); *GMC v. Boggs*, 109 Ga. App. 839, 137 S.E.2d 569 (1964); *Waters v. NABISCO*, 113 Ga. App. 170, 147 S.E.2d 676 (1966); *Gulf Am. Fire & Cas. Co. v. Herndon*, 113 Ga. App. 678, 149 S.E.2d 404 (1966); *Travelers Ins. Co. v. Floyd*, 114 Ga. App. 487, 151 S.E.2d 816 (1966); *Waters v. Aetna Cas. & Sur. Co.*, 114 Ga. App. 744, 152 S.E.2d 754 (1966); *Smith v. Liberty Mut. Ins. Co.*, 114 Ga. App. 755, 152 S.E.2d 782 (1966); *Aetna Cas. & Sur. Co. v. Beauchamp*, 114 Ga. App. 834, 152 S.E.2d 898 (1966); *Argonaut Ins.*

Co. v. Wilson, 119 Ga. App. 121, 166 S.E.2d 641 (1969); *McMullen v. Liberty Mut. Ins. Co.*, 119 Ga. App. 410, 167 S.E.2d 360 (1969); *Hartford Accident & Indem. Co. v. Hale*, 119 Ga. App. 565, 168 S.E.2d 204 (1969); *Hartford Accident & Indem. Co. v. Carroll*, 121 Ga. App. 78, 172 S.E.2d 869 (1970); *Mull v. Aetna Cas. & Sur. Co.*, 226 Ga. 462, 175 S.E.2d 552 (1970); *Hopper v. Continental Ins. Co.*, 121 Ga. App. 850, 176 S.E.2d 109 (1970); *Jenkins Enters., Inc. v. Williams*, 122 Ga. App. 840, 178 S.E.2d 926 (1970); *Home Indem. Co. v. Tanksley*, 123 Ga. App. 435, 181 S.E.2d 390 (1971); *Argonaut Ins. Co. v. Allen*, 123 Ga. App. 741, 182 S.E.2d 508 (1971); *Travelers Ins. Co. v. Buice*, 124 Ga. App. 626, 185 S.E.2d 549 (1971); *King v. Pacific Employers Ins. Co.*, 124 Ga. App. 792, 186 S.E.2d 156 (1971); *Employers Mut. Liab. Ins. Co. v. Turner*, 126 Ga. App. 24, 189 S.E.2d 862 (1972); *Fidelity & Cas. Co. v. Funderburk*, 128 Ga. App. 395, 196 S.E.2d 695 (1973); *Liberty Mut. Ins. Co. v. Williams*, 129 Ga. App. 354, 199 S.E.2d 673 (1973); *Pack v. Insurance Co. of N. Am.*, 129 Ga. App. 589, 200 S.E.2d 300 (1973); *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668 (S.D. Ga. 1973); *Allstate Ins. Co. v. Prance*, 130 Ga. App. 735, 202 S.E.2d 832 (1974); *West Point Pepperell, Inc. v. Springfield*, 140 Ga. App. 530, 231 S.E.2d 811 (1976); *Nance v. Argonaut Ins. Co.*, 143 Ga. App. 537, 239 S.E.2d 156 (1977); *Wills v. St. Paul Fire & Marine Ins. Co.*, 143 Ga. App. 562, 239 S.E.2d 219 (1977); *Newton v. Liberty Mut. Ins. Co.*, 148 Ga. App. 224, 251 S.E.2d 138 (1978); *Hart v. Owens-Illinois, Inc.*, 161 Ga. App. 831, 289 S.E.2d 544 (1982); *Georgia Power Co. v. Brown*, 169 Ga. App. 45, 311 S.E.2d 236 (1983); *GMC v. Summerous*, 170 Ga. App. 338, 317 S.E.2d 318 (1984); *Georgia Mental Health Inst. v. Padgett*, 171 Ga. App. 353, 319 S.E.2d 524 (1984); *Caraway v. ESB, Inc.*, 172 Ga. App. 349, 323 S.E.2d 197 (1984); *Smith v. Lockheed-Georgia Co.*, 185 Ga. App. 869, 366 S.E.2d 178 (1988).

Scope of Section

Ga. L. 1920, p. 167, § 30 (see O.C.G.A. § 34-9-262) provided for compensation in all cases of partial incapacity, whether temporary or permanent, unless such incapacity was caused by the loss of one of the members of the body enumerated in Ga. L. 1920, p. 167, § 32 (see O.C.G.A. § 34-9-263); in such

a case, that section applied exclusively. *Georgia Cas. Co. v. Jones*, 156 Ga. 664, 119 S.E. 721 (1923).

Construction of §§ 34-9-262 and 34-9-263.

— For the succeeding period of partial disability, if resulting solely from one or more of the injuries specifically mentioned in Ga. L. 1920, p. 167, § 32 (see O.C.G.A. § 34-9-263), the compensation must be as prescribed by that section and not otherwise; but if such partial disability results solely from such injuries as are covered only by Ga. L. 1920, p. 167, § 30 (see § 34-9-262), then the compensation must be as provided by that section; if, however, such partial disability results in part from injuries specifically mentioned in Ga. L. 1920, p. 167, § 32 (see O.C.G.A. § 34-9-263), then the aggregate compensation is that amount for both classes of injuries, the amount allowed for each injury being dependent upon the section providing for it and the aggregate amount being kept within the maximum allowed. *Austin Bros. Bridge Co. v. Whitmire*, 31 Ga. App. 560, 121 S.E. 345 (1924).

If injury not to specific member, compensation determined by § 34-9-261 or § 34-9-262. — If the injury is not to a specific member, compensation must be determined under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) when the incapacity to work resulting from an injury was total, or under former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262) if the incapacity for work resulting from the injury was partial. *Employers Liab. Assurance Corp. v. Hollifield*, 93 Ga. App. 51, 90 S.E.2d 681 (1955).

Limitation on compensation paid as result of one injury. — O.C.G.A. § 34-9-263(b)(2) merely provides that an employee who suffers a single compensable injury shall not be entitled to permanent partial disability benefits for that injury, so long as the employee would be entitled to receive temporary total disability or temporary partial disability benefits as the result of that same injury. *Cedartown Nursing Home v. Dunn*, 174 Ga. App. 720, 330 S.E.2d 905 (1985).

Compensation for separate injuries. — An injured employee is not precluded from receipt of compensation for a permanent partial physical disability, while at the same time receiving compensation for a temporary total or partial economic disability

which results from an entirely separate injury. *Cedartown Nursing Home v. Dunn*, 174 Ga. App. 720, 330 S.E.2d 905 (1985).

Arm fracture and permanent partial loss of left arm specific member injury. — Where employee sustained a work-related injury which resulted in a fracture of the head of the humerus and a permanent partial loss of the use of the employee's left arm, an award of compensation for specific member injury, rather than bodily disability, was proper. *Owens-Illinois, Inc. v. Douglas*, 151 Ga. App. 408, 260 S.E.2d 509 (1979).

Loss to trumpet part of ear. — Compensation payable to a claimant who lost the trumpet part of claimant's ear in an accident under the workers' compensation provisions was not governed by former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), inasmuch as that section related to loss of bodily members and loss of hearing in both ears, and it has been held that an ear is not embraced in the term "member," but whatever compensation the claimant was entitled to must be determined by former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), relating to total incapacity, and former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262), relating to partial incapacity. *Lumbermens Mut. Cas. Co. v. Cook*, 69 Ga. App. 131, 25 S.E.2d 67 (1943) (decided under former Code 1933, § 114-406, prior to revision by Ga. L. 1971, p. 895, § 1).

Compensation not limited to § 34-9-263 where superadded injury affects body portions other than specific member. — If there was a permanent loss of use, either total or partial, resulting from an injury to a specific member, compensation may be had under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), and this is exclusive of compensation under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) and former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262), unless in consequence of the injury to the member the claimant suffered a superadded injury or disease affecting other portions of the claimant's body, as a result of which the claimant was either totally or partially disabled to work at gainful employment, in which event compensation is payable under those former provisions. *Clark v. Liberty Mut. Ins. Co.*, 108 Ga. App. 806, 134 S.E.2d 534 (1963).

Compensation for both permanent partial loss and partial incapacity legal where multi-

Scope of Section (Cont'd)

ple injuries. — If the accident to the claimant resulted in multiple injuries to claimant, an award of compensation for a permanent partial loss of the use of a member specified in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) and for partial incapacity to work in accordance with former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262), if there was evidence to support such an award, was not contrary to law or in excess of the powers of the board. *Hartford Accident & Indem. Co. v. Brennan*, 85 Ga. App. 163, 68 S.E.2d 170 (1951).

Total loss of use of both legs requires compensation as for total, not partial, incapacity; further, where the claimant suffered only a 60 percent loss of use to each of claimant's legs, the award of compensation for "incapacity", rather than for an "industrial handicap," was not error. *Armour & Co. v. Walker*, 99 Ga. App. 64, 107 S.E.2d 691 (1959).

Subsequent modification for partial incapacity following total incapacity final award.

— If an award of the maximum amount for total incapacity was made under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), a subsequent modification for partial incapacity under former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262) was the later, and therefore the final, award. *Neal v. Insurance Co. of N. Am.*, 134 Ga. App. 854, 216 S.E.2d 626 (1975).

Estimate of future extent of disability cannot affect compensation payable. — Neither the estimate of the witnesses nor the conclusion of the director as to the time in the future to which the disability may extend affects the compensation payable. *Brazier v. United States Fid. & Guar. Co.*, 99 Ga. App. 588, 109 S.E.2d 309 (1959).

Finding of continuous disability not authorized where maximum period of compensation exhausted.

— If an employee was injured in 1926 and received full compensation for total disability until February, 1927, and until May, 1927, partial compensation due to a change in condition, the employee's application for additional compensation in October, 1935, could not authorize a finding of continuous disability since October, 1934, since under the workers' compensation law (see O.C.G.A. § 34-9-1 et

seq.) the employee's maximum period of compensation was exhausted prior to that date. *Travelers Ins. Co. v. Anderson*, 185 Ga. 105, 194 S.E. 193 (1937).

Proof required for benefits. — If an employee was injured during the course of employment, returned to the job to perform light-duty work, and was then discharged for a cause unrelated to the employee's injury, the employee was entitled to receive temporary partial disability benefits for the period that the employee engaged in light-duty work following the accident, if the employee produced evidence to show that the employee earned less after the employee's return to work than the employee did before injury. *Augusta Coca-Cola Bottling Co. v. Carter*, 172 Ga. App. 195, 322 S.E.2d 365 (1984).

Definitions

"Average weekly wages." — Term "average weekly wages" had same meaning as definition of term in former Code 1933, § 114-402 (see O.C.G.A. § 34-9-260). *Lumbermen's Mut. Cas. Co. v. Cowart*, 81 Ga. App. 423, 59 S.E.2d 15 (1950).

"Change in condition." — Where the injury came within former Code 1933, § 114-404 or § 114-405 (see O.C.G.A. § 34-9-261 or O.C.G.A. § 34-9-262), "change in condition" meant solely an economic change in condition occasioned by the employee's return or ability to return to work for the same or any other employer. *Morrison Assurance Co. v. Hodges*, 130 Ga. App. 436, 203 S.E.2d 629 (1973).

"Disability." — Word "disability," as used in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), means impairment of earning capacity. *Blue Bell Globe Mfg. Co. v. Baird*, 61 Ga. App. 298, 6 S.E.2d 83 (1939).

The loss of earning power is the basis for an allowance of compensation. Incapacity has been said to exist by reason of the inability to procure employment, as well as the incapacity to perform the service. Compensation under the workers' compensation provisions depends on diminution of earning capacity. The word "disability," as used in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), means impairment of earning capacity. *Lumbermens Mut.*

Cas. Co. v. Cook, 69 Ga. App. 131, 25 S.E.2d 67 (1943).

"Disability," within the meaning of this section, meant an incapacity for work, or earning capacity. The question of what constitutes incapacity for work is one of fact. Riegel Textile Corp. v. Vinyard, 88 Ga. App. 753, 77 S.E.2d 760 (1953) (see O.C.G.A. § 34-9-262).

Under former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262), "disability" meant not the percentage of physical impairment, but the percentage of impairment of earning capacity. Employers Liab. Assurance Corp. v. Hollifield, 93 Ga. App. 51, 90 S.E.2d 681 (1955); Hall v. Saint Paul-Mercury Indem. Co., 96 Ga. App. 567, 101 S.E.2d 94 (1957).

Care should be taken in construing the word "disability," which in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) was specifically measured by the specific physical impairment, where in former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) and former Code 1933, § 114-406 (see O.C.G.A. § 34-9-262), it was measured by the decreased economic return resulting from a general physical impairment. Brazier v. United States Fid. & Guar. Co., 99 Ga. App. 588, 109 S.E.2d 309 (1959).

Incapacity for Work

Total disability is the antithesis of partial disability. Travelers' Ins. Co. v. Hurt, 176 Ga. 153, 167 S.E. 175 (1932).

Disability not dependent on ability to find employment. — The nature and extent of the disability resulting from the injury received is not dependent upon the employee's ability to find employment. Travelers' Ins. Co. v. Hurt, 176 Ga. 153, 167 S.E. 175 (1932).

Where employee not rendered totally unable to perform work, compensation for partial, not total, disability. — Where the evidence demands a finding that the employee is not by reason of the employee's physical impairment totally disabled from engaging in remunerative employment, compensation should be based on former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262) for permanent partial disability, rather than on former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) for total disability.

GMC v. Harrison, 107 Ga. App. 667, 131 S.E.2d 234 (1963).

Where employee physically able to perform remunerative labor. — If the employee, while physically able to perform remunerative labor at an occupation different from that in which the employee was injured, fails to accept employment suitable to such impaired condition when it is offered the employee, or does not obtain such employment by reason of the employee's unwillingness so to do, or by reason of economic or other conditions in no way chargeable to or occasioned by the employee's injury, the employee is not to be considered as totally disabled, and the amount of compensation payable to the employee is limited to two-thirds of the difference between the employee's average weekly wages before the injury, and the average weekly wages which the employee is capacitated to earn thereafter. General Accident Fire & Life Assurance Corp. v. McDaniel, 44 Ga. App. 40, 160 S.E. 554 (1931).

Where there was no evidence that the plaintiff's condition worsened after plaintiff's job terminated at the close of the season so that plaintiff could not resume plaintiff's former or similar employment, plaintiff was entitled only to an award for partial disability under this section. City of Augusta v. Rosier, 119 Ga. App. 192, 166 S.E.2d 378 (1969) (see O.C.G.A. § 34-9-262).

Temporary partial disability when claimant accepted lesser paying work. — Administrative law judge (ALJ) should have considered a claimant's entitlement to temporary partial disability benefits in a case where the claimant was fired from the job at which the disabling injury was incurred and, after a diligent job search, the claimant took a lesser paying job as a waitress for a continuing disability incident to the compensable one; the ALJ improperly imposed an additional burden of proof on the claimant by requiring the claimant to prove that the acceptance of lower-paying employment was proximately caused by the compensable work-related injury. Roberts v. Jones Co., 277 Ga. App. 517, 627 S.E.2d 139 (2006).

Total disability cannot be due to unwillingness or inability to find different employment. — In order for disability to be accounted total, the inability of an employee to

Incapacity for Work (Cont'd)

procure and to perform work at a different occupation suitable to the employee's impaired physical condition must not be due merely to a lack of diligent effort on the part of the employee to obtain such other employment, or to the employee's unwillingness to accept such different employment, or to conditions of general unemployment which are disconnected with the employee's injury, such as might render the employee unable to find any such different employment. *General Accident Fire & Life Assurance Corp. v. McDaniel*, 44 Ga. App. 40, 160 S.E. 554 (1931).

Total disability results from inability to do any work or to procure any suitable remunerative employment. — The incapacity for work resulting from injury is total not only so long as the injured employee is unable to do any work of any character, but also while the employee remains unable, as a result of injury, either to resume the employee's former occupation or to procure remunerative employment at a different occupation suitable to the employee's impaired capacity. *Employers Liab. Assurance Corp. v. Hollifield*, 93 Ga. App. 51, 90 S.E.2d 681 (1955).

The incapacity is total so long as the injured employee, by reason of and on account of the employee's injury, is unable to do any work of any character, and so long as the employee remains, for such reason, unable either to resume the employee's former occupation or to procure any other sort of remunerative employment suitable to the employee's impaired physical condition. *City of Augusta v. Rosier*, 119 Ga. App. 192, 166 S.E.2d 378 (1969).

Claimant awarded total disability compensation for unemployment period resulting from injury. — Where a claimant has a period of unemployment resulting from the injury and due to no fault of the claimant, the claimant should be awarded compensation for total disability during this period. *Reeves v. Echota Cotton Mills*, 123 Ga. App. 649, 182 S.E.2d 126 (1971).

Period of total incapacity may be, and usually is, followed by period of partial incapacity, during which the injured employee is able both to procure and to perform work at some occupation suitable to

the employee's then existing capacity but less remunerative than the work in which the employee was engaged at the time of injury. That situation determines the period of the employee's partial incapacity. *Lumbermens Mut. Cas. Co. v. Cook*, 69 Ga. App. 131, 25 S.E.2d 67 (1943).

Consideration of reason for lost time from work. — State board of workers' compensation's refusal to consider the reasons for the employee's lost time from work was based on an erroneous legal theory and had the effect of reducing the substantive rights of the employer under O.C.G.A. § 34-9-262. *Shaw Indus. v. Shaw*, 262 Ga. App. 586, 586 S.E.2d 80 (2003).

Claimant losing job because of plant closing, not injury, cannot apply for increased compensation. — If the claimant applied for an increase in compensation on account of an alleged change in conditions, and if it appeared, without dispute, that the claimant had been engaged in remunerative labor up to a few days before the application, and had lost the claimant's position because of the closing down of the plant in which the claimant was employed, and not by reason of the claimant's previous injury, this finding did not authorize an award of compensation as for total disability. *General Accident Fire & Life Assurance Corp. v. McDaniel*, 44 Ga. App. 40, 160 S.E. 554 (1931).

Awards for partial incapacity, under this section, were payable only during such incapacity. *Hartford Accident & Indem. Co. v. Fuller*, 102 Ga. App. 384, 116 S.E.2d 628 (1960) (see O.C.G.A. § 34-9-262).

Partial incapacity terminates when the employee again becomes capable of earning the same wage the employee earned before injury, whether at the same or at a different occupation, and without regard to such personal inconveniences as may result to the employee solely from the employee's injury. *Columbia Cas. Co. v. Whiten*, 51 Ga. App. 42, 179 S.E. 630 (1935).

Except as specifically provided in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) partial incapacity terminated when the employee again became capable of earning the same wage the employee earned before injury, whether at the same or at a different occupation, and without regard to such personal inconveniences as may result to the employee solely from the employee's

injury, and which are not caused or aggravated by the employee's new employment. *Castle v. Imperial Laundry & Dry Cleaning Co.*, 62 Ga. App. 184, 8 S.E.2d 547 (1940); *Lumbermens Mut. Cas. Co. v. Cook*, 69 Ga. App. 131, 25 S.E.2d 67 (1943).

Proof required for resumption of benefits. — A claimant for resumption of temporary partial disability benefits, who had been terminated from a salesperson's position and who had not sought other employment after termination, failed to prove a change in condition entitling the salesperson to a resumption of benefits. Whether the cause of termination was due to any compensable disability was not determinative; the burden was on the claimant to show that claimant's inability to secure suitable employment elsewhere was proximately caused by the claimant's previous accidental injury. *Gilbert/Robinson, Inc. v. Meyers*, 214 Ga. App. 510, 448 S.E.2d 246 (1994).

Ability to earn. — In determining what a claimant was "able" to earn, it was error to conclude that claimant was "able" to earn \$0 simply because claimant was not working; when a claimant is able to earn, but is not earning, the employer may reasonably theorize, based upon proof of available jobs for which the claimant is qualified, what the claimant is able to earn. *Mountainside Medical Center/Pickens Healthcare v. Tanner*, 225 Ga. App. 722, 484 S.E.2d 706 (1997).

Permanency

Award res judicata until change of condition. — As to former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262), where no mention of the word "permanent" was made, the question of whether maximum improvement had been reached at the time of the hearing had no effect on the award at that time; the award went into effect and was res judicata until the condition changed and a new agreement, or a request for a hearing based on a change of condition, was made. *Brazier v. United States Fid. & Guar. Co.*, 99 Ga. App. 588, 109 S.E.2d 309 (1959).

Impairment of Earning Capacity

Provisions provide for different bases for compensation. — Former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A.

§§ 34-9-261 and 34-9-262) provided for compensation on the basis of a decrease in earnings; former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) provided compensation for the loss, or loss of use, of a member, irrespective of the earning ability of a claimant after an accident was sustained. *Roddy v. Hartford Accident & Indem. Co.*, 65 Ga. App. 632, 16 S.E.2d 81 (1941).

Claimant suffering from physical impairment not entitled to compensation for member loss. — If claimant is suffering physical impairment resulting from an injury claimant is not entitled to compensation for loss of use of any member, but is entitled to compensation for whatever loss of earning capacity claimant has sustained as a permanent result of the accident. *Employers Liab. Assurance Corp. v. Hollifield*, 93 Ga. App. 511, 90 S.E.2d 681 (1955).

Recovery under both §§ 34-9-262 and 34-9-263. — Former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) provided that the compensation to be paid for the injury shall be in lieu of all other compensation. If the employee can recover compensation for such an injury under both former Code 1933, §§ 114-405 and 114-406 (see O.C.G.A. §§ 34-9-262 and 34-9-263), then the employee's compensation under the latter is not in lieu of all other compensation. *Massey v. Aetna Cas. & Sur. Co.*, 86 Ga. App. 211, 71 S.E.2d 103 (1952).

Impairment of earning capacity compensable. — With the exception of the specific members dealt with in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), the amount of compensation which an employee was entitled to receive for an injury is determined by the employee's diminished earning capacity as provided in former Code 1933, §§ 11-404 and 11-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262). Therefore, if any injury to the employee, by an accident arising out of and in the course of employment, either totally or partially, impairs the employee's earning capacity, such injury was compensable. *Blue Bell Globe Mfg. Co. v. Baird*, 61 Ga. App. 298, 6 S.E.2d 83 (1939).

A physical disability not specified in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), resulting in the total or partial loss of earning capacity, was compensable under former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A. §§ 34-9-261 and

Impairment of Earning Capacity (Cont'd)

34-9-262). *United States Cas. Co. v. Young*, 104 Ga. App. 373, 121 S.E.2d 680 (1961).

Impairment due to injury, not economic conditions. — The incapacity referred to in former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262) was loss of earning capacity due to the injury and not due to the employee's unwillingness to work or to the economic conditions of unemployment. *Federated Mut. Implement & Hdwe. Ins. Co. v. Whiddon*, 88 Ga. App. 12, 75 S.E.2d 830 (1953).

Disability measured by difference in earning capacity before and after injury. — It has been held that the disability for which compensation was payable under former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262) was the economic disability which the employee suffered as the result of an injury, this economic disability to be measured solely by the difference in the earning capacity of the employee before and after the injury. *Ocean Accident & Guar. Co. v. Hulsey*, 105 Ga. App. 479, 125 S.E.2d 115 (1962).

Disability not computed on physical disability alone, nor on actual earnings. — The extent of disability is not computed on physical disability alone, for a partial physical disability may result in a total loss of earning capacity, nor is it computed alone on what the claimant is actually earning, for the board must determine to the best of its ability the earning capacity, and extent of decrease, if any. *Smith v. Liberty Mut. Ins. Co.*, 117 Ga. App. 308, 160 S.E.2d 535 (1968).

Compensation determined by comparing average weekly wages prior to injury with wages earned thereafter. — The only method of computing compensation for a partially disabled claimant is 60 percent (now two-thirds) of the difference between claimant's average weekly wages prior to the injury and the average weekly wages claimant is able to earn thereafter, but not to exceed \$20.00 (now \$80.00) per week. The only formula for determining this difference is to compare claimant's average weekly wages prior to the injury with wages earned each individual week thereafter until the time of the hearing, because claimant may have earned varying amounts during the

period prior to the hearing, and if there are periods of unemployment, through no fault of the claimant, due to the injury, then claimant would be entitled to temporary total disability for this period. *Liberty Mut. Ins. Co. v. Goins*, 96 Ga. App. 887, 101 S.E.2d 920 (1958).

The only formula for determining the claimant's compensation is to compare claimant's average weekly wages prior to the injury with wages earned each individual week thereafter until the time of the hearing. This is so because claimant may have earned varying amounts during the period prior to the hearing. If there are periods of unemployment, through no fault of the claimant, due to the injury, then claimant would be entitled to temporary total disability for this period. *Mauldin v. Georgia Cas. & Sur. Co.*, 119 Ga. App. 406, 167 S.E.2d 371 (1969).

No compensation where no determination of average weekly wages earnable. — Where a claimant was given an award for partial incapacity under this section, but no finding or determination was made as to the percentage of the loss of capacity to work or the average weekly wages which the claimant was able to earn thereafter upon which to base the amount of compensation to which the claimant was entitled under the award, it is not an error to refuse to enter a judgment for unpaid compensation thereunder against the employer and insurance carrier. *Colbert v. Fireman's Fund Ins. Co.*, 112 Ga. App. 187, 144 S.E.2d 470 (1965) (see O.C.G.A. § 34-9-262).

Part of an award granting compensation on the bases of partial incapacity is erroneous where there has been no finding or determination made as to the weekly wages which the claimant is able to earn upon which an intelligent calculation can be made of the compensation to be paid. *St. Paul Fire & Marine Ins. Co. v. Seay*, 123 Ga. App. 828, 182 S.E.2d 705 (1971).

Where claimant working longer hours at lesser rate, but with higher earning capacity. — A claimant who, because of claimant's partial disability, was working longer hours at a lesser hourly rate, but who nonetheless had an earning capacity at the time of the hearing in excess of claimant's average weekly wages prior to the original injury, was not entitled by law to any differential compensa-

tion under this section. *Reeves v. Echota Cotton Mills*, 123 Ga. App. 649, 182 S.E.2d 126 (1971) (see O.C.G.A. § 34-9-262).

Worker employed in own business although receiving no net income. — Worker experienced change from total disability to temporary partial disability as the worker's ability to run almost all aspects of the worker's production company showed that the worker's prior injury was partial in character and the worker had regained the capacity to perform work, even if the worker was not receiving a net income from the worker's production company as it was the worker's capacity for work, not whether the worker was actually receiving an income, that determined the worker's temporary partial disability status. *WAGA-TV, Inc. v. Yang*, 256 Ga. App. 224, 568 S.E.2d 58 (2002).

Loss of earning capacity on account of partial disability not authorized by evidence.

— Where the finding of fact of the hearing director, approved by the state board, to the effect that the claimant's average weekly wages were \$80.00 prior to the accident, was not authorized by the evidence and the law applicable thereto, but where, the claimant's average weekly wages for the period of 13 weeks immediately prior to the accident were in fact \$52.02, and where the finding of fact of the hearing director, approved by the board, was authorized under the evidence, to the effect that the claimant had been able to earn as much as \$60.00 per week in claimant's employment since recovering from total disability, there was no compensable loss of earning capacity on account of partial disability under the provisions of this section. *Lumbermen's Mut. Cas. Co. v. Cowart*, 81 Ga. App. 423, 59 S.E.2d 15 (1950) (see O.C.G.A. § 34-9-262).

Impairment total where claimant unable to procure any work. — Where the hearing director found as a fact that the claimant sustained an injury resulting in a 30 percent disability for performing any regular gainful employment involving stooping or bending, and the record failed to show that claimant was fitted for, was offered, or could have procured, any work other than claimant's previous work which did involve stooping and bending, a finding was authorized and was made by the board that a disability for this type of work existed, and a finding was demanded under the evidence that the dis-

ability, if it existed, resulted in a total impairment of earning capacity. *Employers Liab. Assurance Corp. v. Hollifield*, 93 Ga. App. 51, 90 S.E.2d 681 (1955).

Pain itself is not compensable; disability was not compensable under this section regardless of pain except where there was a decrease in monetary return. *Williamson v. Aetna Cas. & Sur. Co.*, 101 Ga. App. 220, 113 S.E.2d 208 (1960) (see O.C.G.A. § 34-9-262).

With the exceptions indicated in this section, the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) failed to provide for compensation in cases of partial incapacity, except where the average weekly wages after the injury were less than those prior thereto. There was no recognition of the elements of pain and suffering, or of the increased discomfort and difficulty in performing the labors for which wages were paid after the injury, and as long as the average of these remain the same or more than those previously received, the law allowed no compensation. *American Mut. Liab. Ins. Co. v. Hampton*, 33 Ga. App. 476, 127 S.E. 155 (1925) (see O.C.G.A. § 34-9-262).

Disability was not compensable under former Code 1933, §§ 11-404 and 11-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262) regardless of pain except where there was a decrease in monetary return. *Davis v. Fireman's Fund Ins. Co.*, 106 Ga. App. 519, 127 S.E.2d 481 (1962).

Outside income not contributable to earning capacity not taken into account in fixing disability compensation. — Income received by the employee from outside sources and in no way attributable to the employee's earning capacity is not to be taken into account in fixing the amount of compensation for the period of disability which the employee suffers. *Ocean Accident & Guar. Co. v. Hulsey*, 105 Ga. App. 479, 125 S.E.2d 115 (1962).

Compensation already paid for specific member injury considered in temporary partial disability award. — Where, on the application of the claimant, the board makes an award finding a change in the claimant's condition from an industrial handicap, as provided for in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), to a partial incapacity to work, as provided by

Impairment of Earning Capacity (Cont'd)

former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262), the board was authorized to order compensation paid under that section during the partial incapacity, even though the benefits previously awarded under former Code 1933, § 114-406 had been paid in a lump-sum settlement, and the period thereof represented had not expired; and the board properly deducted from the maximum period allowed for the partial disability the period during which the claimant was paid for total incapacity, and the time during which claimant had no incapacity, as found by the board, and the interval for which claimant was paid the lump-sum settlement on account of the industrial handicap under former Code 1933, § 114-406. *Hardware Mut. Cas. Co. v. Wilson*, 72 Ga. App. 574, 34 S.E.2d 634 (1945).

Different compensation may be ordered for change of condition. — When there was an adjudication of a change of condition the board may, as provided in this section, order a different payment of compensation suited to the change, and the order became effective from the time an application for a hearing based upon a change in condition was filed. *Bump v. Continental Cas. Co.*, 109 Ga. App. 228, 136 S.E.2d 14 (1964) (see O.C.G.A. § 34-9-262).

Employer entitled to credit for prior advance payments in excess of amount due. — Where there is a change of condition, an employer and insurance carrier are entitled to credit for any advance payments of compensation made prior to the filing of the application for the change of condition hearing in excess of the amount due the

claimant under the original award. *Ingram v. Bituminous Cas. Corp.*, 109 Ga. App. 87, 134 S.E.2d 861 (1964).

Error to shift payments to partial disability where wages employee able to earn undetermined. — It was error to shift payments from total disability under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) to partial disability under former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262), where there had been no finding or determination made as to the weekly wages which the claimant was able to earn upon which an intelligent calculation can be made of the compensation to be paid, even though the evidence on change of condition showed an amelioration of the employee's condition and that the employee was no longer totally disabled. *Hardeman v. Liberty Mut. Ins. Co.*, 124 Ga. App. 710, 185 S.E.2d 789 (1971).

Average weekly wages stipulated in agreement res judicata. — The average weekly wage stipulated in an approved agreement for compensation for total incapacity to work is res judicata, which precludes the employer from contradicting or challenging the average weekly payments at a further change of condition hearing. *Reeves v. Echota Cotton Mills*, 123 Ga. App. 649, 182 S.E.2d 126 (1971).

Right to compensation ceases where maximum time period elapses. — After more than 300 (now 350) weeks elapsed between the date of the injury and the date of request for another hearing, the evidence demanded a finding that the right to compensation ceased. *Strickland v. Metropolitan Cas. Ins. Co.*, 54 Ga. App. 866, 189 S.E. 424 (1936).

OPINIONS OF THE ATTORNEY GENERAL

Injured employee receiving additional benefits not ineligible for total incapacity rating. — The fact that an injured employee was receiving additional benefits would not make the employee ineligible for a total incapacity rating under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), and switch the employee to eligibility for partial

disability under former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262), since partial incapacity was determined by the difference between the wages which an employee earns before injury and which the employee was able to earn thereafter. 1971 Op. Att'y Gen. No. 71-136.

RESEARCH REFERENCES

ALR. — Right to take rise or fall in wages since date of accident into account in fixing workman's compensation, 2 ALR 1642; 92 ALR 1188.

Workmen's compensation: right of employer or insurance carrier to discontinue, without an order or ruling in that regard, payments provided for by agreement, 129 ALR 418.

Compensability of specially equipped van or vehicle under workers' compensation statutes, 63 ALR5th 163.

34-9-263. Compensation for permanent partial disability.

(a) *Definition.* As used in this chapter, “permanent partial disability” means disability partial in character but permanent in quality resulting from loss or loss of use of body members or from the partial loss of use of the employee’s body.

(b) *Payment of benefits.*

(1) In cases of permanent partial disability, the employer shall pay weekly income benefits to the employee according to the schedule included within this Code section. These benefits shall be payable without regard to whether the employee has suffered economic loss as a result of the injury, except as herein provided.

(2) Income benefits due under this Code section shall not become payable so long as the employee is entitled to benefits under Code Section 34-9-261 or 34-9-262.

(3) If any employee is receiving benefits under this Code section and experiences a change in condition qualifying the employee for income benefits under Code Section 34-9-261 or 34-9-262, any payments under this Code section shall cease until further change of the employee’s condition occurs.

(c) *Schedule of income benefits.* Subject to the maximum and minimum limitations on weekly income benefits specified in Code Section 34-9-261, the employer shall pay weekly income benefits equal to two-thirds of the employee’s average weekly wage for the number of weeks determined by the percentage of bodily loss or loss of use times the maximum weeks as follows:

| <u>Bodily Loss</u> | <u>Maximum Weeks</u> |
|------------------------|----------------------|
| (1) Arm | 225 |
| (2) Leg | 225 |
| (3) Hand | 160 |
| (4) Foot | 135 |
| (5) Thumb | 60 |
| (6) Index finger | 40 |

(7) Middle finger 35

(8) Ring finger 30

(9) Little finger 25

(10) Great toe 30

(11) Any toe other than the great toe 20

(12) Loss of hearing, traumatic

 One ear 75

 Both ears 150

(13) Loss of vision of one eye 150

(14) Disability to the body as a whole 300

(d) *Impairment ratings.* In all cases arising under this chapter, any percentage of disability or bodily loss ratings shall be based upon *Guides to the Evaluation of Permanent Impairment*, fifth edition, published by the American Medical Association.

(e) *Loss of more than one major member.* Loss of both arms, hands, legs, or feet, or any two or more of these members, or the permanent total loss of vision in both eyes shall create a rebuttable presumption of permanent total disability compensable as provided in Code Section 34-9-261. (Ga. L. 1920, p. 167, § 32; Ga. L. 1923, p. 92, § 3; Code 1933, § 114-406; Ga. L. 1945, p. 485, § 1; Ga. L. 1955, p. 210, § 3; Ga. L. 1958, p. 360, §§ 1, 2; Ga. L. 1963, p. 141, § 7; Ga. L. 1971, p. 895, § 1; Ga. L. 1973, p. 232, § 5; Ga. L. 1974, p. 1143, §§ 5, 6; Ga. L. 1978, p. 2220, § 5; Ga. L. 1982, p. 3, § 34; Ga. L. 1985, p. 149, § 34; Ga. L. 1985, p. 727, § 10; Ga. L. 1996, p. 1291, § 12; Ga. L. 2001, p. 748, § 8.)

Law reviews. — For article, “Workers’ Compensation,” see 53 Mercer L. Rev. 521 (2001). For survey article on workers’ compensation law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For annual survey of law of worker’s compensation, see 56 Mercer L. Rev. 479 (2004).

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General Consideration

Term "weekly benefits" under O.C.G.A. § 34-9-82(a) does not refer to only those weekly benefits provided under O.C.G.A. §§ 34-9-261 and 34-9-262, which compensate for income loss, but also includes permanent partial disability benefits paid pursuant to O.C.G.A. § 34-9-263 so as to extend the statute of limitation period for filing a claim to two years after the date of the last such payment. *Mickens v. Western Prob. Det. Ctr.*, 244 Ga. App. 268, 534 S.E.2d 927 (2000).

Except for member loss, only actual total or partial disability compensated. — Except in cases involving the loss of or loss of use of a member, the workers' compensation provisions do not contemplate the payment of compensation to an employee except in cases of actual total or partial disability. *Pacific Employers Ins. Co. v. Shoemaker*, 105 Ga. App. 432, 124 S.E.2d 653 (1962).

Claimant was not entitled to temporary total disability and temporary partial disability benefits since claimant already collected a lump sum payment for permanent partial disability, and the method of crediting the overpayment was not set forth with sufficient specificity. *Universal Ceramics, Inc. v. Watson*, 177 Ga. App. 345, 339 S.E.2d 304 (1985).

No compensation for nondisability producing disfigurement. — Georgia is among a minority of states which does not allow workers' compensation for nondisability producing disfigurement. *Nowell v. Stone Mt. Scenic R.R.*, 150 Ga. App. 325, 257 S.E.2d 344 (1979).

Cited in *Taylor v. Lumbermen's Mut. Cas. Co.*, 43 Ga. App. 292, 158 S.E. 623 (1931); *Keel v. American Employers' Ins. Co.*, 44 Ga. App. 773, 162 S.E. 847 (1932); *Maryland Cas. Co. v. Smith*, 45 Ga. App. 82, 163 S.E. 247 (1932); *Travelers' Ins. Co. v. Reid*, 178 Ga. 399, 173 S.E. 376 (1934); *United States Fid. & Guar. Co. v. Edmondson*, 179 Ga. 590, 176 S.E. 406 (1934); *United States Fid. & Guar. Co. v. Edmondson*, 50 Ga. App. 157, 177 S.E. 352 (1934); *Columbia Cas. Co. v. Whiten*, 51 Ga. App. 42, 179 S.E. 630 (1935); *Continental Cas. Co. v. Haynie*, 51 Ga. App. 650, 181 S.E. 126 (1935); *Fidelity & Cas. Co. v. Clements*, 53 Ga. App. 622, 186 S.E. 764 (1936); *Travelers Ins. Co. v. Reid*, 54 Ga. App. 13, 186 S.E. 887 (1936); *London Guarantee & Accident Co. v. Boynton*, 54 Ga.

App. 419, 188 S.E. 265 (1936); *Miller v. Indemnity Ins. Co.*, 55 Ga. App. 644, 190 S.E. 868 (1937); *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939); *Bituminous Cas. Corp. v. Lockett*, 65 Ga. App. 829, 16 S.E.2d 614 (1941); *London Guarantee & Accident Co. v. Pittman*, 69 Ga. App. 146, 25 S.E.2d 60 (1943); *Bituminous Cas. Corp. v. Sapp*, 196 Ga. 431, 26 S.E.2d 724 (1943); *New Amsterdam Cas. Co. v. Brown*, 81 Ga. App. 790, 60 S.E.2d 245 (1950); *Georgia Ins. Serv. v. Lord*, 83 Ga. App. 28, 62 S.E.2d 402 (1950); *Miller v. Independent Life & Accident Ins. Co.*, 86 Ga. App. 538, 71 S.E.2d 705 (1952); *Yates v. United States Rubber Co.*, 100 Ga. App. 583, 112 S.E.2d 182 (1959); *Brown v. General Accident Fire & Life Assurance Corp.*, 101 Ga. App. 208, 113 S.E.2d 215 (1960); *Davis v. Cobb County*, 106 Ga. App. 336, 126 S.E.2d 710 (1962); *Surmiak v. Standard Accident Ins. Co.*, 106 Ga. App. 479, 127 S.E.2d 334 (1962); *Employers Mut. Liab. Ins. Co. v. Shipman*, 108 Ga. App. 184, 132 S.E.2d 568 (1963); *Hackel v. Fidelity & Cas. Co.*, 111 Ga. App. 190, 140 S.E.2d 923 (1965); *Surmiak v. Standard Accident Ins. Co.*, 113 Ga. App. 3, 147 S.E.2d 56 (1966); *Waters v. NABISCO*, 113 Ga. App. 170, 147 S.E.2d 676 (1966); *Gulf Am. Fire & Cas. Co. v. Herndon*, 113 Ga. App. 678, 149 S.E.2d 404 (1966); *Reliance Ins. Co. v. Oliver*, 117 Ga. App. 466, 160 S.E.2d 615 (1968); *Liberty Mut. Ins. Co. v. Hayes*, 117 Ga. App. 500, 160 S.E.2d 902 (1968); *Argonaut Ins. Co. v. Wilson*, 119 Ga. App. 121, 166 S.E.2d 641 (1969); *Bituminous Cas. Corp. v. Willingham*, 119 Ga. App. 761, 168 S.E.2d 910 (1969); *Medley v. Hartford Accident & Indem. Co.*, 121 Ga. App. 54, 172 S.E.2d 461 (1970); *Bush v. Fidelity & Cas. Co.*, 121 Ga. App. 718, 175 S.E.2d 114 (1970); *Argonaut Ins. Co. v. Allen*, 123 Ga. App. 741, 182 S.E.2d 508 (1971); *Employers Commercial Union Ins. Co. v. Palmer*, 127 Ga. App. 54, 192 S.E.2d 439 (1972); *Blackwell v. Liberty Mut. Ins. Co.*, 128 Ga. App. 614, 197 S.E.2d 404 (1973); *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668 (S.D. Ga. 1973); *Georgia Cas. & Sur. Co. v. Rainwater*, 132 Ga. App. 170, 207 S.E.2d 610 (1974); *Reliance Ins. Co. v. Cushing*, 132 Ga. App. 179, 207 S.E.2d 664 (1974); *Pope v. Aetna Life & Cas. Co.*, 132 Ga. App. 798, 209 S.E.2d 246 (1974); *Fidelity & Cas. Co. v. Singleton*, 133 Ga. App. 31, 209 S.E.2d 684 (1974); *American Mut. Liab. Ins.*

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Co. v. Williams, 133 Ga. App. 257, 211 S.E.2d 193 (1974); Blankenship v. Atlantic Steel Co., 137 Ga. App. 282, 223 S.E.2d 479 (1976); Nance v. Argonaut Ins. Co., 143 Ga. App. 537, 239 S.E.2d 156 (1977); Wills v. St. Paul Fire & Marine Ins. Co., 143 Ga. App. 562, 239 S.E.2d 219 (1977); Johnson v. Allstate Ins. Co., 241 Ga. 234, 244 S.E.2d 851 (1978); Rowell v. Transport Ins. Co., 153 Ga. App. 456, 265 S.E.2d 364 (1980); Hart v. Owens-Illinois, Inc., 161 Ga. App. 831, 289 S.E.2d 544 (1982); Georgia Mental Health Inst. v. Padgett, 171 Ga. App. 353, 319 S.E.2d 524 (1984); Caraway v. ESB, Inc., 172 Ga. App. 349, 323 S.E.2d 197 (1984); Edgeman v. Organic Chem. Corp., 173 Ga. App. 4, 325 S.E.2d 400 (1984); Holt's Bakery v. Hutchinson, 177 Ga. App. 154, 338 S.E.2d 742 (1985); State v. Birditt, 181 Ga. App. 356, 352 S.E.2d 203 (1986); Sanders v. Georgia-Pacific Corp., 181 Ga. App. 757, 353 S.E.2d 849 (1987); Horizon Indus., Inc. v. Carter, 188 Ga. App. 194, 372 S.E.2d 301 (1988); Sutton v. Quality Furn. Co., 191 Ga. App. 279, 381 S.E.2d 389 (1989); Crider's Furs, Inc. v. Atkinson, 221 Ga. App. 681, 472 S.E.2d 507 (1996).

Scope of Section

Former Code 1933, §§ 114-404 and 114-406 (see O.C.G.A. §§ 34-9-261 and 34-9-263) were not mutually exclusive. Employers Mut. Liab. Ins. Co. v. Derwael, 105 Ga. App. 54, 123 S.E.2d 345 (1961).

Section covers industrial employees injured in course of employment. — This section was related to industry and made provision for compensation to employees in industry who have suffered injuries in the course of employment. Shipman v. Employers Mut. Liab. Ins. Co., 105 Ga. App. 487, 125 S.E.2d 72 (1962) (see O.C.G.A. § 34-9-263).

This section conclusively presumed partial incapacity from losses herein named. Blue Bell Globe Mfg. Co. v. Baird, 64 Ga. App. 347, 13 S.E.2d 105 (1941) (see O.C.G.A. § 34-9-263).

When compensation is allowed under Ga. L. 1920, p. 167, § 32 (see O.C.G.A. § 34-9-263), it is barred under Ga. L. 1920, p. 167, §§ 30 and 31 (see O.C.G.A. §§ 34-9-261 and 34-9-262) for the same in-

jury. Georgia Cas. Co. v. Jones, 156 Ga. 664, 119 S.E. 721 (1923).

Where an award for a partial permanent handicap was given under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), it was proper not to consider claims for compensation under former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262). Black v. American & Foreign Ins. Co., 123 Ga. App. 133, 179 S.E.2d 679 (1970).

Preceding sections compensate earning capacity losses. — A physical disability not specified in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), resulting in total or partial loss of earning capacity, was compensable under former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262). United States Cas. Co. v. Young, 104 Ga. App. 373, 121 S.E.2d 680 (1961).

Certain physical disabilities not compensable. — Physical disabilities other than those specified in this section unaccompanied by impairment of earning capacity were not compensable. United States Cas. Co. v. Young, 104 Ga. App. 373, 121 S.E.2d 680 (1961) (see O.C.G.A. § 34-9-263).

Limitation on compensation as result of one injury. — O.C.G.A. § 34-9-263(b)(2) merely provides that an employee who suffers a single compensable injury shall not be entitled to permanent partial disability benefits for that injury, so long as the employee would be entitled to receive temporary total disability or temporary partial disability benefits as the result of that same injury. Cedartown Nursing Home v. Dunn, 174 Ga. App. 720, 330 S.E.2d 905 (1985).

Compensation for separate injuries. — An injured employee is not precluded from receipt of compensation for a permanent partial physical disability, while at the same time receiving compensation for a temporary total or partial economic disability which results from an entirely separate injury. Cedartown Nursing Home v. Dunn, 174 Ga. App. 720, 330 S.E.2d 905 (1985).

Where worker was totally disabled by respiratory impairment resulting from byssinosis and other, non-work-related causes, including smoking, O.C.G.A. §§ 34-9-263 and 34-9-283, provisions for a permanent partial disability, were inapposite. Computation of benefits had to be

made under O.C.G.A. § 34-9-285. *Whitaker v. Fieldcrest Mills, Inc.*, 174 Ga. App. 533, 330 S.E.2d 761 (1985).

Claimant's condition may change from total incapacity to permanent partial handicap. — Under the provisions of the workers' compensation law, the board may find a change in the claimant's condition from total incapacity (see O.C.G.A. § 34-9-261) to a permanent partial industrial handicap (see O.C.G.A. § 34-9-263). *Noles v. Mills*, 116 Ga. App. 560, 158 S.E.2d 261 (1967).

Definitions

"Disability." — Loss of earning power is the basis for an allowance of compensation. Incapacity has been said to exist by reason of inability to procure employment, as well as incapacity to perform the service. Compensation under the workers' compensation provisions depends on diminution of earning capacity. The word "disability," as used in the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), means impairment of earning capacity. *Lumbermens Mut. Cas. Co. v. Cook*, 69 Ga. App. 131, 25 S.E.2d 67 (1943).

Care should be taken in construing the word "disability," which in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) was measured by the specific physical impairment, and where in former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262) it was measured by the decreased economic return resulting from a general physical impairment. *Brazier v. United States Fid. & Guar. Co.*, 99 Ga. App. 588, 109 S.E.2d 309 (1959).

"Injury" to specific member. — Specific member "injury" is resulting loss of use of that member regardless of the situs of the physical impact and physical impact is not a necessary prerequisite to "injury" within the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Owens-Illinois, Inc. v. Douglas*, 151 Ga. App. 408, 260 S.E.2d 509 (1979).

"Loss of a hand." — An injury to the hand which was cured within 10 days after claimant returned to work was not "the loss of a hand" under this section. *Castle v. Imperial Laundry & Dry Cleaning Co.*, 62 Ga. App. 184, 8 S.E.2d 547 (1940) (see O.C.G.A. § 34-9-263).

"Complete loss of hearing," as used in this section, meant the loss of industrial hearing. *Shipman v. Employers Mut. Liab. Ins. Co.*, 105 Ga. App. 487, 125 S.E.2d 72 (1962) (see O.C.G.A. § 34-9-263).

"Complete loss of hearing" as used in this section did not mean complete deafness, but meant the loss of the industrial use of the ear or ears. Thus, even if one has some hearing ability in an ear but the ear has none of the hearing ability required of one's work, one was deemed to have "complete loss of hearing" in the ear for the purposes of workers' compensation. *Aetna Ins. Co. v. Woody*, 118 Ga. App. 819, 165 S.E.2d 469 (1968) (see O.C.G.A. § 34-9-263).

Word "member" does not embrace the ear. *Travelers Ins. Co. v. Albin*, 33 Ga. App. 666, 127 S.E. 804 (1925).

This section became operative only when "substantially all" (meaning one-half) of the phalange was removed. *Pye v. Insurance Co. of N. Am.*, 146 Ga. App. 365, 246 S.E.2d 400 (1978) (decided prior to 1996 amendment; see O.C.G.A. § 34-9-263).

Specific or General Disability

Section distinguished from § 34-9-261. — The compensation allowable under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) for a total incapacity was distinguished from a disability, such as the loss of a member, for which compensation was allowed under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263). *Bethlehem Steel Co. v. Dempsey*, 94 Ga. App. 408, 94 S.E.2d 749 (1956).

Compensation for specific members determined by this section. — It is necessary to ascertain the permanent partial disability before an award can be made under this section, but when permanent partial disability is ascertained, then the claimant becomes entitled to receive compensation as for permanent partial loss of use of the member, and such compensation is in lieu of all other compensation for the permanent partial handicap. *American Mut. Liab. Ins. Co. v. Braden*, 43 Ga. App. 74, 157 S.E. 904 (1931) (see O.C.G.A. § 34-9-263).

In a case involving an injury to a specified member of the body as described in this section, the amount of compensation which can be awarded for an injury to such specific member was the amount prescribed in that

Specific or General Disability (Cont'd)

section, and such compensation was in lieu of all other compensation for permanent partial industrial handicap. *Liberty Mut. Ins. Co. v. Holloway*, 58 Ga. App. 542, 199 S.E. 334 (1938) (see O.C.G.A. § 34-9-263).

In a case involving an injury to a specified member of the body, as described in this section, the amount of compensation which can be awarded for such injury was the amount set out in that section, and such compensation will be in lieu of all other compensation. *Bituminous Cas. Co. v. Dyer*, 62 Ga. App. 279, 7 S.E.2d 415 (1940) (see O.C.G.A. § 34-9-263).

Where an employee suffers an injury which results in a partial or total disability (industrial handicap) to one member of the employee's body only, the employee is entitled only to compensation for an industrial handicap. *Armour & Co. v. Walker*, 99 Ga. App. 64, 107 S.E.2d 691 (1959).

When an agreement showed that the claimant's injury was to a specific member, the period for which compensation was payable was determined by this section. *Nation v. Pacific Employers Ins. Co.*, 112 Ga. App. 380, 145 S.E.2d 265 (1965) (see O.C.G.A. § 34-9-263).

Where the injury is confined to a specific member injury, the right to compensation is not based on economic condition or ability to return to work but solely upon the loss of use of the specific member. *Morrison Assurance Co. v. Hodges*, 130 Ga. App. 436, 203 S.E.2d 629 (1973).

Section excludes any other compensation.

— The plain and unambiguous wording of this section excluded any other compensation for disability where the injury resulted and compensation was paid for the loss of a member. *National Sur. Corp. v. Martin*, 86 Ga. App. 77, 71 S.E.2d 666 (1952) (see O.C.G.A. § 34-9-263).

Compensation for the loss of a member under this section was in full for such specific injury, and excluded compensation for temporary total disability arising solely from the loss of the member. *Stone v. American Mut. Liab. Ins. Co.*, 42 Ga. App. 271, 155 S.E. 795 (1930); *American Mut. Liab. Ins. Co. v. Braden*, 43 Ga. App. 74, 157 S.E. 904 (1931); *Travelers' Ins. Co. v. Reid*, 49 Ga. App. 317, 175 S.E. 414 (1934) (see O.C.G.A. § 34-9-263).

Where no superadded injury or disease.

— Where an employee received an injury only to a specific member, as specified in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), and there was no superadded injury or disease affecting other portions of the employee's body, as a result of which the employee became totally disabled, the employee's compensation was determined by former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), and the employee was not entitled to receive the compensation for total incapacity to work allowed by former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), for other injuries in addition to the specific compensation for total or partial loss of use of the member. *London Guarantee & Accident Co. v. Ritchey*, 53 Ga. App. 628, 186 S.E. 863 (1936).

A disability resulting from loss or loss of use of a specific member, where there was no superadded injury or disease affecting other portions of the body, should be computed under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), providing schedules of compensation relating to loss of specific members, rather than former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), providing for total incapacity to work, and this was true even though the claimant was totally incapacitated at the time. *Globe Indem. Co. v. Brooks*, 84 Ga. App. 687, 67 S.E.2d 176 (1951).

Disability resulting from loss of use of a specific member must be computed under the schedule in this section where there was no superadded injury or disease affecting other portions of the body. *National Sur. Corp. v. Martin*, 86 Ga. App. 77, 71 S.E.2d 666 (1952) (see O.C.G.A. § 34-9-263).

A resulting injury to other parts of the body must be shown if other than compensation for injury to a member is to be awarded. *Godbee v. American Mut. Liab. Ins. Co.*, 95 Ga. App. 86, 96 S.E.2d 648 (1957).

If an employee suffers an injury which results in a partial or total disability (industrial handicap) to one member of the employee's body only with no superadded injury, the employee is entitled only to compensation for an industrial handicap as provided by this section, irrespective of the employee's earning ability after the accident is sustained. *Waters v. Aetna Cas. & Sur. Co.*,

114 Ga. App. 744, 152 S.E.2d 754 (1966) (see O.C.G.A. § 34-9-263).

Superadded injury following member loss. — It might be that if one of the specific injuries in this section named should be accompanied or followed by a partial permanent or temporary disability due to some other cause, such as infection or paralysis, and not to the loss of member, whereby a superadded injury follows, the employee would be entitled to additional compensation. *Georgia Cas. Co. v. Jones*, 156 Ga. 664, 119 S.E. 721 (1923) (see O.C.G.A. § 34-9-263).

If an employee suffers an injury to a specific member which caused a superadded incapacity due to some cause produced by the injury to the specific member, resulting in an incapacity to labor, compensation was not limited to this section. *Armour & Co. v. Walker*, 99 Ga. App. 64, 107 S.E.2d 691 (1959) (see O.C.G.A. § 34-9-263).

If one sustains a disabling injury to a specific member of the body and thereafter the condition of other parts of the body change because of the accident so that there is a generalized disability, as contrasted with a specific disability to a body member such as an arm or leg, upon an application for compensation based upon such change in condition from a specific to a general disability, additional compensation may be awarded. *GMC, Fisher Body Div. v. Bowman*, 107 Ga. App. 335, 130 S.E.2d 163 (1963).

If there was a permanent loss of use, either total or partial, resulting from an injury to a specific member, compensation may be had under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), and this was exclusive of compensation under former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262), unless in consequence of the injury to the member the claimant suffered a superadded injury or disease affecting other portions of claimant's body, as a result of which claimant was either totally or partially disabled to work at gainful employment, in which event compensation was payable under those former provisions. *Clark v. Liberty Mut. Ins. Co.*, 108 Ga. App. 806, 134 S.E.2d 534 (1963).

A superadded injury or disease was one which occurred to a specific member of the body subsequent to a job-related injury and affected other portions of the body, resulting

in the claimant's total disability, and, thus, eligibility for compensation under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) for total incapacity to work, rather than under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) relating to specific member injuries. *Bond v. Employers Ins. Co.*, 154 Ga. App. 244, 268 S.E.2d 354 (1980).

Member not "lost," but employee totally disabled by injuries. — Where an employee was totally disabled by injuries to one of the employee's feet, but the foot was not "lost," the employee's compensation was not fixed and limited by former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263). *City of Waycross v. Hayes*, 48 Ga. App. 317, 172 S.E. 756 (1934).

Multiple injuries. — Where the accident to the claimant resulted in multiple injuries to claimant, an award of compensation for permanent partial loss of the use of a member specified in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) and for partial incapacity to work in accordance with former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262), if there was evidence to support such award, was not contrary to law or in excess of the powers of the board. *Hartford Accident & Indem. Co. v. Brennan*, 85 Ga. App. 163, 68 S.E.2d 170 (1951).

Former Code 1933, § 114-408 (see O.C.G.A. § 34-9-241) dealt with second specific member injuries stated in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) and not to injuries to the body as a whole, which came within the provisions of § 114-408. *Minter Naval Stores v. Bell*, 133 Ga. App. 114, 210 S.E.2d 331 (1974) (decided under former Code 1933, § 114-408, prior to revision by Ga. L. 1978, p. 2220, § 6).

Where injury not to specific member, compensation determined by § 34-9-261 or § 34-9-262. — Where the injury was not to a specific member, compensation must be determined under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), where the incapacity to work resulting from an injury was total, or under former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262), where the incapacity for work resulting from the injury was partial. *Employers Liab. Assurance Corp. v. Hollifield*, 93 Ga. App. 51, 90 S.E.2d 681 (1955).

Specific or General Disability (Cont'd)

Claimant suffering from physical impairment not entitled to compensation for member loss. — If claimant is suffering physical impairment resulting from claimant's injury, claimant is not entitled to compensation for loss of use of any member, but is entitled to compensation for whatever loss of earning capacity claimant has sustained as a permanent result of the accident. *Employers Liab. Assurance Corp. v. Hollifield*, 93 Ga. App. 51, 90 S.E.2d 681 (1955).

Compensation for injury to body as a whole is determined by claimant's loss of earning capacity and not the percent of physical disability. *Minter Naval Stores v. Bell*, 133 Ga. App. 114, 210 S.E.2d 331 (1974) (decided prior to 1996 amendment).

Compensable Injuries**1. Injuries Considered Compensable**

Related injuries from same identical accident compensable. — Two related injuries, such as an injury to the back which first became disabling, and an injury to the leg which stems from the back injury but was not disabling at first, may properly be held to result from the identical accident and may be compensated for, even though the disability from both does not develop, arise, or become known at the same time. *GMC, Fisher Body Div. v. Bowman*, 107 Ga. App. 335, 130 S.E.2d 163 (1963).

Compensation under this section was solely dependent upon loss of function of arm. *Reliance Ins. Co. v. Oliver*, 114 Ga. App. 639, 152 S.E.2d 423 (1966) (see O.C.G.A. § 34-9-263(c)(1)).

Arm fracture and permanent partial loss of left arm specific member injury. — Where employee sustained a work-related injury which resulted in a fracture of the head of the humerus and a permanent partial loss of use of the employee's left arm, an award of compensation for specific member injury, rather than bodily disability, was proper. *Owens-Illinois, Inc. v. Douglas*, 151 Ga. App. 408, 260 S.E.2d 509 (1979).

Total loss of use of leg. — Where an injury sustained by an employee was confined solely to the employee's leg, and if there was then a total loss of use of the leg, the employee was entitled under this section

to compensation. *Travelers' Ins. Co. v. Reid*, 49 Ga. App. 317, 175 S.E. 414 (1934), later appeal, 54 Ga. App. 13, 186 S.E. 887 (1936) (see O.C.G.A. § 34-9-263).

Under this section, total loss of use of leg was equivalent to loss of leg. *Roddy v. Hartford Accident & Indem. Co.*, 65 Ga. App. 632, 16 S.E.2d 81 (1941) (see O.C.G.A. § 34-9-263).

Where the workers' compensation claimant sustained a total loss of claimant's left leg, and within 10 weeks after the injury occurred had been able to return to claimant's regular job at an increase in claimant's earnings, claimant would still be entitled to compensation for the total loss of claimant's leg. *Roddy v. Hartford Accident & Indem. Co.*, 65 Ga. App. 632, 16 S.E.2d 81 (1941).

Where an injury was sustained by an employee under the provisions of the workers' compensation provisions, which resulted in total loss of use of a leg and total incapacity to work at the time, the injury was scheduled under this section. *National Sur. Corp. v. Nelson*, 99 Ga. App. 95, 107 S.E.2d 718 (1959) (see O.C.G.A. § 34-9-263).

Permanent and total loss of use of hand. — Under this section, an employee who suffered a permanent and total loss of the use of a hand, by reason of an accident arising out of and in the course of employment, may be allowed compensation for the permanent handicap. *South v. Indemnity Ins. Co. of N. Am.*, 39 Ga. App. 47, 146 S.E. 45 (1928), cert. denied, 39 Ga. App. 843 (1929) (see O.C.G.A. § 34-9-263).

Permanent partial loss of use of hand. — Under this section, an employee who suffers a permanent but partial loss of the use of a hand may be allowed compensation. *South v. Indemnity Ins. Co. of N. Am.*, 39 Ga. App. 47, 146 S.E. 45 (1928), cert. denied, 39 Ga. App. 843 (1929) (see O.C.G.A. § 34-9-263).

Hand injury resulting from finger injury compensated on basis of finger loss. — If the hand is injured as a result of the injury to a finger, and in no other way, the injury to the hand shall be compensated for in a certain amount for the loss of the finger, or the use thereof, or for partial loss or partial loss of use. *Travelers Ins. Co. v. Colvard*, 70 Ga. App. 257, 28 S.E.2d 317 (1943).

The law provides that if the hand is injured as a result of the injury to a finger, and in no other way, the injury to the hand shall

be compensated for in a certain and definite manner, namely, a certain amount for the loss of the finger, or the use thereof, or for partial loss or partial loss of use. There is no other reasonable construction of the law, because if there is only an injury to a finger, and compensation as for an injury to the whole hand is allowed, it seems that uncertainty, lack of uniformity, and confusion would result in the attempted administration of the compensation law. *Murray v. Hartford Accident & Indem. Co.*, 135 Ga. App. 870, 219 S.E.2d 472 (1975).

This section provided compensation for loss of use of the fingers separately from the hand. Therefore, where only the fingers are injured, and the use of the hand is affected only insofar as the use of the fingers is affected, compensation must be paid on the basis fixed for the fingers and not the hand. *Continental Cas. Co. v. Castleberry*, 147 Ga. App. 684, 250 S.E.2d 19 (1978) (see O.C.G.A. § 34-9-263).

Where hand left less serviceable than it would have been had fingers healed properly. — Where the claimant can establish by proof that fingers for which claimant was duly compensated had apparently healed at the time of an approved settlement, and where thereafter it developed that the healing was incomplete or so that what was left of claimant's hand was less serviceable than it would have been had the healing of the fingers been complete and proper, claimant is entitled to recover for the percentage of the loss of the use of claimant's hand, less the amount claimant had already received or is entitled to receive for claimant's fingers. *Wiley v. Bituminous Cas. Co.*, 76 Ga. App. 862, 47 S.E.2d 652 (1948).

When fingers are either totally or partially disabled, what is left of the hand is presumed to be serviceable. However, if the injured fingers fail to heal, or improperly heal, this may render useless what is left of the hand. Also, it may impair what is left of the hand to a percentage of disability far greater than the loss of the fingers where they properly healed. *Murray v. Hartford Accident & Indem. Co.*, 135 Ga. App. 870, 219 S.E.2d 472 (1975).

Loss of multiple phalanges considered loss of entire finger. — The total loss of use of a member shall be considered as equivalent to the loss of the member, and the loss

of more than one phalange shall be considered the loss of the entire finger or thumb. *Holcombe v. Fireman's Fund Ins. Co.*, 102 Ga. App. 587, 116 S.E.2d 891 (1960) (decided prior to 1996 amendment).

Partial foot loss concurring with toe loss. — The fact that compensation was awarded to an employee for the loss of two toes, as provided in this section, does not preclude the employee from afterwards receiving compensation for a partial loss of the use of the employee's foot, where the loss of the toes, for which compensation had already been awarded, concurred with other injuries in the foot arising out of the same accident which caused the loss of the toes, in causing the partial loss of the use of the foot. *General Accident, Fire & Life Assurance Corp. v. Beatty*, 174 Ga. 314, 162 S.E. 668, answer conformed to, 45 Ga. App. 104, 163 S.E. 302 (1932) (see O.C.G.A. § 34-9-263).

Hearing loss at work due to very loud noises. — If, on the trial of an application for compensation for loss of hearing, under the provisions of this section, it appeared that the claimant sustained a loss of hearing while working on a flight line as a mechanic, and that such loss was due to claimant's continued and repetitious exposure over a period of months to very loud noises emanating from the operation of jet aircraft engines in close proximity to claimant's work, a finding that claimant suffered a compensable injury was authorized. *Shipman v. Employers Mut. Liab. Ins. Co.*, 105 Ga. App. 487, 125 S.E.2d 72 (1962) (see O.C.G.A. § 34-9-263).

Determining extent of vision loss. — If claimant had perfect vision prior to accident, corrected vision formula cannot be applied. *Georgia Cas. & Sur. Co. v. Speller*, 122 Ga. App. 459, 177 S.E.2d 491 (1970).

Physical impairment due to paranoid schizophrenia. — Evidence sufficient to support award for permanent partial disability based upon a 20 percent permanent physical impairment due to paranoid schizophrenia. *GMC v. Summerous*, 170 Ga. App. 338, 317 S.E.2d 318 (1984).

2. Injuries Not Considered Compensable

Hand loss not caused by finger injury. — Where there is no evidence that an injury to the fingers resulted in a loss of use of the hand, an award granting compensation for a

Compensable Injuries (Cont'd)**2. Injuries Not Considered****Compensable (Cont'd)**

10 percent loss of the hand is not authorized. *Continental Cas. Co. v. Castleberry*, 147 Ga. App. 684, 250 S.E.2d 19 (1978).

Loss of hearing in one ear. — While the law provides that compensation shall be paid for the complete loss of hearing in both ears, there is no express provision for the loss of hearing in one ear. *Travelers Ins. Co. v. Albin*, 33 Ga. App. 666, 127 S.E. 804 (1925) (decided under former Code 1933, § 114-406, prior to revision by Ga. L. 1971, p. 895, § 1).

Compensation payable to a claimant who lost the trumpet part of claimant's ear in an accident under the workers' compensation provisions was not governed by former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), inasmuch as it relates to loss of bodily members and loss of hearing in both ears, and it had been held that an ear was not embraced in the term "member," but whatever compensation the claimant is entitled to must be determined by former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), relating to total incapacity, and former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262), relating to partial incapacity. *Lumbermens Mut. Cas. Co. v. Cook*, 69 Ga. App. 131, 25 S.E.2d 67 (1943) (decided under former Code 1933, § 114-406, prior to revision by Ga. L. 1971, p. 895, § 1).

Total disability entitled to income compensation benefits only. — Regardless of the percentage of an employee's physical disability, so long as the employee suffers a total impairment of the employee's earning capacity the employee is "totally disabled" and entitled to income compensation benefits under O.C.G.A. § 34-9-261 and not O.C.G.A. § 34-9-263. *Hensel Phelps Constr. Co. v. Manigault*, 167 Ga. App. 599, 307 S.E.2d 79 (1983).

Loss of foot or toes. — Where the evidence did not demand a finding that the 15 percent disability found to exist as to claimant's "right lower extremity" or the 25 percent disability found to exist as to claimant's right foot was the result of anything other than the 100 percent loss of claimant's three toes, the full board was authorized to find that claimant was not entitled to separate

additional compensation for claimant's foot or claimant's leg and to award compensation based solely on the loss of the toes. *UPS v. Outlaw*, 190 Ga. App. 840, 380 S.E.2d 310 (1989).

3. Pain

Pain and suffering, unless so severe as to result in economic disability, are not compensable. *Nowell v. Stone Mt. Scenic R.R.*, 150 Ga. App. 325, 257 S.E.2d 344 (1979).

Pain itself not compensable. — Under this section, pain was not itself compensable, but where it was so severe that disability resulted, then the fact that the disability or loss of use resulted because the human mechanism must cease the use rather than bear the pain, a compensable loss of use results. *Williamson v. Aetna Cas. & Sur. Co.*, 101 Ga. App. 220, 113 S.E.2d 208 (1960) (see O.C.G.A. § 34-9-263).

Where the director found that no disability was shown to exist in the claimant's hip or tailbone, except for reflected pain, that pain is still compensable under this section where it prevented the claimant from any gainful employment. *Clark v. Liberty Mut. Ins. Co.*, 108 Ga. App. 806, 134 S.E.2d 534 (1963) (see O.C.G.A. § 34-9-263).

A compensable loss of use results where the pain is so severe that the human mechanism must cease rather than bear the pain. *Durden v. Liberty Mut. Ins. Co.*, 151 Ga. App. 399, 259 S.E.2d 656 (1979).

Discomfort alone not considered disability. — Discomfort, unless it be such that it prevented the employee from performing the employee's duties, was not considered a disability within the meaning of this section. *Jones v. United States Fid. & Guar. Co.*, 125 Ga. App. 323, 187 S.E.2d 879 (1972) (see O.C.G.A. § 34-9-263).

Sufficiently disabling pain compensable. — While it is true that pain alone is not compensable, where the pain is so severe that the human mechanism must cease rather than bear the pain, a compensable loss occurs. *Bouldware v. Delta Corp.*, 160 Ga. App. 100, 286 S.E.2d 333 (1981).

Benefits Awarded

Right to compensation for specific member disability based upon loss of member's

function. — The right to compensation for specific body member disability under this section was based not upon permanent industrial handicap, but solely upon the loss of function of the member itself. *Zurich Ins. Co. v. Robinson*, 127 Ga. App. 113, 192 S.E.2d 533 (1972) (see O.C.G.A. § 34-9-263).

As a matter of law, a claimant is entitled to benefits for permanent partial disability for each specified individual member injured in a work-related accident. *N.G. Gilbert Corp. v. Cash*, 181 Ga. App. 775, 353 S.E.2d 840 (1987).

Under O.C.G.A. § 34-9-263(b)(2), it is not receipt of benefits that triggers payment, but entitlement to such benefits. Because an employee had been totally disabled from employment since the employee's injury, the employee was entitled to receive temporary total disability benefits pursuant to O.C.G.A. § 34-9-261 since that date; therefore, the employee could not receive permanent partial disability benefits under § 34-9-263(b)(2). *Wet Walls, Inc. v. Ledezma*, 266 Ga. App. 685, 598 S.E.2d 60 (2004).

Insufficient notice and opportunity to be heard. — Because the record showed that a workers' compensation claimant was awarded temporary total disability benefits and that the issue of permanent partial disability benefits was not raised by either party, the insurer was not afforded notice or an opportunity to be heard on the issue of permanent partial disability benefits; thus, it was entitled to a hearing regarding such on remand. *Cypress Ins. Co. v. Duncan*, 281 Ga. App. 469, 636 S.E.2d 159 (2006).

Claimant's earning ability after accident irrelevant. — Former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262) provided for compensation on the basis of a decrease in earnings; former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) provided compensation for the loss, or loss of use, of a member, irrespective of the earning ability of a claimant after an accident was sustained. *Roddy v. Hartford Accident & Indem. Co.*, 65 Ga. App. 632, 16 S.E.2d 81 (1941).

An award for an industrial handicap as specifically provided for by this section was based on impairment to the member, irrespective of the earning ability of a claimant after an accident is sustained. *GMC v. Sligh*,

108 Ga. App. 354, 133 S.E.2d 56 (1963) (see O.C.G.A. § 34-9-263).

Claimant still entitled to compensation though able to return to regular job. — This section provided compensation for the loss, or loss of use, of a member, irrespective of the earning ability of the claimant after the injury was sustained, and a claimant was still entitled to compensation for the loss or injury to a member even though claimant was able to return to claimant's regular job. *Godbee v. American Mut. Liab. Ins. Co.*, 95 Ga. App. 86, 96 S.E.2d 648 (1957) (see O.C.G.A. § 34-9-263).

An injured employee may receive compensation for a permanent partial physical disability, while at the same time receiving compensation for a temporary partial economic disability for separate injuries to the same part of the body. *City of Atlanta v. Gentry*, 184 Ga. App. 8, 360 S.E.2d 611 (1987).

Compensation payable in relationship that percentage of loss bears to total loss. — Where there was an injury to a specific member listed under this section and a percentage of loss of use of the member can be determined, compensation was payable in the relationship that the percentage of loss of use bore to the total loss of the member. *Employers Liab. Assurance Corp. v. Hollifield*, 93 Ga. App. 51, 90 S.E.2d 681 (1955) (see O.C.G.A. § 34-9-263).

Apportionment of benefits required when claimant has preexisting degeneration infirmity. — Apportionment of permanent partial disability benefits is required by O.C.G.A. § 34-9-241 when a claimant has a preexisting degeneration infirmity described in O.C.G.A. § 34-9-263; thus, denial of benefits was authorized where medical records showed that claimant had a preexisting hearing loss and claimant failed to show the percentage of disability, if any, attributable to claimant's compensable injury. *Metro Interiors, Inc. v. Cox*, 218 Ga. App. 396, 461 S.E.2d 570 (1995).

Error to remand to board to determine loss where record's evidence supports board's finding. — Where there is evidence in the record supporting the board's implicit finding that the claimant's loss of use of the specific member involved is 100 percent, the superior court errs in remanding for the purpose of determining the percentage of

Benefits Awarded (Cont'd)

loss of use. *Travelers Ins. Co. v. Hogue*, 130 Ga. App. 844, 204 S.E.2d 760 (1974).

Percentage of disability finding supported by evidence. — As the percentage of disability found by the state board was within the range of all the evidence, the finding could not be said to lack evidentiary support. The claimant offered evidence showing a 15 percent disability, while claimant's employer and its self-insurer offered evidence suggesting a five percent disability, and the board determined that the claimant sustained a ten percent permanent partial disability. *Mix v. Allied Readymix*, 248 Ga. App. 261, 546 S.E.2d 41 (2001).

Permanent partial industrial handicaps shall be compensated by payments for periods specified. — The compensation for permanent partial industrial handicaps shall be as specified; and the compensation shall be in lieu of all other compensation. *Home Accident Ins. Co. v. McNair*, 173 Ga. 566, 161 S.E. 131 (1931), answer conformed to, 44 Ga. App. 659, 162 S.E. 635 (1932).

Weekly compensation for definite periods of time. — This section was intended to provide weekly compensation for total or partial loss, or loss of use, of a member for definite periods of time. For partial loss, or loss of use, of a member, its language was definitively calculated to import that the lesser the loss or disability, the lesser the weekly compensation payment. Nowhere did it imply the lesser the loss, the shorter the period of payment. *Pittsburgh Plate Glass Co. v. Bailey*, 111 Ga. App. 609, 142 S.E.2d 388 (1965) (see O.C.G.A. § 34-9-263).

Award subject to review upon change in condition. — An award granting to an employee compensation for the total loss of use of a leg is not a final and conclusive adjudication in favor of the right of the employee to recover the weekly amounts of compensation therein granted the employee for the number of weeks therein specified. Such an award is subject to review upon the application of either the employer or the employee, whenever either brings oneself within the terms of former Code 1933, § 114-709 (see O.C.G.A. § 34-9-104). *Home Accident Ins. Co. v. McNair*, 173 Ga. 566, 161 S.E. 131 (1931), answer conformed to, 44 Ga. App. 659, 162 S.E. 635 (1932).

Total loss of use of a member was equivalent to the loss of that member, and compensation for such total loss of use shall be continued under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) until there shall be permanent or partial recovery of the use, at which time compensation should be reduced proportionately to the recovery of the use of the member under former Code 1933, § 114-709 (see O.C.G.A. § 34-9-104). *Continental Cas. Co. v. Haynie*, 182 Ga. 608, 186 S.E. 683 (1936).

Award authorized for injured member restored to full use, but in danger of reinjury. — An award to a claimant worker for permanent partial disability due to an injured member of claimant's body which has recovered sufficiently to restore full use thereof, but which is left in such tender condition that the full use thereof must be refrained from on account of the imminent danger of reinjuring it is authorized. *Liberty Mut. Ins. Co. v. Thrower*, 76 Ga. App. 275, 45 S.E.2d 459 (1947).

Compensation must be awarded in accordance with section's schedule. — Where the uncontradicted evidence showed that the claimant sustained complete or partial amputations or total or partial loss of use of one or more fingers and a partial amputation and/or loss of use of the thumb, the compensation must be awarded in accordance with the schedule set forth in this section. The board was not empowered in a case such as this, even though supported by sufficient competent testimony, to superimpose its views upon the clear and specific mandates of that section and render an award on a percentage basis, in lieu of the detailed directives appearing in the law. *Holcombe v. Fireman's Fund Ins. Co.*, 102 Ga. App. 587, 116 S.E.2d 891 (1960) (see O.C.G.A. § 34-9-263).

Attempt by board to legislate as to measure of compensation payable was invalid. *Southern Coop. Foundry Co. v. Drummond*, 76 Ga. App. 222, 45 S.E.2d 687 (1947).

Payments of compensation for specific member injuries are in lieu of all other compensation. *Benton v. United States Cas. Co.*, 118 Ga. App. 804, 165 S.E.2d 473 (1968).

Employee can recover compensation under both § 34-9-261 and § 34-9-263. — Former Code 1933, § 114-406 (see O.C.G.A.

§ 34-9-263) provided that the compensation to be paid for the injury shall be in lieu of all other compensation. If the employee can recover compensation for such an injury under both former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) and former Code 1933, § 114-406, then the employee's compensation under the previous section was not in lieu of all other compensation. *Massey v. Aetna Cas. & Sur. Co.*, 86 Ga. App. 211, 71 S.E.2d 103 (1952).

Total disability is antithesis of partial disability. *Travelers' Ins. Co. v. Hurt*, 176 Ga. 153, 167 S.E. 175 (1932).

Disability not dependent on ability to find employment. — The nature and extent of the disability resulting from the injury received is not dependent upon the employee's ability to find employment. *Travelers' Ins. Co. v. Hurt*, 176 Ga. 153, 167 S.E. 175 (1932).

Impairment of earning capacity compensable. — With the exception of the specific members dealt with in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), the amount of compensation which an employee was entitled to receive for an injury is determined by the employee's diminished earning capacity as provided in former Code 1933, §§ 114-404 and 114-405 (see O.C.G.A. §§ 34-9-261 and 34-9-262). Therefore, if any injury to the employee by accident arising out of and in the course of employment either totally or partially impaired the employee's earning capacity, such injury was compensable. *Blue Bell Globe Mfg. Co. v. Baird*, 61 Ga. App. 298, 6 S.E.2d 83 (1939).

Impairment determined by comparing average weekly wages prior to injury with wages earned thereafter. — The only method of computing compensation for a partially disabled claimant is 60 percent (now two-thirds) of the difference between claimant's average weekly wages prior to the injury and the average weekly wages claimant is able to earn thereafter. The only formula for determining this difference is to compare claimant's average weekly wages prior to the injury with claimant's wages earned each individual week thereafter until the time of the hearing, because claimant may have earned varying amounts during the period prior to the hearing and if there are periods of unemployment, through no fault of the claimant, due to the injury, then

claimant would be entitled to temporary total disability for this period. *Liberty Mut. Ins. Co. v. Goins*, 96 Ga. App. 887, 101 S.E.2d 920 (1958).

No compensation where claimant earns more than prior average wages. — A partially disabled claimant will not be entitled to compensation for the period in which claimant earned more than claimant's average weekly wages prior to the injury. *Liberty Mut. Ins. Co. v. Goins*, 96 Ga. App. 887, 101 S.E.2d 920 (1958).

Earning capacity impairment total where claimant unable to procure any work. — Since the hearing director found as a fact that the claimant sustained an injury resulting in a 30 percent disability for performing any regular gainful employment involving stooping or bending, and the record failed to show that claimant was fitted for, was offered, or could have procured, any work other than claimant's previous work which did involve stooping and bending, a finding was authorized and was made by the board that a disability for this type of work existed, and a finding was demanded under the evidence that the disability, if it existed, resulted in a total impairment of earning capacity. *Employers Liab. Assurance Corp. v. Hollifield*, 93 Ga. App. 51, 90 S.E.2d 681 (1955).

Compensation theretofore paid for specific member injury considered in total disability award. — Where the employee was totally disabled, the employee may not receive an award of compensation for total disability under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), without any consideration for the weeks during which compensation had theretofore been paid for specific member injury under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263). *Benton v. United States Cas. Co.*, 118 Ga. App. 804, 165 S.E.2d 473 (1968).

Compensation paid under section considered in temporary partial disability award. — Where, on application of the claimant, the board makes an award finding a change in the claimant's condition from an industrial handicap, as provided for in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), to partial incapacity to work, as provided by former Code 1933, § 114-405 (see O.C.G.A. § 34-9-262), the board was authorized to

Benefits Awarded (Cont'd)

order compensation paid under that section during the partial incapacity, even though the benefits previously awarded under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263) had been paid in a lump sum settlement, and the period therefor represented had not expired; and the board properly deducted from the maximum period allowed for the partial disability the period during which the claimant was paid for total incapacity, and the time during which claimant had no incapacity, as found by the board, and the interval for which claimant was paid the lump sum settlement on account of the industrial handicap under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263). *Hardware Mut. Cas. Co. v. Wilson*, 72 Ga. App. 574, 34 S.E.2d 634 (1945).

Partial incapacity terminates when employee capable of earning same wage. — Except as specifically provided in this section, partial incapacity terminated when the employee again became capable of earning the same wage the employee earned before the injury, whether at the same or at a different occupation, and without regard to such personal inconveniences as may result to the employee solely from the employee's injury, and which are not caused or aggravated by the employee's new employment. *Lumbermens Mut. Cas. Co. v. Cook*, 69 Ga. App. 131, 25 S.E.2d 67 (1943) (see O.C.G.A. § 34-9-263).

Lump sum payment not conditioned upon adjudication of permanent disability and definite amount of compensation. — Under Georgia law, it is not a condition precedent to a lump sum payment that it first be adjudicated that the disability is permanent and that a definite amount of compensation be fixed. If this were not true, there would be no lump sum payments of compensation except as compensation for the injuries enumerated in former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263). *Lumbermens Mut. Cas. Co. v. McIntyre*, 67 Ga. App. 666, 21 S.E.2d 446 (1942).

Where the question at issue was the degree of disability, either to the claimant's whole person or to a specific member, the award was not unsupported by evidence where the trier of fact arrived at a specific percentage of disability from all of the evidence in the

case. *Davis v. GMC*, 166 Ga. App. 401, 304 S.E.2d 402 (1983).

Proof that an existing incapacity is permanent is not necessary to support an award for either loss of earning capacity or loss of use of a specific member. *Davis v. GMC*, 166 Ga. App. 401, 304 S.E.2d 402 (1983).

Parties cannot contradict matters previously agreed upon. — Entering into an agreement and causing it to receive the approval of the board, the parties thereto effectively precluded themselves from thereafter contradicting and challenging the matters thus agreed upon. *Employers Mut. Liab. Ins. Co. v. Turner*, 126 Ga. App. 24, 189 S.E.2d 862 (1972).

Case remanded where evidence not considered in light of correct and applicable law. — Where it appears affirmatively that an award by the board is based upon an erroneous legal theory, and that for this reason the board has not considered all of the evidence in the light of correct and applicable legal principles, case would be remanded to the board for further findings. *Bouldware v. Delta Corp.*, 160 Ga. App. 100, 286 S.E.2d 333 (1981).

Res judicata. — An award based on an agreement between an employer and an employee for maximum weekly payments "until terminated in accordance with the provisions of the Workers' Compensation Act," showing on its face that the employee received multiple injuries, must be construed as an award under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), for total disability, rather than one under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), for injury to a specific member, and such an award was res judicata. Accordingly, where a later award was made for permanent disability of a specific member, the employer was not entitled to credit against the later award for weekly payments made under the original award, even though at the hearing there was no evidence that there had been any disability from any injury other than that to the specific member. *St. Paul Fire & Marine Ins. Co. v. Durden*, 104 Ga. App. 541, 122 S.E.2d 262 (1961).

An approved agreement or an award of the board providing for the payment of compensation on account of total disability is res judicata as to the existence of such disability and the compensation due there-

under until such time as it is set aside either by an approved final settlement receipt or by a subsequent award finding a change in condition. *Pacific Employers Ins. Co. v. Shoemake*, 105 Ga. App. 432, 124 S.E.2d 653 (1962).

If the evidence showed that the claimant suffered temporary total disability as a result of an accident, and thereafter the disability was confined to the claimant's arm, an award

finding a change of condition, discounting disability payments under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261), and finding a percentage of disability under former Code 1933, § 114-406 (see O.C.G.A. § 34-9-263), may be authorized if the facts support such a finding. *Turner v. Travelers Ins. Co.*, 114 Ga. App. 729, 152 S.E.2d 783 (1966).

RESEARCH REFERENCES

ALR. — Right to take rise or fall in wages since date of accident into account in fixing workmen's compensation, 2 ALR 1642; 92 ALR 1188.

Workmen's compensation: what amounts to loss of member within the meaning of the acts, 18 ALR 1350.

Workmen's compensation: injury while riding to or from work in employer's conveyance as arising out of, or in course of, employment, 21 ALR 1223; 24 ALR 1233; 62 ALR 1438; 145 ALR 1033.

Workmen's compensation: compensation for loss or impairment of eyesight within Workmen's Compensation Acts, 24 ALR 1466; 73 ALR 706; 99 ALR 1499; 142 ALR 822.

Accident and disability insurance: when insured deemed to be totally and continuously unable to transact all business duties, 37 ALR 151; 41 ALR 1376; 51 ALR 1048; 79 ALR 857; 98 ALR 789; 39 ALR3d 1026.

Workmen's compensation: compensation for disfigurement, 80 ALR 970; 116 ALR 712.

Workmen's compensation: mental state or

nervous condition following accident or injury as compensable, or factor in determining amount or duration of period of compensation, 86 ALR 961.

Workmen's compensation: right to compensation for temporary total disability in addition to compensation for permanent partial disability, 88 ALR 385.

Loss or impairment of vision as within meaning of total disability clause, 1 ALR2d 756.

Amount recoverable under loss of member or vision clauses of accident insurance, 44 ALR2d 1233.

Validity and construction of accident insurance policy provision making benefits conditional on disability occurring immediately, or at once, or within specified time of accident, 39 ALR3d 1026.

Admissibility of opinion evidence as to employability on issue of disability in health and accident insurance and workers' compensation cases, 89 ALR3d 783.

Compensability of specially equipped van or vehicle under workers' compensation statutes, 63 ALR5th 163.

34-9-264. Compensation for loss of hearing caused by harmful noise; procedure for measuring degree of hearing impairment; eligibility for compensation; liability of employer.

(a) As used in this Code section, the term:

(1) "Harmful noise" means sound in employment capable of producing occupational loss of hearing as defined in paragraph (2) of this subsection. Sound of an intensity of less than 90 decibels, A scale, shall be deemed incapable of producing occupational loss of hearing as defined in this Code section.

(2) "Occupational loss of hearing" means a permanent sensorineural loss of hearing in both ears caused by prolonged exposure to harmful noise in employment.

(b) Compensation based on $66 \frac{2}{3}$ percent of average weekly wages, subject to limitations of Code Section 34-9-261, shall be payable for loss of hearing caused by harmful noise, subject to the following rules which shall be applicable in determining eligibility, amount, and period during which compensation shall be payable:

(1) In the evaluation of occupational hearing loss, only the hearing levels at the frequencies of 500, 1,000, and 2,000 cycles per second shall be considered. Hearing losses for frequencies below 500 and above 2,000 cycles per second are not to be considered as constituting compensable hearing disability. No consideration shall be given to the question of whether or not the ability of an employee to understand speech is improved by the use of a hearing aid. The board may order the employer to provide the employee with an original hearing aid if it will materially improve the employee's ability to hear;

(2) The percentage of hearing loss shall be calculated as the average, in decibels, of the thresholds of hearing for the frequencies of 500, 1,000, and 2,000 cycles per second. Pure tone air conduction audiometric instruments, properly calibrated according to accepted national standards such as American Standards Association, Inc. (ASA), International Standards Organization (ISO), or American National Standards Institute, Inc. (ANSI), shall be used for measuring hearing loss. If more than one audiogram is taken, the audiogram having the lowest threshold will be used to calculate occupational hearing loss. If the losses of hearing average 15 decibels (26 db if ANSI or ISO) or less in the three frequencies, such losses of hearing shall not constitute any compensable hearing disability. If the losses of hearing average 82 decibels (93 db if ANSI or ISO) or more in the three frequencies, then the same shall constitute and be total or 100 percent compensable hearing loss. In measuring hearing impairment, the lowest measured losses in each of the three frequencies shall be added together and divided by three to determine the average decibel loss. For each decibel of loss exceeding 15 decibels (26 db if ANSI or ISO) an allowance of $1 \frac{1}{2}$ percent shall be made up to the maximum of 100 percent which is reached at 82 decibels (93 db if ANSI or ISO). In determining the binaural percentage of loss, the percentage of impairment in the better ear shall be multiplied by five. The resulting figure shall be added to the percentage of impairment in the poorer ear, and the sum of the two divided by six. The final percentage shall represent the binaural hearing impairment;

(3) There shall be payable for total occupational loss of hearing 150 weeks of compensation and for partial occupational loss of hearing such proportion of these periods of payment as such partial loss bears to the total loss;

(4) Except in instances of preexisting loss of hearing due to disease, trauma, or congenital deafness in one ear, no compensation shall be payable under this Code section unless prolonged exposure to harmful noise in employment has caused loss of hearing in both ears as herein-after provided;

(5) No compensation benefits shall be payable for temporary total or temporary partial disability under this Code section; and there shall be no award for tinnitus or a psychogenic hearing loss;

(6) The regular use of employer provided protective devices capable of preventing loss of hearing from the particular harmful noise where the employee works shall constitute removal from exposure to such particular harmful noise. No compensation benefits shall be payable for occupational loss of hearing caused by harmful noise if the employee fails to regularly utilize the employer provided protection device or devices which are capable of preventing loss of hearing from the particular harmful noise where the employee works;

(7) The employer liable for the compensation in this Code section shall be the employer in whose employment the employee was last exposed to harmful noise in Georgia during a period of 90 working days or parts thereof; and an exposure during a period of less than 90 working days or parts thereof shall be held not to be an injurious exposure; provided, however, that, in the event an insurance carrier has been on the risk for a period of time during which an employee has been injuriously exposed to harmful noise and if after such insurance carrier goes off the risk said employee has been further exposed to harmful noise, although not exposed for 90 working days or parts thereof, so as to constitute an injurious exposure, such carrier shall, nevertheless, be liable;

(8) An employer shall become liable for the entire occupational hearing loss to which his employment has contributed; but, if previous deafness is established by a hearing test or other competent evidence, whether or not the employee was exposed to harmful noise within six months preceding such test, the employer shall not be liable for previous loss so established, nor shall he be liable for any loss for which compensation has previously been paid or awarded. The employer shall be liable only for the difference between the percentage of occupational hearing loss determined as of the date of disability and the percentage of loss established by preemployment and audiometric examinations excluding, in any event, hearing losses arising from nonoccupational causes.

(c) No claim for compensation for occupational hearing loss shall be filed until six months have elapsed since exposure to harmful noise with the last employer. The last day of such exposure shall be the date of disability. (Code 1933, § 114-406.1, enacted by Ga. L. 1974, p. 1143, § 6; Ga. L. 1982, p. 3, § 34.)

Code Commission notes. — Pursuant to § 28-9-5, in 1988, hyphens were deleted between the words “employer provided” in two places in paragraph (b)(6).

JUDICIAL DECISIONS

Premature filing of claim. — Worker’s prematurely filed claim for occupational hearing loss ripened and was deemed to be filed at the expiration of the statutory six-month waiting period, even though the hearing on the worker’s claim was not held until two years after it was filed, since the employer was not prejudiced by the prema-

ture filing. *Woodgrain Millwork v. Millender*, 250 Ga. App. 204, 551 S.E.2d 78 (2001).

Cited in *Rowell v. Transport Ins. Co.*, 153 Ga. App. 456, 265 S.E.2d 364 (1980); *National Data Corp. v. Hooper*, 185 Ga. App. 866, 366 S.E.2d 189 (1988); *Copeland v. Continental Kewitt*, 218 Ga. App. 305, 461 S.E.2d 277 (1995).

RESEARCH REFERENCES

ALR. — Loss of hearing as within meaning of total disability clause, 1 ALR2d 952.

34-9-265. Compensation for death resulting from injury and other causes; penalty for death from injury proximately caused by intentional act of employer; payment of death benefits where no dependents found.

(a) When an employee is entitled to compensation under this chapter for an injury received and death ensues from any cause not resulting from the injury for which he or she was entitled to compensation, payments of the unpaid balance for such injury shall cease and all liability therefor shall terminate.

(b) If death results instantly from an accident arising out of and in the course of employment or if during the period of disability caused by an accident death results proximately therefrom, the compensation under this chapter shall be as follows:

(1) The employer shall, in addition to any other compensation, pay the reasonable expenses of the employee’s burial not to exceed \$7,500.00. If the employee leaves no dependents, this shall be the only compensation;

(2) The employer shall pay the dependents of the deceased employee, which dependents are wholly dependent on his or her earnings for support at the time of the injury, a weekly compensation equal to the compensation which is provided for in Code Section 34-9-261 for total incapacity;

(3) If the employee leaves dependents only partially dependent on his or her earnings for their support at the time of the injury, the weekly compensation for these dependents shall be in the same proportion to the compensation for persons wholly dependent as the average amount

contributed weekly by the deceased to the partial dependents bears to the deceased employee's average weekly wages at the time of the injury; and

(4) When weekly payments have been made to an injured employee before his or her death, compensation to dependents shall begin on the date of the last of such payments; but the number of weekly payments made to the injured employee under Code Section 34-9-261, 34-9-262, or 34-9-263 shall be subtracted from the maximum 400 week period of dependency of a spouse provided by Code Section 34-9-13; and in no case shall payments be made to dependents except during dependency.

(c) The compensation provided for in this Code section shall be payable only to dependents and only during dependency.

(d) The total compensation payable under this Code section to a surviving spouse as a sole dependent at the time of death and where there is no other dependent for one year or less after the death of the employee shall in no case exceed \$150,000.00.

(e) If it shall be determined that the death of an employee was the direct result of an injury proximately caused by the intentional act of the employer with specific intent to cause such injury, then there shall be added to the weekly income benefits paid to the dependents, if any, of the deceased employee a penalty of 20 percent; provided, however, such penalty in no case shall exceed \$20,000.00. For the purpose of this subsection, an employer shall be deemed to have intended an injury only if the employer had actual knowledge that the intended act was certain to cause such injury and knowingly disregarded this certainty of injury. Nothing in this subsection shall limit the effect of Code Section 34-9-11.

(f) Each insurer or self-insurer which, in a compensable death case, finds no dependent or dependents qualifying to receive dependency benefits shall pay to the State Board of Workers' Compensation one-half of the benefits which would have been payable to such dependent or dependents or the sum of \$10,000.00, whichever is less. All such funds paid to the board shall be deposited in the general fund of the state treasury. If, after such payment has been made, it is determined that a dependent or dependents qualified to receive benefits exist, then the insurer or self-insurer shall be entitled to reimbursement by refund for moneys collected in error. (Ga. L. 1920, p. 167, § 38; Ga. L. 1922, p. 190, § 4; Ga. L. 1923, p. 92, § 4; Code 1933, § 114-413; Ga. L. 1939, p. 234, § 1; Ga. L. 1949, p. 1357, § 3; Ga. L. 1955, p. 210, § 4; Ga. L. 1963, p. 141, § 9; Ga. L. 1968, p. 3, § 3; Ga. L. 1973, p. 232, § 6; Ga. L. 1974, p. 1143, § 9; Ga. L. 1975, p. 190, § 6; Ga. L. 1982, p. 3, § 34; Ga. L. 1983, p. 700, § 2; Ga. L. 1985, p. 727, § 11; Ga. L. 1988, p. 660, § 1; Ga. L. 1992, p. 1942, § 23; Ga. L. 1995, p. 642, § 11; Ga. L. 1996, p. 1291, § 13; Ga. L. 1998, p. 1508, § 8; Ga. L. 1999, p. 817, § 9; Ga. L. 2000, p. 1321, § 7; Ga. L. 2004, p. 631, § 34; Ga. L. 2006, p. 676, § 4/HB 1240.)

Cross references. — Persons presumed dependent, § 34-9-13.

Editor's notes. — Ga. L. 1995, p. 642, § 13, not codified by the General Assembly, provides for severability.

Law reviews. — For article, "Actions for Wrongful Death in Georgia," see 9 Ga. B.J. 368 (1947). For article surveying developments in Georgia workers' compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981). For review of 1998 legislation relating to labor and industrial relations, see 15 Ga. St. U. L. Rev. 185 (1998). For annual survey of workers' com-

pensation law, see 57 Mercer L. Rev. 419 (2005).

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 285 (1992). For note on the 1995 amendment of this Code section, see 12 Ga. St. U.L. Rev. 280 (1995).

For comment criticizing Hartford Accident & Indem. Co. v. Braswell, 85 Ga. App. 487, 69 S.E.2d 385 (1952), see 4 Mercer L. Rev. 215 (1952). For comment on Lockheed Aircraft Corp. v. Marks, 88 Ga. App. 167, 76 S.E.2d 507 (1953), see 16 Ga. B.J. 215 (1953).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DEATH ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

DETERMINATION OF DEPENDENCY

COMPENSATION AWARDED

General Consideration

Discrimination against nonresident aliens lawful. — Former O.C.G.A. § 34-9-265(b)(5) clearly discriminated between U.S. and Canadian citizens and residents on the one hand and all other nonresident aliens on the other. However, the discrimination was not an unlawful one, as the equal protection clause did not extend to nonresident aliens. Barge-Wagener Constr. Co. v. Morales, 263 Ga. 190, 429 S.E.2d 671 (1993).

Statutory rights. — Workers' compensation is a creature of statute. The rights created therein not existing at common law are only such as are set forth in its provisions. Turner v. United States Fid. & Guar. Co., 125 Ga. App. 371, 187 S.E.2d 905 (1972).

Widow not barred from acting as personal representative of estate and for herself individually. — The fact that a widow acted in the capacity of the personal representative of the estate in collecting compensation, and for herself individually in collecting the benefits due under this section, was no bar to any part of such an action, since strictness of pleading and procedure was not required before the board. Hartford Accident & Indem. Co. v. Braswell, 85 Ga. App. 487, 69 S.E.2d 385 (1952), for comment, see 4 Mercer L. Rev. 215 (1952). (see O.C.G.A. § 34-9-265).

Limitation of damages for silicosis and asbestosis. — Until the legislature adopts a definition of "transitory period" as ending when the benefits payable for silicosis and asbestosis under former § 34-9-334 became equal to those payable for other injuries and diseases, or repeals the section altogether, the ceiling contained therein applies to silicosis or asbestosis claims and subjects them to a lower maximum recovery than disability claims due to other injuries or diseases. Hudson v. Vulcan Materials Co., 179 Ga. App. 341, 346 S.E.2d 117 (1986) (decided prior to 1987 repeal of § 34-9-334).

Stroke. — Court did not err in affirming the denial of workers' compensation benefits because the evidence linking stress to the employee's stroke was conflicting; the evidence supported the conclusion that stress—whether job-related or otherwise—did not contribute to the employee's condition. Pitts v. City of Rome, 256 Ga. App. 278, 568 S.E.2d 167 (2002).

Cited in United States Fid. & Guar. Co. v. Washington, 37 Ga. App. 140, 139 S.E. 359 (1927); McBrayer v. Columbia Cas. Co., 44 Ga. App. 59, 160 S.E. 556 (1931); Tillman v. Moody, 181 Ga. 530, 182 S.E. 906 (1935); London Guarantee & Accident Co. v. Boynton, 54 Ga. App. 419, 188 S.E. 265 (1936); Strickland v. Metropolitan Cas. Ins. Co., 54 Ga. App. 866, 189 S.E. 424 (1936);

Dunn v. American Mut. Liab. Ins. Co., 64 Ga. App. 509, 13 S.E.2d 902 (1941); Bituminous Cas. Corp. v. Lockett, 65 Ga. App. 829, 16 S.E.2d 614 (1941); New Amsterdam Cas. Co. v. Davis, 67 Ga. App. 518, 21 S.E.2d 256 (1942); Wilson v. Maryland Cas. Co., 71 Ga. App. 184, 30 S.E.2d 420 (1944); Mays v. Glens Falls Ins. Co., 81 Ga. App. 478, 59 S.E.2d 286 (1950); McDonald v. Travelers Ins. Co., 81 Ga. App. 614, 59 S.E.2d 537 (1950); Liberty Mut. Ins. Co. v. Haygood, 81 Ga. App. 726, 59 S.E.2d 731 (1950); Great Am. Indem. Co. v. Usry, 87 Ga. App. 821, 75 S.E.2d 270 (1953); Grooms v. Globe Indem. Co., 92 Ga. App. 387, 88 S.E.2d 504 (1955); Globe Indem. Co. v. Reid, 92 Ga. App. 828, 89 S.E.2d 905 (1955); Selig Co. v. McKissic, 94 Ga. App. 215, 94 S.E.2d 51 (1956); Pacific Employers Ins. Co. v. West, 213 Ga. 296, 99 S.E.2d 89 (1957); Yates v. United States Rubber Co., 100 Ga. App. 583, 112 S.E.2d 182 (1959); Davis v. Cobb County, 106 Ga. App. 336, 126 S.E.2d 710 (1962); Bell v. Liberty Mut. Ins. Co., 108 Ga. App. 173, 132 S.E.2d 538 (1963); J.M. Tull Metals Co. v. United States, 123 Ga. App. 76, 179 S.E.2d 543 (1970); Worley v. Save Oil Co., 231 Ga. 227, 200 S.E.2d 896 (1973); Worley v. Providence Wash. Ins. Co., 130 Ga. App. 607, 203 S.E.2d 910 (1974); Flint River Mills v. Henry, 239 Ga. 347, 236 S.E.2d 583 (1977); Dixie-Cole Transf. Trucking Co. v. Fudge, 147 Ga. App. 306, 248 S.E.2d 694 (1978); Howard v. Alfrey, 697 F.2d 1006 (11th Cir. 1983).

Death Arising Out of and in the Course of Employment

This section dealt with cases where death resulted from an accident. American Mut. Liab. Ins. Co. v. Castleberry, 46 Ga. App. 60, 166 S.E. 670 (1932) (see O.C.G.A. § 34-9-265).

Accident must arise out of and in course of employment. — In order for a death to be compensable to a dependent under the provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), it must result instantly from an accident arising out of and in the course of employment, or later result proximately therefrom; and the burden of proof is on the claimant to show that the death so resulted. Johnson v. Fireman's Fund Indem. Co., 79 Ga. App. 187, 53 S.E.2d 204 (1949); Liberty Mut. Ins. Co. v. Harden, 85

Ga. App. 830, 70 S.E.2d 89 (1952).

It is not necessary that the compensable injury was sole cause of employee's death, but merely that the injury lighted up, activated, or aggravated a disease or dormant condition that contributed to the employee's death. B.P.O. Elks Lodge No. 230 v. Foster, 91 Ga. App. 696, 86 S.E.2d 725 (1955).

If employment contributes to injury, it is an "accident" in the terms of the law, regardless of whether or not some other factors united with the employment to produce it. Nor must the accident suffered be one caused by external factors alone, such as a blow or other external violence, but a stroke, a ruptured blood vessel or a heart attack may, under proper circumstances, be the subject matter of compensation. Thompson-Weinman Co. v. Yancey, 90 Ga. App. 213, 82 S.E.2d 725 (1954).

Injury which aggravates a pre-existing disease is compensable where such an increased result would not have occurred except for the injury. McDaniel v. Employers Mut. Liab. Ins. Co., 104 Ga. App. 340, 121 S.E.2d 801 (1961).

Benefits cease if death results from causes other than injury. — Practically all workers' compensation awards are contingent upon one or more of many varying conditions. Thus, an award for permanent total disability under former Code 1933, § 114-404 (see O.C.G.A. § 34-9-261) was contingent upon the continuance of total incapacity, and if death resulted from causes other than the injury sustained by the workman, the benefits cease. Hartford Accident & Indem. Co. v. Fuller, 102 Ga. App. 384, 116 S.E.2d 628 (1960).

Claimant must show that death resulted from employment accident. — The claimant must always carry the burden of showing that death resulted from an accident arising out of and in the course of the employment. Hardware Mut. Cas. Co. v. King, 104 Ga. App. 252, 121 S.E.2d 336 (1961).

Presumption that death arose from employment if deceased found where reasonably expected to be. — Where an employee is found dead in a place where the employee might reasonably be expected to be in the performance of the employee's duties, the natural presumption arises that the employee's death arose out of and in the course of

Death Arising Out of and in the Course of Employment (Cont'd)

employment. *Hardware Mut. Cas. Co. v. King*, 104 Ga. App. 252, 121 S.E.2d 336 (1961).

Death must be unexplained. — The presumption that when an employee is found dead in a place where the employee might reasonably have expected to be in the performance of the employee's duties it is presumed the death arose out of employment will be applied only where the death is unexplained. *Odom v. Transamerica Ins. Group*, 148 Ga. App. 156, 251 S.E.2d 48 (1978).

Just as reasonable to presume that death resulted from natural causes. — Where there is no evidence establishing the cause of death, and it is just as reasonable to presume that the death resulted from natural causes not associated with the employment as from a cause or causes to which the employment contributed, then the claimant has failed to carry the burden of proving that the employee met death as the result of an accident arising out of the employment. *Hardware Mut. Cas. Co. v. King*, 104 Ga. App. 252, 121 S.E.2d 336 (1961).

Sufficient to show such exertion of employment as raises inference that exertion caused heart attack. — Where compensation is sought under the provisions of the Workers' Compensation Law (see O.C.G.A. § 34-9-1 et seq.) for the death of an employee by reason of a heart attack, which it is contended was proximately contributed to by the exertion of the employment, it is sufficient either to show an exertion as raises a natural inference through human experience of such a causation, or to show by expert medical testimony that the amount of exertion actually existing might be treated as a causative factor. *Refrigerated Transp. Co. v. Shirley*, 93 Ga. App. 334, 92 S.E.2d 26 (1956).

Upon showing of connection between injury and death, burden shifts to employer to prove otherwise. — The claimant in a workers' compensation case having proved the injury and subsequent pain, disability, and death, and that the deceased's pain began the day deceased was injured and lasted until death, the burden was upon the employer and the insurance carrier, where the dece-

dent died from a brain tumor, to prove, as a matter of affirmative defense, that some intervening or preexisting agency was the cause of death, rather than the wrenching of the decedent's back proved by the plaintiff. *Royal Indem. Co. v. Land*, 45 Ga. App. 293, 164 S.E. 492 (1932).

Sufficient testimony authorizing the board to infer that the employee began to show symptoms of heart disease almost immediately after the employee's injury, and that these symptoms continued and persisted until they culminated in the employee's first heart attack and subsequently resulted in the employee's fatal illness, creates a presumption of a causal connection between the employee's injury and the employee's death and casts the burden upon the employer of showing, as a matter of affirmative defense, that some intervening or preexisting agency was the cause of death, rather than the injury. *Zurich Ins. Co. v. Hightower*, 113 Ga. App. 503, 148 S.E.2d 464 (1966).

Error not to accept uncontradicted opinion of cardiologists of connection between work and heart attack. — Where the evidence revealed without contradiction that the claimant's spouse reported for work and that the spouse was pursuing the spouse's duties when the spouse suffered a heart attack, and the employer's records, which were introduced in evidence, so recited, and the opinions given by the doctors who testified as experts were hypothesized from those records, as well as from the general question as to whether exercise in general could occasion such a heart attack as was suffered by the claimant's spouse, the director (now administrative law judge) erred in refusing to accept the uncontradicted opinion of the cardiologists that there was a definite connection between the work which the employee had done in the course of employment and the heart attack which caused the spouse's death, and in denying compensation. *Crawford W. Long Hosp. v. Mitchell*, 100 Ga. App. 276, 111 S.E.2d 120 (1959).

Suicide caused by compensable injury. — Because sufficient evidence supported a finding that the decedent's tinnitus resulted from an automobile accident which occurred in the course of employment, and that such deprived the decedent of normal judgment, the trial court did not err in awarding the surviving spouse both out-

standing TTD and statutory death benefits based on the decedent's suicide. Moreover: (1) the question of whether the decedent's suicide was a reasonably foreseeable result of the automobile accident was irrelevant; and (2) any finding that the decedent's suicide constituted an unforeseeable intervening cause would serve only to relieve the tortfeasor of liability, but would not bear on the question of whether the death was compensable. *Bayer Corp. v. Lassiter*, 282 Ga. App. 346, 638 S.E.2d 812 (2006).

Determination of Dependency

Dependency, in whole or part, is essential before award can be made to a child under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *New Amsterdam Cas. Co. v. Freeland*, 216 Ga. 491, 117 S.E.2d 538 (1960).

Dependency contingent on whether dependents in fact supported by decedent's earnings. — Dependency does not depend on whether the alleged dependents could support themselves without the decedent's earnings, or so reduce their expenses that they would be supported independent of the decedent's earnings, but on whether they were in fact supported in whole or in part by such earnings, under circumstances indicating an intent on the part of the deceased to furnish such support. *Insurance Co. of N. Am. v. Cooley*, 118 Ga. App. 46, 162 S.E.2d 821 (1968).

Question of dependency is one of fact to be determined from the amounts, frequency, and continuity of actual contributions of cash or supplies, the needs of the claimant, and the legal or moral obligation of the employee. *Maryland Cas. Co. v. Campbell*, 34 Ga. App. 311, 129 S.E. 447 (1925).

The question of dependency is one of fact, to be determined according to the facts and circumstances of each particular case, from the amounts, frequency, and continuity of actual contributions of cash and supplies, the need of the claimant, and the legal or moral obligations of the employee. *Insurance Co. of N. Am. v. Cooley*, 118 Ga. App. 46, 162 S.E.2d 821 (1968).

Dependency not necessarily negated by fact of employee's unemployment. — While dependency must have actually existed at the time of the accident and three months prior

thereto, physical contributions of cash or supplies are only evidential of such dependency, and the fact that they were temporarily interrupted by unemployment, or some other cause independent of the will and the desire of the employee, and were not made continuously for three months immediately preceding the injury, will not necessarily negative dependency where other evidence showed such dependency. The evidence in this case was sufficient to show the dependency of the mother on her son. *Maryland Cas. Co. v. Campbell*, 34 Ga. App. 311, 129 S.E. 447 (1925).

Claimant not "wholly dependent" where claimant receives substantial outside contributions. — A claimant was not "wholly dependent," within the meaning of subsection (b) of this section, where claimant earned a substantial part of claimant's support or received substantial contributions from sources other than the employee. *Travelers Ins. Co. v. Campbell*, 114 Ga. App. 601, 152 S.E.2d 430 (1966) (see O.C.G.A. § 34-9-265).

If contributions insubstantial or sporadic. — Contributions to the claimants by the employee's brothers, if insubstantial or sporadic, would not preclude a finding that claimants were wholly dependent upon the employee. *Travelers Ins. Co. v. Campbell*, 114 Ga. App. 601, 152 S.E.2d 430 (1966).

Workers' compensation provisions, while complete within itself, excludes from consideration other statutory provisions with regard to inheritance of a wife from a deceased husband, in determining whether or not the wife is entitled to share as a dependent in the award of compensation for his death. *Atkinson v. Atkinson*, 47 Ga. App. 345, 170 S.E. 527 (1933).

Employee's natural children legally adopted by another. — Where the stipulated and agreed facts show that the natural children of an employee, who was killed as the result of an injury arising out of and in the course of employment, are at the time of the death of the employee the legally adopted children of another wholly supported by their adoptive parents (their natural parents being divorced), the children are not entitled to receive compensation. *New Amsterdam Cas. Co. v. Freeland*, 216 Ga. 491, 117 S.E.2d 538 (1960).

Secondary dependents receive benefits if

Determination of Dependency (Cont'd)

no primary beneficiary compensated. — Secondary dependents are entitled to benefits only if there is no eligible primary beneficiary or the primary beneficiary has waived that beneficiary's right to compensation. *O'Steen v. Florida Ins. Exch.*, 118 Ga. App. 562, 164 S.E.2d 334 (1968).

Wholly dependent minor daughter entitled to full benefits, to exclusion of partially dependent mother. — In a workers' compensation case, an unmarried daughter under the age of 18 of the deceased employee was conclusively presumed to be wholly dependent upon the deceased employee by the provisions of the law, and was entitled to full death benefits until she reached the age of 18, to the exclusion of the mother of the deceased employee, when there was a finding by the state board, supported by evidence, that the mother had been only partially dependent upon the deceased employee. *Mays v. Glen Falls Indem. Co.*, 77 Ga. App. 332, 48 S.E.2d 550 (1948).

Claimant living with employee, but not holding herself out as married. — Where the board finds that the claimant and the deceased employee had not contracted a valid marriage because, though they lived together, the evidence showed they had not held themselves out as man and wife, the claimant is not entitled to compensation, even if the claimant was actually dependent on the employee. *Georgia Cas. & Sur. Co. v. Bloodworth*, 120 Ga. App. 313, 170 S.E.2d 433 (1969).

When dependency ceases. — Dependency ceases at the age of 18 unless the child is physically or mentally incapacitated from earning a livelihood, and this is to be determined as of the date of death. *Turner v. United States Fid. & Guar. Co.*, 125 Ga. App. 371, 187 S.E.2d 905 (1972). But see § 34-9-13 as amended in 1985.

Evidence authorized the finding that first cousin of deceased employee was totally dependent upon deceased at the time of death. *Bituminous Cas. Corp. v. Williams*, 80 Ga. App. 337, 56 S.E.2d 157 (1949).

Dependents who are not citizens. — In the absence of dependents who are not citizens according to the strictures of former O.C.G.A. § 34-9-265(b)(5), the limitation on compensation contained therein was inap-

plicable. Accordingly, the superior court erred in affirming the decision of the full board which applied this provision so as to reduce the award to an insurer where the deceased employee was an Ethiopian national who had sent money to the employee's parents in that country, although they were never shown to be the employee's dependents. *Georgia Subsequent Injury Trust Fund v. Bottle Whse., Inc.*, 209 Ga. App. 244, 433 S.E.2d 84 (1993).

Compensation Awarded

Paragraph (b)(1) of this section did not limit the medical expenses of the last illness in a case where death resulted from the accident. *United States Fid. & Guar. Co. v. Taylor*, 101 Ga. App. 544, 114 S.E.2d 441 (1960) (see O.C.G.A. § 34-9-265).

Denial of common-law remedy to heirs of decedent does not violate the equal protection clause. *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668 (S.D. Ga. 1973).

Dependents may recover unpaid or uncollected award due employee. — While 300 (now 400) weeks from the date of the injury was the limited period in which dependents could recover under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), this did not mean they could not recover an unpaid or uncollected award due the employee in the employee's lifetime. *Columbia Cas. Co. v. Whiten*, 51 Ga. App. 42, 179 S.E. 630 (1935).

Compensation benefits payable to dependents are computed by provisions effective at time deceased sustained accident. *Zurich Ins. Co. v. Spence*, 122 Ga. App. 464, 177 S.E.2d 503 (1970).

Employee cannot bar dependents by employee's own acts during employee's lifetime, every contract of employment being presumed to have been made subject to the provisions of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.). *Atkinson v. Atkinson*, 47 Ga. App. 345, 170 S.E. 527 (1933).

Amount awarded to partial dependents is not affected by contributions made to claimants by others. *Maryland Cas. Co. v. Bess*, 33 Ga. App. 798, 127 S.E. 828 (1925).

If deceased employee contributed entire wages to partial dependents, award equals amount of total dependency. — Under this section, where the deceased employee con-

tributed the employee's entire wages to persons who were partially dependent upon the employee, there is no difference between the amount of compensation to be awarded and that which the claimants should receive as total dependents. *Maryland Cas. Co. v. Bess*, 33 Ga. App. 798, 127 S.E. 828 (1925); *Commercial Union Ins. Co. v. Brock*, 134 Ga. App. 903, 216 S.E.2d 700 (1975) (see O.C.G.A. § 34-9-265).

Contribution unaffected by mere fact minor employee regularly received pocket money from wages. — The mere fact that a minor employee regularly received pocket money out of wages which the minor contributed to the common family fund does not mean the employee contributed less than the employee's entire wages to the employee's partial dependents. *Commercial Union Ins. Co. v. Brock*, 134 Ga. App. 903, 216 S.E.2d 700 (1975).

Cost of employee's maintenance as member of family not considered in determining compensation. — Where an employee 19 years of age lived in the employee's father's household as a member of the family, all of whom were dependent upon the employee's earnings for support, and the employee's earnings were contributed to that cause, the cost of the employee's own maintenance as a member of the family was not to be considered in determining the amount of compensation to be awarded upon the claim of the father made in behalf of himself, his wife, and other members of the family as dependents. *Maryland Cas. Co. v. Bess*, 33 Ga. App. 798, 127 S.E. 828 (1925).

For information on the method of computation of partial dependents before the 1922 amendment of Ga. L. 1920, p. 167, § 38, see *Aetna Life Ins. Co. v. Smith*, 29 Ga. App. 628, 116 S.E. 322 (1923) (see O.C.G.A. § 34-9-265).

Value of deceased's room and board not deducted in computing total dependency award. — The state board did not err in not deducting the value of the deceased's board and lodging, the deceased having resided with the claimant and having been furnished meals by the claimant, in computing the award of compensation; in cases of total dependency, the amount of the award is not computed on the basis of the proportion of the amount of contributions to average weekly wages. *Bituminous Cas. Corp. v. Wil-*

liams, 80 Ga. App. 337, 56 S.E.2d 157 (1949).

Benefits due dependents calculated from date of injury. — Where an employee receives an injury arising out of and in the course of employment and at a later date dies as a result of such an injury, the benefits, if any, due the employee's dependents are calculated from the date of the injury and not the date of the employee's death. *Armour & Co. v. Cox*, 96 Ga. App. 829, 101 S.E.2d 733 (1958).

Section awards weekly payments for maximum number of weeks. — This section did not award a maximum sum, but merely called for payments weekly for a maximum number of weeks only. Because of modifications, an award of lump sum amounts, and other changes, the maximum amount of payments (400 weeks) may never be made. *Hartford Ins. Co. v. White*, 142 Ga. App. 307, 235 S.E.2d 740 (1977) (see O.C.G.A. § 34-9-265).

"During dependency." — Where the dependency of a person was fixed by former Code 1933, § 114-414 (see O.C.G.A. § 34-9-13) as a matter of law, the term "during dependency" in subsection (c) of former Code 1933, § 114-413 (see O.C.G.A. § 34-9-265) meant until an event specified in former Code 1933, § 114-414 as terminating dependency. *United States Fid. & Guar. Co. v. Dunbar*, 112 Ga. App. 102, 143 S.E.2d 663 (1965).

Payments not to exceed 400 weeks. — If an award had been made to the claimant in claimant's lifetime for a total disability, and claimant had died before compensation payments had terminated, an award to claimant's dependents for the remaining period of disability, to commence where the payments to the employee left off, would be proper not to exceed 300 (now 400) weeks from the date of the injury. *Columbia Cas. Co. v. Whiten*, 51 Ga. App. 42, 179 S.E. 630 (1935) (decided prior to 1985 amendment).

Number of dependents of no concern to employer or carrier. — Where the death of the employee was compensable, the law fixed the amount to be paid the dependents described by former Code 1933, § 114-414 (see O.C.G.A. § 34-9-13); the number of dependents who participate in the use of the fund was of no concern to the employer or insurance carrier, their only interest being to see that the amount of the award was paid to those entitled to receive the award. *Georgia*

Compensation Awarded (Cont'd)

Forestry Comm'n v. Harrell, 98 Ga. App. 238, 105 S.E.2d 461 (1958); Handcrafted Furn., Inc. v. Black, 182 Ga. App. 115, 354 S.E.2d 696 (1987).

Compensation becomes trust fund held by spouse for beneficiaries support. — The money payable as compensation becomes like money set aside as a year's support, a sort of trust fund to be held and used by the spouse for the benefit of the beneficiaries to whom it belongs. Georgia Forestry Comm'n v. Harrell, 98 Ga. App. 238, 105 S.E.2d 461 (1958).

Obligation to pay not diminished because one member no longer entitled to participate. — The obligation of the employer or insurance carrier to pay the compensation awarded jointly to the spouse and children is not diminished simply because one of their members is no longer entitled to participate in its use. Georgia Forestry Comm'n v. Harrell, 98 Ga. App. 238, 105 S.E.2d 461 (1958).

Board authorized to discard false testi-

mony as to contribution. — Where the commission (now board), on sufficient evidence, found it was impossible for a deceased employee to have contributed \$1.00 per day to the dependent, and where it was warranted in finding that the dependent's testimony, though corroborated by another witness was either true or knowingly false, it was authorized to discard the dependent's evidence and, in the absence of unimpeached evidence, refuse the claim. United States Fid. & Guar. Co. v. Hall, 34 Ga. App. 307, 129 S.E. 305 (1925).

Harmful error to preclude evidence authorizing contrary result. — Where an award is based on an erroneous legal theory which precludes the consideration of evidence that would authorize a contrary result, it is harmful error. Insurance Co. of N. Am. v. Schwandt, 151 Ga. App. 842, 261 S.E.2d 755 (1979).

Awards held reasonable. — See Georgia Cas. Co. v. James, 32 Ga. App. 99, 122 S.E. 651 (1924); Maryland Cas. Co. v. Campbell, 34 Ga. App. 311, 129 S.E. 447 (1925).

OPINIONS OF THE ATTORNEY GENERAL

Responsibility for paying medical services for work release inmate. — Private employer is primarily responsible for payment of medical bills arising from injuries, fatal or otherwise, received by a work release inmate while on the job, but, upon default by the em-

ployer, the Department of Offender Rehabilitation (now Department of Corrections) is ultimately responsible for paying for those medical services. 1981 Op. Att'y Gen. No. 81-27.

RESEARCH REFERENCES

ALR. — Workmen's compensation: effect of divorce on right of spouse or child to compensation, 13 ALR 729.

Workmen's compensation: injury or death due to the elements, 13 ALR 974; 16 ALR 1038; 25 ALR 146; 40 ALR 400; 46 ALR 1218; 53 ALR 1084; 83 ALR 234.

Workmen's compensation: injury or death to which preexisting physical condition of employee causes or contributes, 19 ALR 95; 28 ALR 204; 60 ALR 1299.

Workmen's compensation: death from heart disease, 19 ALR 110; 28 ALR 204; 60 ALR 1299.

Workmen's compensation: death or injury while traveling as arising out of and in the

course of employment, 20 ALR 319; 49 ALR 454; 63 ALR 469; 100 ALR 1053.

Constitutionality of provision of Workmen's Compensation Act for contribution to general fund in absence of dependents of deceased workman, 20 ALR 1001; 35 ALR 1061.

Survival of right to compensation under Workmen's Compensation Acts upon the death of the person entitled to the award, 24 ALR 441; 29 ALR 1426; 51 ALR 1446; 87 ALR 864; 95 ALR 254.

"Dependency" with Workmen's Compensation Act, 35 ALR 1066; 39 ALR 313; 53 ALR 218; 62 ALR 160; 86 ALR 865; 100 ALR 1090.

Workmen's compensation: double compensation to dependents in case of death of two or more, 45 ALR 894.

Change of status as regards relationship or dependents after injury as affecting compensation to employee under Workmen's Compensation Act, 73 ALR 1016.

Right to woman who marries injured workman to compensation as his widow or surviving wife under Workmen's Compensation Act, 98 ALR 993.

Workmen's compensation: release or waiver of claim by employee as affecting right of dependents in event of his death as result of injury, 101 ALR 1410.

Construction and application of provisions of Workmen's Compensation Act for

additional compensation because of failure to comply with specific requirement of statute or regulation by public for protection of workmen, 106 ALR 74.

Workmen's compensation: amount paid to workman on account of accident or disability, or period during which such payments were made or employee worked, as deductible in computing amount payable in event of his death, 115 ALR 900.

Amount recoverable under loss of member or vision clauses of accident insurance, 44 ALR2d 1233.

Validity, construction, and application of workers' compensation provisions relating to nonresident alien dependents, 28 ALR5th 547.

34-9-266. Payment of compensation for time loss, disability, or death resulting from hernia.

In all claims for compensation for hernia resulting from injury by accident arising out of and in the course of the employee's employment it must be definitely proved to the satisfaction of the board (1) that there was an injury resulting in hernia, (2) the hernia appeared suddenly, (3) the hernia was accompanied by pain, (4) the hernia immediately followed an accident, and (5) the hernia did not exist prior to the accident for which compensation is claimed. All inguinal, femoral, or other hernias which are proven to be the result of an injury by accident arising out of and in the course of employment shall be treated in a surgical manner by radical operation. If death results from such operation, the death shall be considered as a result of the injury and compensation shall be paid in accordance with Code Section 34-9-265. In nonfatal cases, time loss only shall be paid unless it is shown by special examination, as provided in Code Section 34-9-202, that the injured employee has a permanent partial disability resulting from the operation. If so, compensation shall be paid in accordance with Code Section 34-9-263. In the event the injured employee refuses to undergo the radical operation for the cure of the hernia, no compensation shall be allowed during the time such refusal continues. If, however, it is shown that the employee has some chronic disease or is otherwise in such physical condition that the board considers it unsafe for the employee to undergo such operation, the employee shall be paid as provided in Code Section 34-9-262. (Ga. L. 1920, p. 167, § 2; Code 1933, § 114-412; Ga. L. 1975, p. 198, § 4; Ga. L. 1982, p. 3, § 34; Ga. L. 1998, p. 1508, § 9.)

Law reviews. — For review of 1998 legislation relating to labor and industrial relations, see 15 Ga. St. U. L. Rev. 185 (1998). For survey article on workers' compensation

law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For annual survey of law of workers' compensation, see 56 Mercer L. Rev. 479 (2004).

JUDICIAL DECISIONS

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General Consideration

Cited in *Sullivan v. Social Circle Cotton Mills*, 41 Ga. App. 714, 154 S.E. 467 (1930); *Paschal v. Foremost Dairies*, 56 Ga. App. 397, 192 S.E. 634 (1937); *Perrien v. Southern Coop. Foundry Co.*, 60 Ga. App. 195, 3 S.E.2d 240 (1939); *Royal Indem. Co. v. Beckmann*, 66 Ga. App. 369, 17 S.E.2d 910 (1941); *Hartford Accident & Indem. Co. v. Hillhouse*, 73 Ga. App. 122, 35 S.E.2d 603 (1945); *American Mut. Liab. Ins. Co. v. Gunter*, 74 Ga. App. 534, 40 S.E.2d 394 (1946); *United States Cas. Co. v. Richardson*, 75 Ga. App. 496, 43 S.E.2d 793 (1947); *American Cas. Co. v. Herron*, 102 Ga. App. 658, 117 S.E.2d 172 (1960); *Jones v. Utica Mut. Ins. Co.*, 144 Ga. App. 460, 241 S.E.2d 578 (1978).

Scope and Effect of Provisions

Section deals exclusively with principle of law regarding compensation for hernia or for death therefrom. — It necessarily follows that unless the evidence shows that the claimant is entitled to compensation for total or partial disability under some other principle of law under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), the claimant is not entitled to prevail. *Boswell v. Liberty Mut. Ins. Co.*, 77 Ga. App. 556, 49 S.E.2d 117 (1948).

Provisions of this section were mandatory. *Fidelity & Cas. Co. v. Whitehead*, 117 Ga. App. 200, 160 S.E.2d 241 (1968) (see O.C.G.A. § 34-9-266).

Workers' compensation provisions exclude disease, unless resulting from accident. — The workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) excludes disease in any form, except as otherwise provided, unless the disease results naturally

and unavoidably from the accident. *Johnston v. Boston-Old Colony Ins. Co.*, 106 Ga. App. 410, 126 S.E.2d 919 (1962).

If provisions inapplicable, common-law damage action against employer maintainable. — If the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) does not apply to an "occupational disease" caused by injuries which are not the result of an accident and are not compensable under these provisions, the employee may maintain an ordinary or common-law action for damages against an employer, provided a cause of action exists in the employee's favor under the law relating to the liability of a master, independently of the workers' compensation law. *Covington v. Berkeley Granite Corp.*, 182 Ga. 235, 184 S.E. 871, answer conformed to, 53 Ga. App. 269, 185 S.E. 386 (1936), *aff'd*, 183 Ga. 801, 190 S.E. 8 (1937).

Injury by Employment Accident

1. Required Elements

In hernia cases it is necessary for the claimant to definitely prove to the board's satisfaction that: (1) there was an injury resulting in a hernia; (2) the hernia appeared suddenly; (3) it was accompanied by pain; (4) the hernia immediately followed an accident; (5) the hernia did not exist prior to the accident for which compensation is claimed. *Williams v. United States Fid. & Guar. Co.*, 90 Ga. App. 409, 83 S.E.2d 225 (1954).

In order to be entitled to compensation for a hernia, the employee must prove that the hernia resulted from an accident arising out of and in the course of employment, that the resulting hernia did not exist prior to the accident, that it was accompanied by pain,

that it appeared suddenly, and that it immediately followed the accident. *American Mut. Liab. Ins. Co. v. Dyer*, 94 Ga. App. 619, 95 S.E.2d 725 (1956).

Section's requirements designed as means to prove causal connection between accidental injury and hernia. — The five requirements of this section were designed as the means to establish clearly and definitely by proof that there was a direct continuity of causal connection between an accidental injury and a hernia; no particular words should be so narrowly construed and applied as to defeat this purpose. *Blackshear v. Liberty Mut. Ins. Co.*, 69 Ga. App. 790, 26 S.E.2d 793 (1943), *rev'd* on other grounds, 197 Ga. 334, 28 S.E.2d 860 (1944) (see O.C.G.A. § 34-9-266).

2. Accidental Injury

Section excludes injuries not caused by accident. — This section seemed to recognize that a hernia may occur without an accident or injury in providing for "compensation for hernia resulting from injury by accident," and thereby excluding congenital hernias and hernias acquired without injury or accident. *American Life Ins. Co. v. Stone*, 78 Ga. App. 98, 50 S.E.2d 231 (1948) (see O.C.G.A. § 34-9-266).

"Accident" not construed differently in hernia cases. — There is no express statement that the word "accident," as used in this section, or the phrase "injury by accident" shall be construed differently in hernia cases from their meaning in other portions of the workers' compensation law (see O.C.G.A. § 34-9-1 *et seq.*). *Hardware Mut. Cas. Co. v. Sprayberry*, 195 Ga. 393, 24 S.E.2d 315, answer conformed to, 69 Ga. App. 196, 25 S.E.2d 74 (1943) (see O.C.G.A. § 34-9-266).

"Injury by accident" had the same meaning as the expression used in former Code 1933, §§ 114-101 and 114-102 (see O.C.G.A. § 34-9-1). *Hardware Mut. Cas. Co. v. Sprayberry*, 69 Ga. App. 196, 25 S.E.2d 74 (1943).

Hernia resulting from action done in ordinary performance of duties not "injury by accident." — An act done by an employee in the ordinary performance of the duties for which the employee is employed, when done in a manner not unusual or unexpected, but in a manner ordinarily required and ex-

pected of the employee in the performance of the employee's duties, does not constitute an "injury by accident;" a hernia resulting to the employee from the performance of such an act does not result from an injury by accident. *Westbrook v. Highview, Inc.*, 42 Ga. App. 834, 157 S.E. 362 (1931). But see *Hardware Mut. Cas. Co. v. Sprayberry*, 195 Ga. 393, 24 S.E.2d 315, answer conformed to, 69 Ga. App. 196, 25 S.E.2d 74 (1943).

Hernia caused by strain in employment deemed "accidental injury." — A sudden and violent rupture or break in the physical structure of the body of an employee, caused by some strain or exertion in the employment of the master, is an "accidental injury" within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 *et seq.*), even though no external unforeseen event, such as slipping, falling, or being struck contributes thereto. *Brown v. Lumbermen's Mut. Cas. Co.*, 49 Ga. App. 99, 174 S.E. 359 (1934).

A hernia sustained as a result of a strain by an employee while performing the employee's work is an "accident," or an "accidental injury" within the meaning of the workers' compensation law (see O.C.G.A. § 34-9-1 *et seq.*), although there was no unexpected, unusual, or fortuitous happening, other than the injury. *Hardware Mut. Cas. Co. v. Sprayberry*, 195 Ga. 393, 24 S.E.2d 315, answer conformed to, 69 Ga. App. 196, 25 S.E.2d 74 (1943).

3. Causation

Compensable hernia occurs where close coincidence between injury and hernia, and no intervening agency. — A compensable hernia, under this section, was one where there is a relative and reasonably close coincidence between the accidental injury and the hernia, and it was clear that no other agency intervened as to time, place, or action, to cause the hernia, save the accidental injury growing out of and in the course of the employment. *Blackshear v. Liberty Mut. Ins. Co.*, 69 Ga. App. 790, 26 S.E.2d 793 (1943), *rev'd* on other grounds, 197 Ga. 334, 28 S.E.2d 860 (1944) (see O.C.G.A. § 34-9-266).

Case remanded to board where relation between accident, injury, and coronary occlusion not shown. — Where, in a compensation proceeding, the hearing director

Injury by Employment Accident (Cont'd) **3. Causation (Cont'd)**

(now the administrative law judge) showed conclusively that the director applied strict rules covering compensation for hernia cases whereas the deceased died of coronary occlusion, but did not show the relation between the accident and the operation on the one hand, and the operation and coronary occlusion on the other hand, the hearing director made a mistake in considering the facts, and it is within the jurisdiction of an appellate court to remand the case to the state board for further consideration. *Parks v. American Fid. & Cas. Co.*, 97 Ga. App. 833, 104 S.E.2d 624 (1958).

4. Sudden Appearance Immediately Following Accident

Hernia must "immediately" follow an accident to be compensable. *Westbrook v. Highview, Inc.*, 42 Ga. App. 834, 157 S.E. 362 (1931).

Hernia need not "instantaneously" follow accident. — The requirements of this section did not, properly construed, mean that it must be shown that the hernia "instantaneously" appeared and "instantaneously" followed the accident, but it was the intention of the legislature, in using such terms, to prescribe, as between a cause and its effect, an interval of time which, though short, would be sufficient in duration for the effect to follow the putative cause in the usual course of nature and reasonably preclude the intervention of another agency or force. *Hardware Mut. Cas. Co. v. Sprayberry*, 69 Ga. App. 196, 25 S.E.2d 74 (1943) (see O.C.G.A. § 34-9-266).

Under the provisions of this section, the words ". . . appeared suddenly . . ." and ". . . immediately following . . .," were not to be construed as synonymous with the term "instantaneous," but should be given that construction and application which will effectuate the general intent and purpose of that section. *Blackshear v. Liberty Mut. Ins. Co.*, 69 Ga. App. 790, 26 S.E.2d 793 (1943), rev'd on other grounds, 197 Ga. 334, 28 S.E.2d 860 (1944) (see O.C.G.A. § 34-9-266).

Word "immediately" means only that there must not have been any substantial interval between the accident and the man-

ifestation of the rupture and the appearance of the hernia following in due, natural, and uninterrupted course therefrom. *Liberty Mut. Ins. Co. v. Blackshear*, 197 Ga. 334, 28 S.E.2d 860 (1944).

Appearance of hernia within one hour of injury. — Where it certainly could be said in a compensation case that the hernia "appeared" and "followed the injury" within not more than an hour, the director (now administrative law judge) was authorized to find that, within the contemplation of the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), it appeared "suddenly" and "immediately followed" the accident, no such interval of time elapsing between the accident and the appearance of the hernia as would suggest that the hernia was produced by a blow or such cause as would place it in the category of a disease. *Hardware Mut. Cas. Co. v. Sprayberry*, 69 Ga. App. 196, 25 S.E.2d 74 (1943).

External protrusion fruition of hernia. — In an indirect hernia caused by an accident accompanied by violence, the blow is the initial cause; the inception of the hernia and the external protrusion is the fruition. *Blackshear v. Liberty Mut. Ins. Co.*, 69 Ga. App. 790, 26 S.E.2d 793 (1943), rev'd on other grounds, 197 Ga. 334, 28 S.E.2d 860 (1944).

External protrusion not conclusive evidence of time hernia began. — The external protrusion is but evidence of the more developed hernia, but is not conclusive evidence of the cause or the time it began; the only conclusive thing the protrusion proves is that it is then existent by visible evidence, not that it then, and then only, occurred along with the protrusion itself. *Blackshear v. Liberty Mut. Ins. Co.*, 69 Ga. App. 790, 26 S.E.2d 793 (1943), rev'd on other grounds, 197 Ga. 334, 28 S.E.2d 860 (1944).

Sudden appearance of rupture, manifested by pain, immediately following accident constitutes integral part of "hernia." — The term "hernia," as used in this section, meant the protrusion of an internal organ or part projecting through an opening in the walls of the abdominal cavity. The rupture of the tissues of the abdominal walls arising out of an injury in the course of the employment constitutes the actual accidental injury, and the hernia is merely a natural resultant therefrom; the sudden appearance

of the rupture, as manifested by accompanying evidences of pain, immediately and without a substantial interval following the accident, constitutes an integral part of the resulting "hernia," within the meaning of that section. *Liberty Mut. Ins. Co. v. Blackshear*, 197 Ga. 334, 28 S.E.2d 860 (1944) (see O.C.G.A. § 34-9-266).

Award of compensation found proper. — Where it appeared that an employee in a rock quarry, in the course of employment, was engaged with the use of a heavy crowbar in prying loose a rock which was wedged, and in so doing voluntarily twisted the crowbar and "went with it," but did not slip or fall, and immediately felt a sudden pain in the employee's groin and a hernia suddenly appeared, the award of compensation to the employee under this section was proper. *American Mut. Liab. Ins. Co. v. McCarty*, 45 Ga. App. 483, 165 S.E. 291 (1932) (see O.C.G.A. § 34-9-266).

Compensation not permitted. — A hernia which was the result of an exercise program the employee undertook as part of the employee's treatment for the work-related back injury did not meet the requirements of O.C.G.A. § 34-9-266 because it neither resulted from nor immediately followed the accident, and could not be considered a "superadded injury." *Standridge v. Candlewick Yarns*, 202 Ga. App. 553, 415 S.E.2d 10, cert. denied, 202 Ga. App. 907, 415 S.E.2d 10 (1992).

5. Prior Existence

Necessary to prove that hernia not in existence prior to accident. — Under this section, not only must the hernia have resulted from an injury by accident arising out of and in the course of the employee's employment, but it must be definitely proved to the satisfaction of the board that the resulting hernia did not exist prior to the accident, was accompanied by pain, and appeared suddenly and immediately followed the accident. *Liberty Mut. Ins. Co. v. Blackshear*, 197 Ga. 334, 28 S.E.2d 860 (1944) (see O.C.G.A. § 34-9-266).

The rule as to a hernia is somewhat different from that applying to other injuries, in that not only must the hernia have resulted from an injury by accident arising out of and in the course of the employee's employment, but it must be definitely proved to the

satisfaction of the board that the resulting hernia did not exist prior to the accident, was accompanied by pain, appeared suddenly, and immediately followed the accident. *Williams v. United States Fid. & Guar. Co.*, 90 Ga. App. 409, 83 S.E.2d 225 (1954).

Section allows compensation for aggravation of preexisting hernia. — While, under this section, there may not be a recovery of compensation for disability due to a preexisting hernia, there may be a recovery of compensation due to an aggravation of a preexisting hernia. *Manufacturers Cas. Ins. Co. v. Peacock*, 97 Ga. App. 26, 101 S.E.2d 898 (1958). But see *Boswell v. Liberty Mut. Ins. Co.*, 77 Ga. App. 556, 49 S.E.2d 117 (1948) (see O.C.G.A. § 34-9-266).

Section allows compensation for total incapacity resulting from preexisting hernia. — The denial, because the hernia was found to be preexisting, of medical and hospital expenses incurred by reason of a hernia under this section did not preclude the recovery of compensation for the period of total incapacity of work which was the result of an aggravation of a preexisting hernia by an accident arising out of and in the course of the employee's employment. *Boswell v. Liberty Mut. Ins. Co.*, 77 Ga. App. 556, 49 S.E.2d 117 (1948) (see O.C.G.A. § 34-9-266).

Evidence authorized finding that employee previously afflicted with hernia. — Where, upon the hearing of a claim for compensation for death resulting from an operation for a hernia, brought under this section, the evidence authorized a finding that the deceased employee had been previously afflicted with the hernia for a number of years, as evidenced by a protrusion in the employee's groin, and that, while the employee was performing the usual duties of employment, and without any accident, the old hernia slipped down through the right inguinal ring and became strangulated, necessitating an immediate operation, the denial of compensation was properly affirmed. *Littlejohn v. Piedmont Hotel*, 62 Ga. App. 695, 9 S.E.2d 688 (1940) (see O.C.G.A. § 34-9-266).

Finding of previously existing hernia not authorized. — Where, as in this case, the claim is for a complete strangulated hernia, proof merely that, prior to the accident from which the complete hernia arose, the claim-

Injury by Employment Accident (Cont'd)
5. Prior Existence (Cont'd)

ant showed a possible sign of a partial hernia a few inches from the place of the complete hernia, but not attended by partial or reduced capacity for work, does not even authorize, much less demand, a finding that the hernia alleged to have resulted from the accident in question previously existed. *London Guarantee & Accident Co. v. Shockley*, 31 Ga. App. 762, 122 S.E. 99 (1924).

No compensation for pre-existing hernia. — O.C.G.A. § 34-9-266 created an exception to O.C.G.A. § 34-9-1(4), which allowed employees to obtain medical benefits when they had a pre-existing condition that was aggravated by a work-related injury, and the trial court erred by ordering the Georgia board of workers' compensation, appellate division, to award medical benefits to an employee who obtained treatment for hernias the employee developed before beginning work for the employer, after the employee aggravated the medical condition in a work-related accident. *Union City Auto Parts v. Edwards*, 263 Ga. App. 799, 589 S.E.2d 351 (2003).

Surgical Operation

Proof that surgical repair tendered and refused question of fact. — It is not cause for a reversal of the award that the board never specifically ordered the claimant to undergo surgical repair, but proof that it was tendered, and if so, refused, remains a question of fact. *Fidelity & Cas. Co. v. Whitehead*, 117 Ga. App. 200, 160 S.E.2d 241 (1968).

When surgical correction accepted following initial refusal, compensation resumes from date of acceptance. — Where an employee refused to undergo surgery for cure

of the hernia, if and when a correction should finally be accepted, compensation would resume from the date of acceptance, and after the correction a determination could be made as to whether it resulted in a removal of all disability resulting from the hernia. If not, an employee would be entitled to further compensation as provided in this section. *Fidelity & Cas. Co. v. Whitehead*, 114 Ga. App. 630, 152 S.E.2d 706 (1966) (see O.C.G.A. § 34-9-266).

Provisions on surgery subject to provisions limiting liability of employer. — The provisions of this section which require that all hernia, inguinal, femoral or otherwise, so proven to be the result of an injury by accident arising out of and in the course of employment, shall be treated in a surgical manner by radical operation must be taken as subject to the former provisions which limited the liability of the employer for any such treatment to a period of 30 days following the accident and the sum of \$100.00. *Southern Sur. Co. v. Byck*, 39 Ga. App. 699, 148 S.E. 294 (1929) (see O.C.G.A. § 34-9-266).

Employee not required to await operation pending adjudication on appeal of merits of compensation claim. — Where the surgical award was not the basis of appeal, the injured employee was not required to await an operation pending a final adjudication on the appeal of the merits of the employee's weekly compensation claim; to decide otherwise would in effect place the plaintiff in the unfortunate dilemma of refusing the operation and losing compensation, or accepting the operation and giving up the right to appeal for more adequate and just compensation in the event of the failure of the operation to effect a complete cure. *St. Paul Fire & Marine Ins. Co. v. Horton*, 103 Ga. App. 171, 118 S.E.2d 597 (1961).

RESEARCH REFERENCES

ALR. — Workmen's compensation: injury or death to which preexisting physical condition of employee causes or contributes, 19 ALR 95; 28 ALR 204; 60 ALR 1299.

Survival of right to compensation under Workmen's Compensation Acts upon the death of the person entitled to the award, 24 ALR 441; 29 ALR 1426; 51 ALR 1446; 87 ALR 864; 95 ALR 254.

Workmen's compensation: aggravation by particular condition or equipment of plant of injury which in its inception was not connected with the employment, 37 ALR 771.

Hernia as result of sudden strain as accident or accidental injury within Workmen's Compensation Act, 98 ALR 205.

Construction and application of specific

provisions of Workmen's Compensation Act relating to hernia, 114 ALR 1337.

ARTICLE 8 COMPENSATION FOR OCCUPATIONAL DISEASE

PART 1 GENERAL PROVISIONS

34-9-280. Definitions.

As used in this article, the term:

(1) "Disablement" means the event of an employee becoming actually disabled to work, as provided in Code Sections 34-9-261, 34-9-262, and 34-9-263, because of occupational disease.

(2) "Occupational disease" means those diseases which arise out of and in the course of the particular trade, occupation, process, or employment in which the employee is exposed to such disease, provided the employee or the employee's dependents first prove to the satisfaction of the State Board of Workers' Compensation all of the following:

(A) A direct causal connection between the conditions under which the work is performed and the disease;

(B) That the disease followed as a natural incident of exposure by reason of the employment;

(C) That the disease is not of a character to which the employee may have had substantial exposure outside of the employment;

(D) That the disease is not an ordinary disease of life to which the general public is exposed;

(E) That the disease must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence.

For the purposes of this paragraph, partial loss of hearing due to noise shall not be considered an occupational disease. Psychiatric and psychological problems and heart and vascular diseases shall not be considered occupational diseases, except where they arise from a separate occupational disease. (Code 1933, §§ 114-802, 114-803, 114-812, enacted by Ga. L. 1946, p. 103; Ga. L. 1971, p. 895, § 3; Ga. L. 1982, p. 3, § 34; Ga. L. 1982, p. 2485, §§ 4, 5, 8; Ga. L. 1987, p. 1474, § 1.)

Editor's notes. — Ga. L. 1987, p. 1474, § 17, not codified by the General Assembly, provided that that Act would apply to any

occupational disease not previously diagnosed before July 1, 1987.

Law reviews. — For article, "Occupational

Diseases Under the Georgia Workmen's Compensation Act," see 8 Mercer L. Rev. 333 (1957).

For comment, "Georgia's Mental Block in Workers' Compensation," see 36 Mercer L. Rev. 971 (1985).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DISABLEMENT

OCCUPATIONAL DISEASE

1. IN GENERAL

2. FORMER LAW

PLEADING AND PRACTICE

General Consideration

Effect of statutory amendments. — As to the effect of amendments to the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., on existing and terminated employment relationships, see *Venable v. John P. King Mfg. Co.*, 174 Ga. App. 800, 331 S.E.2d 638 (1985).

No partial disability. — The law does not contemplate such a thing as partial disability, except where, under the provisions of Ga. L. 1946, p. 103 (see O.C.G.A. § 34-9-285), the condition results in part from an occupational disease and in part from some other condition not compensable, in which event the compensation is reduced proportionately. *Yates v. United States Rubber Co.*, 100 Ga. App. 583, 112 S.E.2d 182 (1959).

Cited in *Free v. Associated Indem. Corp.*, 78 Ga. App. 839, 52 S.E.2d 325 (1949); *Ocean Accident & Guarantee Corp. v. Harris*, 87 Ga. App. 399, 74 S.E.2d 12 (1953); *Patterson v. Employer's Mut. Liab. Ins. Co.*, 99 Ga. App. 325, 108 S.E.2d 146 (1959); *Hopkins v. Employers Mut. Liab. Ins. Co.*, 103 Ga. App. 579, 120 S.E.2d 321 (1961); *Farrill v. Travelers Ins. Co.*, 105 Ga. App. 600, 125 S.E.2d 562 (1962); *Butler v. National Lead Co.*, 106 Ga. App. 180, 126 S.E.2d 453 (1962); *Miller v. Travelers Ins. Co.*, 111 Ga. App. 245, 141 S.E.2d 223 (1965); *United States Fid. & Guar. Co. v. Hammock*, 133 Ga. App. 839, 212 S.E.2d 484 (1975); *Insurance Co. of N. Am. v. Brannon*, 137 Ga. App. 468, 224 S.E.2d 115 (1976); *Curtin v. Department of Human Resources*, 150 Ga. App. 448, 258 S.E.2d 68 (1979); *Burbank v. Mutual of Omaha Ins. Co.*, 484 F. Supp. 693 (N.D. Ga. 1979); *Seitzingers, Inc. v. Barnes*, 161 Ga. App. 855, 289 S.E.2d 315 (1982); *Cummings*

v. Walsh Constr. Co., 561 F. Supp. 872 (S.D. Ga. 1983); *Canton Textile Mills, Inc. v. Lathem*, 253 Ga. 102, 317 S.E.2d 189 (1984); *Whitaker v. Fieldcrest Mills, Inc.*, 174 Ga. App. 533, 330 S.E.2d 761 (1985); *Evans v. Bibb Co.*, 178 Ga. App. 139, 342 S.E.2d 484 (1986).

Disablement

Disablement means the event of an employee becoming actually incapacitated because of occupational disease from performing the work the employee was last doing, or from performing work in any other occupation for remuneration. *Yates v. United States Rubber Co.*, 100 Ga. App. 583, 112 S.E.2d 182 (1959).

Where disability was caused by dermatitis herpetiformis, this was an occupational disease within the meaning of this section if it arose out of the claimant's employment. *Griffith v. Employers Mut. Liab. Ins. Co.*, 100 Ga. App. 157, 110 S.E.2d 539 (1959) (see O.C.G.A. § 34-9-280).

If the employee can no longer perform the duties of employment under exposed conditions, then whether or not "disablement" occurs must be determined by whether or not the claimant can find other employment equal to at least one-third of the claimant's former wages or \$20.00 per week, whichever is less. *Yates v. United States Rubber Co.*, 100 Ga. App. 583, 112 S.E.2d 182 (1959).

An injury caused by inhalation of noxious gas is not the type that should be referred to the medical board when the gas that the claimant was exposed to is not necessarily incidental to the work being performed or characteristic of and peculiar to the occupa-

tion of the deceased. *Moone v. Liberty Mut. Ins. Co.*, 145 Ga. App. 629, 244 S.E.2d 148 (1978).

If there is no loss of wages there is no disablement, and consequently no disability. *Yates v. United States Rubber Co.*, 100 Ga. App. 583, 112 S.E.2d 182 (1959).

Occupational Disease

1. In General

O.C.G.A. § 34-9-280(2) requires the employee to prove all five of the criteria set forth therein. *Fulton-DeKalb Hosp. Auth. v. Bishop*, 185 Ga. App. 771, 365 S.E.2d 549 (1988).

Ordinary disease of life to which general public is exposed. — An employee of a Georgia company who contracted malaria while on assignment in Belize satisfied subdivision (2)(D) of O.C.G.A. § 34-9-280 since malaria is not an ordinary disease of life to which the general public of Georgia is exposed, notwithstanding that it is an ordinary disease of life to which the general public of Belize is exposed. *McCarty v. Delta Pride*, 247 Ga. App. 734, 545 S.E.2d 117 (2001).

Emergency medical technician (EMT) who contracted hepatitis B, an infectious viral disease, failed to prove that it was an occupational disease, where the only evidence of record in regard to the five statutory criteria in O.C.G.A. § 34-9-280(2) unrebuttedly established that hepatitis B is of a character to which the EMT may have had unknowing and substantial exposure outside of the EMT's employment and is an ordinary disease of life to which the general public is exposed. *Fulton-DeKalb Hosp. Auth. v. Bishop*, 185 Ga. App. 771, 365 S.E.2d 549 (1988).

Betanaphthalamine exposure. — The disability resulting from exposure to betanaphthalamine would be a disease not of a character to which the employee may have had substantial exposure outside the employment, but is an occupational disease. *Continental Cas. Co. v. Synalloy Corp.*, 667 F. Supp. 1550 (S.D. Ga. 1985), *aff'd*, 826 F.2d 1024 (11th Cir. 1987).

Evidence supported award to employee with asbestosis. — Workers' compensation award to an employee for total, permanent disability caused by pulmonary fibrosis and asbestosis was supported under O.C.G.A.

§ 34-9-280(2) by sufficient evidence that the employee suffered injurious exposure to asbestos during the employee's course of employment with the employer; evidence in the record supported findings by an administrative law judge that the employee was exposed to asbestos while working for the employer, that a causal connection between the employee's exposure and the employee's asbestosis was shown by a preponderance of the evidence, and that the last time that the employee was exposed to asbestos took place during that employment. *Putzel Elec. Contrs. v. Jones*, 282 Ga. App. 539, 639 S.E.2d 540 (2006).

2. Former Law

Editor's notes. — Annotations to decisions under this heading refer to the definition of "occupational disease" contained in this section as it existed prior to the 1987 amendment. That definition of "occupational disease" was contained in former paragraph (3) of this section.

Compensability of occupational disease. — An "occupational disease" was not compensable unless it was one included in this section. *Benfield v. Harriett & Henderson Cotton Mills, Inc.*, 113 Ga. App. 556, 149 S.E.2d 196 (1966) (see O.C.G.A. § 34-9-280).

A disability in the form of a skin condition resulting from working around materials not listed in this section is not compensable. *Rittenhouse v. United States Fid. & Guar. Co.*, 96 Ga. App. 407, 100 S.E.2d 145 (1957) (see O.C.G.A. § 34-9-280).

Where an employee covered by the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) was injured as the result of an accident arising out of and in the course of employment as the result of contact with a substance not listed in this section, the employee was not entitled to compensation for an "occupational disease." *Shore v. Pacific Employers Ins. Co.*, 102 Ga. App. 431, 116 S.E.2d 526 (1960) (see O.C.G.A. § 34-9-280).

Application of 1971 amendment. — The 1971 amendment to O.C.G.A. § 34-9-280 (which added the provisions which now exist as paragraph (2)) did not apply to those plaintiffs whose employment terminated before the effective date of the amendment.

Occupational Disease (Cont'd)
2. Former Law (Cont'd)

Hall v. Synalloy Corp., 540 F. Supp. 263 (S.D. Ga. 1982).

Mental illness that results from a specific incident is not an occupational disease. Harper v. Fidelity & Guar. Ins. Underwriters, 147 Ga. App. 680, 250 S.E.2d 16 (1978).

A claimant's emotional illness is not an occupational disease unless it was due to causes and conditions which are characteristic of and peculiar to the particular employment the claimant is engaged in. Harper v. Fidelity & Guar. Ins. Underwriters, 147 Ga. App. 680, 250 S.E.2d 16 (1978).

Medical board determines compensability of mental disorder. — Whether mental disorder resulted from pressures of claimant's job environment and thus is compensable is a medical question which should be referred to the medical board for investigation. Sawyer v. Pacific Indem. Co., 141 Ga. App. 298, 233 S.E.2d 227 (1977).

Injury due to exposure to known carcinogen. — Employees who alleged injury due to exposure to a known carcinogen could seek remedies solely under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., and not under common law, since the character of their disease could be considered as "listed" under the five criteria of O.C.G.A. § 34-9-280 as a matter of law. Synalloy Corp.

v. Newton, 254 Ga. 174, 326 S.E.2d 470 (1985).

Leukemia is not an occupational disease under O.C.G.A. § 34-9-280. Hull v. Merck & Co., 576 F. Supp. 616 (N.D. Ga. 1984).

Inogenous depression and anxiety neurosis are not occupational diseases because they do not meet the requirement of O.C.G.A. § 34-9-280 that the disease is not an ordinary disease of life to which the general public is exposed. Glynn County Bd. of Comm'rs v. Mimbs, 161 Ga. App. 350, 291 S.E.2d 62 (1982).

X-ray or autopsy are not exclusive methods of diagnosis of asbestosis. — See Yates v. United States Rubber Co., 100 Ga. App. 583, 112 S.E.2d 182 (1959), construing former paragraph defining "asbestosis".

Pleading and Practice

Proof of poisoning required. — A claimant was not entitled to recovery under the provisions pertaining to an occupational disease where there was a mass of evidence from experts showing that after having analyzed cement in which the claimant stood during the claimant's employment as a cement spreader, it was found that such cement did not contain any of the poisons as set forth in this section. Nowell v. Employers Mut. Liab. Ins. Co., 93 Ga. App. 288, 91 S.E.2d 389 (1956) (see O.C.G.A. § 34-9-280).

OPINIONS OF THE ATTORNEY GENERAL

Manner of proof required for compensation for injury caused by contact with poisons. — Unless it can be shown a person is allergic to one of the statutorily designated poisons in this section, and one of them did

in fact cause an allergic reaction, compensation for disease or discomfort from an allergy should not be allowed. 1969 Op. Att'y Gen. No. 69-425 (see O.C.G.A. § 34-9-280).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 311 et seq.

C.J.S. — 30 C.J.S. Employers' Liability for Injuries to Employees, § 5.

99 C.J.S., Workers' Compensation, § 315 et seq.

ALR. — Necessity and sufficiency of evidence that disease contracted by applicant

for workmen's compensation is attributable to employment, 20 ALR 4; 73 ALR 488.

Workmen's compensation: injury from fumes or gases as accident or occupational disease, 90 ALR 619.

Disease resulting from insanitary conditions not peculiar to kind of employment as occupational disease within Workmen's

Compensation Act, 105 ALR 1411.

Workmen's compensation: illness or injury from contaminated water, 141 ALR 1490.

Mental incapacity or disease as constituting total or permanent disability within insurance coverage, 22 ALR3d 1000.

Admissibility of opinion evidence as to employability on issue of disability in health and accident insurance and workers' compensation cases, 89 ALR3d 783.

Mental disorders as compensable under Workmen's Compensation Acts, 97 ALR3d 161.

Right to workers' compensation for physical injury or illness suffered by claimant as result of sudden mental stimuli — Right to compensation under particular statutory provisions and requisites of, and factors affecting, compensability, 109 ALR5th 161.

What constitutes, and remedies for, misuse of easement, 111 ALR5th 313.

Right to workers' compensation for physical injury or illness suffered by claimant as result of nonsudden mental stimuli — Compensability of particular physical injuries or illnesses, 112 ALR5th 509.

34-9-281. Prerequisites to compensation for occupational disease.

(a) Where the employer and employee are subject to this chapter, the disablement or death of an employee resulting from an occupational disease shall be treated as the occurrence of an injury by accident; and the employee or, in the case of his or her death, the employee's dependents shall be entitled to compensation as provided by this chapter. The practice and procedure prescribed in this chapter shall apply to all the proceedings under this article except as otherwise provided.

(b) Except as otherwise provided in this Code section, an employer shall be liable for compensation under this article only where:

(1) The disease arose out of and in the course of the employment in which the employee was engaged under such employer, was contracted while the employee was so engaged, and has resulted from a hazard characteristic of the employment in excess of the hazards of such disease attending employment in general; and

(2) The claim for disablement is filed within one year after the date the employee knew or, in the exercise of reasonable diligence, should have known of the disablement and its relationship to the employment; but in no event shall the claim for disablement be filed in excess of seven years after the last injurious exposure to the hazard of such disease in such employment; provided, however, that an employee with asbestosis or mesothelioma related to exposure to asbestos shall have one year from the date of first disablement after diagnosis of such disease to file a claim for disablement. In cases of death where the cause of action was not barred during the employee's life, the claim must be filed within one year of the date of death. (Code 1933, § 114-801, enacted by Ga. L. 1946, p. 103; Ga. L. 1963, p. 141, § 17; Ga. L. 1982, p. 3, § 34; Ga. L. 1982, p. 2485, §§ 3, 9; Ga. L. 1983, p. 3, § 25; Ga. L. 1987, p. 1474, § 2; Ga. L. 1991, p. 1586, § 1; Ga. L. 2004, p. 631, § 34.)

Cross references. — Time limitations for filing claims under chapter generally, § 34-9-82.

Code Commission notes. — Pursuant to § 28-9-5, in 1991, a comma was inserted following “provided” in the first sentence of paragraph (b)(2).

Editor’s notes. — Ga. L. 1987, p. 1474, § 17, not codified by the General Assembly, provided that that Act would apply to any

occupational disease not previously diagnosed before July 1, 1987.

Ga. L. 1991, p. 1586, § 2, not codified by the General Assembly, provides that this amendment shall not operate to revive any claim barred prior to July 1, 1991.

Law reviews. — For article, “Occupational Diseases Under the Georgia Workmen’s Compensation Act,” see 8 Mercer L. Rev. 333 (1957).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION STATUTE OF LIMITATIONS

General Consideration

Occupational disease deemed injury by accident. — This section provided that the disablement or death of an employee resulting from an occupational disease shall be treated as the happening of an injury by accident. *Yates v. United States Rubber Co.*, 100 Ga. App. 583, 112 S.E.2d 182 (1959) (see O.C.G.A. § 34-9-281).

Action for injury arising from employment barred. — An action for a current or future physical injury by accident due to occupational disease or otherwise (caused by ingestion of or exposure to asbestos fibers) and arising out of the scope of employment is barred by the exclusivity provisions of the workers’ compensation law (see O.C.G.A. § 34-9-1 et seq.). *Johnson v. Hames Contracting, Inc.*, 208 Ga. App. 664, 431 S.E.2d 455 (1993).

Cited in *American Mut. Liab. Ins. Co. v. Ellison*, 80 Ga. App. 62, 55 S.E.2d 258 (1949); *American Mut. Liab. Ins. Co. v. Duncan*, 83 Ga. App. 863, 65 S.E.2d 59 (1951); *Zurich Ins. Co. v. Spence*, 122 Ga. App. 464, 177 S.E.2d 503 (1970); *Hall v. Synalloy Corp.*, 540 F. Supp. 263 (S.D. Ga. 1982); *Commercial Assocs. v. Tilcon Gammino, Inc.*, 998 F.2d 1092 (1st Cir. 1993).

Statute of Limitations

Retroactive operation of statute of limitations is constitutional. — The legislature may revive a workers’ compensation claim which would have been barred by a previous limitation period by enacting a new statute

of limitation, without violating the constitutional prohibition against retroactive laws in Ga. Const. 1983, Art. I, § 1, Par. X. *Canton Textile Mills, Inc. v. Lathem*, 253 Ga. 102, 317 S.E.2d 189, cert. denied, 469 U.S. 918, 105 S. Ct. 296, 83 L. Ed. 2d 231 (1984).

Section controls over § 34-9-82. — There was ample evidence to support the determination that the claimant’s pneumoconiosis was an occupational disease; therefore, the specific statute of limitation applicable to occupational diseases as set forth in O.C.G.A. § 34-9-281(b)(2) should control, instead of the statute generally applicable to compensable injuries found in O.C.G.A. § 34-9-82(a). *American Int’l Adjusting Co. v. Davis*, 202 Ga. App. 276, 414 S.E.2d 292 (1991).

Date of accident in silicosis case is date that disablement commences. *Patterson v. Employer’s Mut. Liab. Ins. Co.*, 99 Ga. App. 325, 108 S.E.2d 146 (1959).

Limitations on actions for disablement from silicosis. — In order to be compensable, disablement from silicosis must occur within three years from the date of the last hazardous exposure of the employee in the course of employment and the employee has one year thereafter in which to file the employee’s claim. *Free v. Associated Indem. Corp.*, 78 Ga. App. 839, 52 S.E.2d 325 (1949); *Patterson v. Employer’s Mut. Liab. Ins. Co.*, 99 Ga. App. 325, 108 S.E.2d 146 (1959).

Silicosis being a disease which develops slowly and which cannot be immediately detected, the General Assembly no doubt intended by the three-year clause in the

statute not only to give the disease ample time from the last hazardous exposure in which to develop, but also to give the employee ample time in which to discover that the illness which renders the employee unable to work is silicosis. *Free v. Associated Indem. Corp.*, 78 Ga. App. 839, 52 S.E.2d 325 (1949).

Where the claimant was disabled when claimant quit work, but did not know of claimant's disablement, nor if claimant's disablement was the result of silicosis, claimant had three years after claimant's last exposure to determine claimant's disability, and 30 additional days to so notify claimant's employer of the claim. *Patterson v. Employer's Mut. Liab. Ins. Co.*, 99 Ga. App. 325, 108 S.E.2d 146 (1959).

Since an employee has one year after disablement occurs in a silicosis case to file a claim, and since to be compensable disablement due to silicosis must result within three years after the last injurious exposure to the hazard of such disease during employment, it necessarily follows that under no circumstances may a claim for workers' compensation in a silicosis case be filed more than four years after the termination of employment. *Vaughn v. Coal Operators Cas. Co.*, 106 Ga. App. 129, 126 S.E.2d 428 (1962).

Statute runs when employee had knowledge. — The focus of the statute is on the

employee's knowledge, not when the employer had notice. *American Int'l Adjusting Co. v. Davis*, 202 Ga. App. 276, 414 S.E.2d 292 (1991).

Byssinosis claims. — Employer and insurer had no vested right in the former statute of limitations defense for byssinosis claims regardless of whether the viability of that former defense was or was not previously adjudicated. *Williams v. Crompton Highland Mills, Inc.*, 190 Ga. App. 621, 379 S.E.2d 622 (1989).

Asbestosis claim was not time-barred. — Workers' compensation claim for an employee's total, permanent disability caused by pulmonary fibrosis and asbestosis was not time-barred by O.C.G.A. § 34-9-281(b)(2) although there was evidence that the employee's doctors suspected a causal connection between asbestos exposure and the employee's respiratory illness more than a decade before the claim was filed because evidence supported the finding that the employee did not learn of these suspicions until the asbestosis was diagnosed; the claim was timely whether the limitations period began to run when the employee first learned of the causal connection or when the employee was diagnosed with asbestosis because the claim was filed less than a year after both events. *Putzel Elec. Contrs. v. Jones*, 282 Ga. App. 539, 639 S.E.2d 540 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 311 et seq.

C.J.S. — 100A C.J.S., Workers' Compensation, § 1067.

ALR. — Constitutionality of statute requiring protection against occupational or industrial diseases and accidents with respect to definiteness and completeness, 99 ALR 613.

Workmen's compensation as covering disease contracted by employee while on street or in traveling, 141 ALR 806.

When limitations period begins to run as to claim for disability benefits for contracting of disease under Workers' Compensation or Occupational Diseases Act, 86 ALR5th 295.

34-9-282. Payment of medical and burial expenses of claimants.

Any claimant who shall be entitled to compensation under the terms of this article shall be entitled to burial expenses and medical, hospital, and other treatment in the same amounts and with the same limitations and conditions as provided in Code Sections 34-9-200 and 34-9-265 for injured employees. (Code 1933, § 114-824, enacted by Ga. L. 1946, p. 103; Ga. L. 1963, p. 144, § 18.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, "Code Sections 34-9-200 and 34-9-265" was substituted for "Code Sections 34-9-265 and 34-9-200".

Law reviews. — For article, "Occupational Diseases Under the Georgia Workmen's Compensation Act," see 8 Mercer L. Rev. 333 (1957).

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workers' Compensation, §§ 485 et seq., 500.

34-9-283. Applicability to occupational diseases of provisions of Code Section 34-9-263 regarding permanent partial industrial disabilities.

The provisions of Code Section 34-9-263 with respect to permanent partial industrial disabilities shall apply in the case of an occupational disease, save and except that there shall be no compensation due or payable for the partial loss of or for partial loss of use of a member or for partial loss of vision of an eye. (Code 1933, § 114-807, enacted by Ga. L. 1946, p. 103; Ga. L. 1982, p. 3, § 34; Ga. L. 1995, p. 1302, § 13.)

JUDICIAL DECISIONS

If worker was totally disabled by respiratory impairment resulting from byssinosis and other, non-work-related causes, including smoking, O.C.G.A. §§ 34-9-263 and 34-9-283 provisions for a permanent partial disability were inapposite. Computation of

benefits had to be made under O.C.G.A. § 34-9-285. *Whitaker v. Fieldcrest Mills, Inc.*, 174 Ga. App. 533, 330 S.E.2d 761 (1985).

Cited in *Yates v. United States Rubber Co.*, 100 Ga. App. 583, 112 S.E.2d 182 (1959).

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., Workers' Compensation, § 567 et seq.

34-9-284. Liability of last employer; compensation based on average weekly wage.

Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease and the insurance carrier, if any, by whom the employer was insured when such employee was last so exposed under such employer shall alone be liable therefor, without right of contribution from any prior employer or insurance carrier. The amount of the compensation for any occupational disease shall be based upon the average weekly wages of the employee, as determined under Code Section 34-9-260. The date upon which the employee first suffers disablement from the occupational disease or the last date the employee was employed by any employer, whichever date would provide the higher average weekly wage for such employee, shall be deemed the date of the injury for the purpose of

determining the average weekly wage; and the notice of injury and claim for compensation, as required by Code Sections 34-9-80 through 34-9-82, 34-9-85, and 34-9-86, shall be given and made to such employer. (Code 1933, § 114-809, enacted by Ga. L. 1946, p. 103; Ga. L. 1982, p. 3, § 34; Ga. L. 1987, p. 1474, § 3.)

Editor's notes. — Ga. L. 1987, p. 1474, § 17, not codified by the General Assembly, provided that that Act would apply to any occupational disease not previously diagnosed before July 1, 1987.

JUDICIAL DECISIONS

Cited in Lanier v. Jim Brown Dev. Corp., 199 Ga. App. 255, 404 S.E.2d 626 (1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 311 et seq.

C.J.S. — 100 C.J.S., Workers' Compensation, § 828 et seq.

ALR. — Workers' compensation: Liability of successive employers for disease or condition allegedly attributable to successive employments, 34 ALR4th 958.

34-9-285. Noncompensable disease or infirmity.

Where an occupational disease is aggravated by any other disease or infirmity not itself compensable or where disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any other way contributed to by an occupational disease, the compensation payable shall be reduced and limited only to such proportion of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease, as the causative factor, bears to all the causes of such disability or death. Compensation shall be adjusted by reducing the number of weekly payments or the amounts of such payments as, in the circumstances of the particular case, may be determined by the board. (Code 1933, § 114-805, enacted by Ga. L. 1946, p. 103.)

Code Commission notes. — Pursuant to § 28-9-5, in 1988, "way" was substituted for "wise" in the first sentence.

Law reviews. — For article discussing ap-

portioning disability losses in cases of psychological injury, see 16 Ga. St. B.J. 18 (1979).

JUDICIAL DECISIONS

Section constitutional. — O.C.G.A. § 34-9-285, in authorizing disparate treatment of occupational diseases and other injuries compensable under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., does not violate constitutional guaran-

tees of equal protection. Price v. Lithonia Lighting Co., 256 Ga. 49, 343 S.E.2d 688 (1986).

O.C.G.A. § 34-9-285 is rationally related to a legitimate state interest and does not violate the fourteenth amendment's equal pro-

tection clause. *Price v. Tanner*, 855 F.2d 820 (11th Cir. 1988), cert. denied, 489 U.S. 1081, 109 S. Ct. 1534, 103 L. Ed. 2d 839 (1989).

Partial disability. — The law does not contemplate such a thing as partial disability in the occupational disease statute, except where, under the provisions of Ga. L. 1946, p. 103, the condition results in part from an occupational disease and in part from some other condition not compensable, in which event the compensation is reduced propor-

tionately. *Yates v. United States Rubber Co.*, 100 Ga. App. 583, 112 S.E.2d 182 (1959).

No apportionment between work-related and congenital causes. — The Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., does not provide for apportionment of benefits between work-related and congenital causes. *SMB Stage Line v. Leach*, 204 Ga. App. 229, 418 S.E.2d 791 (1992).

Cited in *Whitaker v. Fieldcrest Mills, Inc.*, 174 Ga. App. 533, 330 S.E.2d 761 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 311 et seq.

ALR. — Workmen's compensation: con-

struction and effect of provisions in relation to new or new and further disability, 72 ALR 1125.

34-9-286. Payment of compensation to persons whose relationship with employee arises after disability.

Reserved. Repealed by Ga. L. 1987, p. 1474, § 4, effective July 1, 1987.

Editor's notes. — This Code section was based on Code 1933, § 114-806, enacted by Ga. L. 1946, p. 103. Section 17 of Ga. L. 1987, p. 1474, not codified by the General

Assembly, provided that that Act would apply to any occupational disease not previously diagnosed before July 1, 1987.

34-9-287. Applicability of article to occupational diseases in which last injurious exposure occurred before April 30, 1946.

Reserved. Repealed by Ga. L. 1987, p. 1474, § 5, effective July 1, 1987.

Editor's notes. — This Code section was based on Code 1933, § 114-808, enacted by Ga. L. 1946, p. 103. Section 17 of Ga. L. 1987, p. 1474, not codified by the General

Assembly, provided that that Act would apply to any occupational disease not previously diagnosed before July 1, 1987.

34-9-288. Applicability of provisions of chapter to article.

All of the provisions of this chapter shall be applicable to this article, unless otherwise provided in or inconsistent with this article. (Code 1933, § 114-810, enacted by Ga. L. 1946, p. 103; Ga. L. 2004, p. 631, § 34.)

Law reviews. — For article, "Occupational Diseases Under the Georgia Workmen's

Compensation Act," see 8 Mercer L. Rev. 33 (1957).

JUDICIAL DECISIONS

Cited in *Hammock v. Davidson Granite Co.*, 107 Ga. App. 673, 131 S.E.2d 132 (1963).

34-9-289. Exclusive liability of employer for employee's death or disability from occupational disease.

Whenever an employer and employee are subject to this chapter, the liability of the employer under this article for the disablement or death of the employee from an occupational disease in any way incurred by such employee in the course of or because of his employment shall be exclusive and in place of any and all other civil liability whatsoever at common law or otherwise to such employee or to his personal representative, next of kin, spouse, parents, guardian, or any others. (Code 1933, § 114-811, enacted by Ga. L. 1946, p. 103; Ga. L. 1987, p. 1474, § 6.)

Editor's notes. — Ga. L. 1987, p. 1474, § 17, not codified by the General Assembly, provided that that Act would apply to any

occupational disease not previously diagnosed before July 1, 1987.

JUDICIAL DECISIONS

Workers' Compensation Act is exclusive remedy. — Whether a claimant actually wins compensation is irrelevant to the fact that the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., is the employee's exclusive remedy against an employer. *Venable v. John P. King Mfg. Co.*, 174 Ga. App. 800, 331 S.E.2d 638 (1985).

Since plaintiff's ailment was considered an "other occupational disease" both during plaintiff's time of employment and when plaintiff subsequently learned that plaintiff's employment was the cause, plaintiff's tort action against the former employer for damages resulting from that ailment was barred by O.C.G.A. § 34-9-289. *Venable v. John P. King Mfg. Co.*, 174 Ga. App. 800, 331 S.E.2d 638 (1985).

Where former employees sued their employer in tort for their development of cancer allegedly as the result of exposure in their place of employment to chemicals, the trial court properly dismissed their complaint; a claim under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.) is the employees' sole and exclusive remedy for injury or occupational disease incurred in the course of employment. *Ervin v. Great Dane Trailers, Inc.*, 195 Ga. App. 317, 393 S.E.2d 467 (1990).

It is well settled in this state that a claim under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., is the employee's sole and exclusive remedy for injury or occupational disease incurred in the course

of employment. This exclusivity includes wilful or intentional acts of the employer, so long as the injury arises out of and in the course of employment, as well as the employer's failure to furnish its employees with a safe place to work. *Bryant v. Wal-Mart Stores, Inc.*, 203 Ga. App. 770, 417 S.E.2d 688, cert. denied, 203 Ga. App. 905, 417 S.E.2d 688 (1992).

RICO statute does not supersede exclusivity provisions. — There is nothing in the language of the RICO statute which indicates that RICO was intended to supersede the exclusivity provisions of the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. Furthermore, the Workers' Compensation Act makes no statutory exception to the exclusivity remedy provision. *Bryant v. Wal-Mart Stores, Inc.*, 203 Ga. App. 770, 417 S.E.2d 688, cert. denied, 203 Ga. App. 905, 417 S.E.2d 688 (1992).

Intentional misconduct by employer. — When an employee's injuries, such as lead poisoning, are compensable under the workers' compensation law (see O.C.G.A. § 34-9-1 et seq.), the employee is absolutely barred from pursuing a common law tort action to recover for such injuries, even if the injuries resulted from intentional misconduct on the part of the employer. *Southwire Co. v. Benefield*, 184 Ga. App. 418, 361 S.E.2d 525, cert. denied, 184 Ga. App. 910, 361 S.E.2d 525 (1987).

Claim to recover for death of employee barred. — Wrongful death claim was barred

by O.C.G.A. § 34-9-289 where the employer locked the premises where employee was working for business purposes, delaying the ability of an emergency medical crew to reach the employee when the employee suffered a stroke. *Bryant v. Wal-Mart Stores, Inc.*, 203 Ga. App. 770, 417 S.E.2d 688, cert. denied, 203 Ga. App. 905, 417 S.E.2d 688 (1992).

Injury from “occupational disease” not compensable without disability. — An injury stemming from an “occupational disease,” as defined by the Workers’ Compensation Act, O.C.G.A. § 34-9-1 et seq., is within coverage of the Act, but it is not

compensable without a disability. *Synalloy Corp. v. Newton*, 254 Ga. 174, 326 S.E.2d 470 (1985).

Effect of statutory amendments. — As to the effect of amendments to the Workers’ Compensation Act, O.C.G.A. § 34-9-1 et seq., on existing and terminated employment relationships, see *Venable v. John P. King Mfg. Co.*, 174 Ga. App. 800, 331 S.E.2d 638 (1985).

Cited in *Fenster v. Gulf States Ceramic*, 124 Ga. App. 102, 182 S.E.2d 905 (1971); *Hull v. Merck & Co.*, 576 F. Supp. 616 (N.D. Ga. 1984); *Synalloy Corp. v. Newton*, 171 Ga. App. 194, 319 S.E.2d 32 (1984).

RESEARCH REFERENCES

C.J.S. — 99 C.J.S., Workers’ Compensation, § 138.

ALR. — Validity of contract providing that acceptance of benefits from relief association shall bar action against employer, 12 ALR 477.

Liability of employer at common law, or apart from workmen’s compensation or specific occupational disease statutes, for occupational disease contracted by employee, 105 ALR 80.

Workmen’s compensation provision as precluding employee’s action against employer for fraud, false imprisonment, defamation, or the like, 46 ALR3d 1279.

What conduct is willful, intentional, or deliberate within workmen’s compensation act provision authorizing tort action for such conduct, 96 ALR3d 1064.

34-9-290. Reporting of hazardous occupations and cases of occupational disease to Department of Human Resources.

Reserved. Repealed by Ga. L. 1996, p. 1291, § 14, effective July 1, 1996.

Editor’s notes. — This Code section was based on Code 1933, § 114-827, enacted by Ga. L. 1946, p. 103; Ga. L. 1972, p. 1069, § 3;

Ga. L. 1978, p. 941, § 1; Ga. L. 1982, p. 3, § 34.

34-9-291. Effect of false representations by employee regarding previous disability from or compensation for occupational disease.

No compensation shall be payable for an occupational disease if the employee, in the course of or in the course of entering into the employment of the employer by whom the compensation would otherwise be payable, falsely represented himself in writing to such employer as not having previously been disabled, laid off, or compensated in damages or otherwise because of such disease. (Code 1933, § 114-804, enacted by Ga. L. 1946, p. 103.)

JUDICIAL DECISIONS

This section related only to effect of false preemployment statements concerning previous occupational disease. *GMC v. Hargis*,

114 Ga. App. 143, 150 S.E.2d 303 (1966) (see O.C.G.A. § 34-9-291).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, §§ 43, 607.

C.J.S. — 100A C.J.S., Workers' Compensation, § 1013 et seq.

ALR. — Eligibility for workers' compensation as affected by claimant's misrepresentation of health or physical condition at the time of hearing, 12 ALR5th 658.

34-9-292. Payment of expenses of board.

The total expenses of the State Board of Workers' Compensation for the administration, operation, and proper functioning of the board under this article shall be a proper charge under Code Section 34-9-63 and shall be payable as provided therein. (Code 1933, § 114-826, enacted by Ga. L. 1946, p. 103; Ga. L. 1982, p. 3, § 34; Ga. L. 1987, p. 1474, § 7.)

Code Commission notes. — Pursuant to § 28-9-5, in 1988, a comma was deleted following "article" in this Code section.

Editor's notes. — Ga. L. 1987, p. 1474,

§ 17, not codified by the General Assembly, provided that that Act would apply to any occupational disease not previously diagnosed before July 1, 1987.

PART 2

MEDICAL BOARD

34-9-310. Resolution of medical questions resulting from claims for compensation.

(a) When medical questions are in controversy in any claim for compensation for an occupational disease, the parties may agree to refer the employee to a licensed physician specializing in the diagnosis and treatment of the disease at issue for an independent medical examination and report. In the event that the parties cannot agree on the referral to be made, the State Board of Workers' Compensation shall refer the employee to a licensed physician who specializes in diagnosis and treatment of the disease at issue and who is certified by the appropriate medical board in the field encompassing such disease for an independent medical examination and report. No award may be made in such case until the appointed physician has filed with the board the report respecting all medical questions at issue. The date of disablement, if in dispute, shall be deemed a medical question. The board is authorized to charge the expense of the independent medical examination and report against either or both parties in the final award.

(b) Proceedings may be suspended and no compensation may be payable for any period during which the employee may unreasonably fail or refuse to submit to such an examination.

(c) Upon the filing of a claim for compensation for death from an occupational disease where an autopsy is necessary to accurately and scientifically ascertain or determine the cause of death, such autopsy may be ordered by the board. The board may specify and designate a licensed physician who is a specialist in such examinations and who is certified by the appropriate medical board in the field encompassing such disease to perform or attend the autopsy and to certify his or her findings thereon. Such findings shall be filed with the State Board of Workers' Compensation and shall become a part of the record in the case. In the event no claim has been filed, the board may exercise such authority on its own motion or on application made at any time, upon presentation of facts showing that a controversy may arise in regard to the cause of death or the existence of any occupational disease. The board is authorized to charge the expense of any such autopsy against the party requesting it.

(d) The physician selected to conduct the independent medical examination of the claimant, and to issue a report on all medical questions presented, shall report in writing and file with the board all findings and conclusions on every medical question in controversy as soon as practicable, but in any event no later than 60 days after the date on which the independent medical examination, or autopsy, has been completed.

(e) Either party may submit information to and may cross-examine such physician in accordance with paragraph (2) of subsection (e) of Code Section 34-9-102. Each party submitting information to such physician shall serve a copy of such information to the opposing party. The findings and conclusions contained in such report or testimony of such physician shall create a presumption of the correctness of such findings and conclusions, which presumption may be rebutted by other competent medical evidence. (Code 1981, § 34-9-310, enacted by Ga. L. 1987, p. 1474, § 8.)

Code Commission notes. — Pursuant to § 28-9-5, in 1987, "to" was inserted preceding "issue a report" in subsection (d).

Editor's notes. — Ga. L. 1987, p. 1474, § 8, effective July 1, 1987, repealed the former Code section and enacted the current Code section. The former Code section, relating to the creation and functions of a medical board to hear and determine con-

troversial medical questions in claims for compensation arising in cases of death or disability from occupational disease, was based on Ga. L. 1981, Ex. Sess., p. 8 (Code Enactment Act).

Ga. L. 1987, p. 1474, § 17, not codified by the General Assembly, provided that that Act would apply to any occupational disease not previously diagnosed before July 1, 1987.

JUDICIAL DECISIONS

Determination of medical facts prior to 1987 reenactment. — See *American Mut. Liab. Ins. Co. v. Duncan*, 83 Ga. App. 863, 65

S.E.2d 59 (1951); *Griffith v. Employers Mut. Liab. Ins. Co.*, 100 Ga. App. 157, 110 S.E.2d 539 (1959); *Farrill v. Travelers Ins. Co.*, 105

Ga. App. 600, 125 S.E.2d 562 (1962); *Butler v. National Lead Co.*, 106 Ga. App. 180, 126 S.E.2d 453 (1962); *Waits v. Travelers Ins. Co.*, 106 Ga. App. 130, 126 S.E.2d 543 (1962); *United States Cas. Co. v. Thomas*, 106 Ga. App. 441, 127 S.E.2d 169, rev'd on other grounds, 218 Ga. 493, 128 S.E.2d 749 (1962); *Hammock v. Davidson Granite Co.*, 107 Ga. App. 673, 131 S.E.2d 132 (1963); *Miller v. Travelers Ins. Co.*, 111 Ga. App. 245,

141 S.E.2d 223 (1965); *Burton v. Aetna Cas. & Sur. Co.*, 115 Ga. App. 112, 153 S.E.2d 734 (1967); *Miller v. Travelers Ins. Co.*, 115 Ga. App. 718, 155 S.E.2d 724 (1967); *McIntyre v. Employers Mut. Liab. Ins. Co.*, 122 Ga. App. 424, 177 S.E.2d 191 (1970); *Sawyer v. Pacific Indem. Co.*, 141 Ga. App. 298, 233 S.E.2d 227 (1977); *Moore v. Liberty Mut. Ins. Co.*, 145 Ga. App. 629, 244 S.E.2d 148 (1978).

RESEARCH REFERENCES

C.J.S. — 100 C.J.S., *Workers' Compensation*, §§ 701, 706 et seq., 717.
ALR. — Necessity and sufficiency of evidence that disease contracted by applicant for workmen's compensation is attributable

to employment, 20 ALR 4; 73 ALR 488.
 Power of court to order disinterment and autopsy or examination for evidential purposes in civil case, 21 ALR2d 538.

34-9-311. Investigation of medical questions by medical board; hearing before medical board; examination of employee by physician; autopsy to determine cause of death; filing of report of medical board with State Board of Workers' Compensation.

Reserved. Repealed by Ga. L. 1987, p. 1474, § 9, effective July 1, 1987.

Editor's notes. — This Code section was based on Code 1933, §§ 114-818, 114-819, 114-820, 114-821, enacted by Ga. L. 1946, p. 103. Ga. L. 1987, p. 1474, § 17, not codified

by the General Assembly, provided that that Act would apply to any occupational disease not previously diagnosed before July 1, 1987.

34-9-312. Promulgation of rules and regulations by medical board as to making of examinations and autopsies; determination of location of examinations; procedure by medical board in conducting medical investigations; reporting of investigations to full medical board and to State Board of Workers' Compensation; reporting of final decision of medical board; procedure by parties for appealing final decision; rendering of decision by board on appeal; conclusiveness of medical board's decisions as to medical questions.

Reserved. Repealed by Ga. L. 1987, p. 1474, § 10, effective July 1, 1987.

Editor's notes. — This Code section was based on Code 1933, § 114-823, enacted by Ga. L. 1946, p. 103, Ga. L. 1982, p. 3, § 34. Ga. L. 1987, p. 1474, § 17, not codified by

the General Assembly, provided that that Act would apply to any occupational disease not previously diagnosed before July 1, 1987.

34-9-313. Power to compel attendance of witnesses and production of records.

The medical board shall have the same power to compel the attendance of witnesses and the production of records as the superior courts of this state have to compel the attendance of witnesses and the production of records. (Code 1933, § 114-828, enacted by Ga. L. 1963, p. 141, § 19.)

PART 3

SPECIAL PROVISIONS REGARDING SILICOSIS AND ASBESTOSIS

34-9-330 through 34-9-335.

Reserved. Repealed by Ga. L. 1987, p. 1474, §§ 11 through 16, effective July 1, 1987.

Editor's notes. — This part was based on Code 1933, §§ 114-809, 114-813, 114-814, 114-815, 114-816, 114-817, enacted by Ga. L. 1946, p. 103. Ga. L. 1987, p. 1474, § 17, not codified by the General Assembly, provided that that Act would apply to any occupational disease not previously diagnosed before July 1, 1987.

Administrative rules and regulations. — Organization and administration, Official Compilation of the Rules and Regulations of the State of Georgia, Subsequent Injury Trust Fund, Chapter 622-1.

ARTICLE 9

SUBSEQUENT INJURY TRUST FUND

Cross references. — Rate of employer contributions, § 34-8-151.

JUDICIAL DECISIONS

Cited in Subsequent Injury Trust Fund v. Alterman Foods, Inc., 162 Ga. App. 428, 291 S.E.2d 758 (1982); Subsequent Injury Trust

Fund v. Harbin Homes, Inc., 182 Ga. App. 316, 355 S.E.2d 702 (1987).

RESEARCH REFERENCES

ALR. — Eligibility for workers' compensation as affected by claimant's misrepresenta-

tion of health or physical condition at the time of hearing, 12 ALR5th 658.

34-9-350. Purpose and construction of article.

It is the purpose of this article to encourage the employment of persons with disabilities by protecting employers from excess liability for compensation when an injury to a disabled worker merges with a preexisting permanent impairment to cause a greater disability than would have resulted from the subsequent injury alone. It shall not be construed to

create, increase, or provide any benefits for injured employees or their dependents not otherwise provided by this chapter. The entitlement of an injured employee or dependents to compensation under this chapter shall be determined without regard to this article, the provisions of which shall be considered only in determining whether the employer or insurer who has paid compensation under this chapter is entitled to reimbursement from the Subsequent Injury Trust Fund. (Code 1933, § 114-911, enacted by Ga. L. 1977, p. 608, § 1; Ga. L. 1995, p. 1302, §§ 14, 15.)

Cross references. — Manner of determining right to compensation upon subsequent injury, § 34-9-241.

Law reviews. — For annual survey of law of worker's compensation, see 56 Mercer L. Rev. 479 (2004).

JUDICIAL DECISIONS

Employee with preexisting permanent impairment injured on the job. — An employer/insurer was entitled to reimbursement for excess liability when an employee with a preexisting permanent impairment, consisting of venous insufficiency, a cardiovascular disorder, suffered a subsequent compensa-

ble injury in the form of a bacterial infection, such that the merger of the preexisting impairment and compensable injury caused greater disability than would have resulted from the compensable injury above. Subsequent Injury Trust Fund v. Hanson Indus., 211 Ga. App. 700, 440 S.E.2d 89 (1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 362.

C.J.S. — 100 C.J.S., Workers' Compensation, § 648.

ALR. — Workers' compensation: compensability of injuries incurred traveling to or from medical treatment of earlier compensable injury, 83 ALR4th 110.

34-9-351. Definitions.

As used in this article, the term:

(1) "Merger of an injury with a preexisting permanent impairment" describes or means that:

(A) Had the preexisting permanent impairment not been present, the subsequent injury would not have occurred;

(B) The disability resulting from the subsequent injury in conjunction with the preexisting permanent impairment is materially, substantially, and cumulatively greater than that which would have resulted had the preexisting permanent impairment not been present, and the employer has been required to pay and has paid compensation for that greater disability; or

(C) Death would not have been accelerated had the preexisting permanent impairment not been present.

(2) "Permanent impairment" means any permanent condition due to previous injury, disease, or disorder which is, or is likely to be, a

hindrance or obstacle to employment or to obtaining reemployment if the employee should become unemployed. (Code 1933, § 114-911, enacted by Ga. L. 1977, p. 608, § 1.)

JUDICIAL DECISIONS

Board erred in requiring that merger be established first under O.C.G.A. § 34-9-351(1)(A) as a condition precedent to determining the existence of a merger under subparagraph (1)(B) and in failing to consider subparagraph (1)(B) of that section. *Brockway Std. v. Harper*, 200 Ga. App. 250, 407 S.E.2d 475 (1991).

Focus of O.C.G.A. § 34-9-351 is not merely the cumulative effect of the injuries but requires that the disability resulting from the subsequent and preexisting injuries be "materially, substantially, and cumulatively greater than that which would have resulted had the preexisting permanent impairment not been present." *JPS Carpets v. Troupe*, 203 Ga. App. 602, 417 S.E.2d 333, cert. denied, 203 Ga. App. 906, 417 S.E.2d 333 (1992).

An employee's first injury must aggravate the degree of permanent partial disability resulting from a second injury in order for there to be a merger between the two injuries rather than considering whether the

disability to an employee's body as a whole and/or the employee's state of employability has been rendered materially, substantially, and cumulatively greater due to the prior injury. *JPS Carpets v. Troupe*, 203 Ga. App. 602, 417 S.E.2d 333, cert. denied, 203 Ga. App. 906, 417 S.E.2d 333 (1992).

Review of lower court's finding of fact. — The full board is a finder of fact which is entitled to make independent findings of fact and conclusions of law even though the facts are the same but the conclusions different. A finding of fact, that the claimant did not establish merger made by the full board when supported by any evidence, is conclusive and binding upon the superior court as well as the Court of Appeals. *Georgia Subsequent Injury Trust Fund v. Brockway Std.*, 204 Ga. App. 519, 419 S.E.2d 755 (1992).

Cited in *Subsequent Injury Trust Fund v. Knight Ridder Newspapers-Macon Tel. & News*, 203 Ga. App. 458, 416 S.E.2d 887 (1992); *Subsequent Injury Trust Fund v. Hanson Indus.*, 211 Ga. App. 700, 440 S.E.2d 89 (1994).

34-9-351.1. Exclusion from eligibility for reimbursement of certain self-insured employers.

Employers which are self-insured with regard to workers' compensation benefits but which are not authorized by the State Board of Workers' Compensation or other regulatory bodies as self-insured employers shall not be eligible for reimbursement from the Subsequent Injury Trust Fund. (Code 1981, § 34-9-351.1, enacted by Ga. L. 1985, p. 1426, § 1.)

34-9-352. Creation and authority of Subsequent Injury Trust Fund; director of Office of Treasury and Fiscal Services as custodian.

There is established a Subsequent Injury Trust Fund which shall be of a perpetual, nonlapsing nature for the sole purpose of making payments in accordance with this article. The fund shall be administered by the administrator of the Subsequent Injury Trust Fund. All moneys in the fund shall be held in trust and shall not be money or property of the state. The board of trustees created by Code Section 34-9-354 shall be authorized to invest the moneys of the fund in the same manner as provided by law for

investments by domestic insurers (Chapter 11 of Title 33). The board of trustees shall be authorized to designate the director of the Office of Treasury and Fiscal Services as custodian of the fund for the purpose of investing the fund. In the event the director of the Office of Treasury and Fiscal Services is appointed custodian he shall have exclusive control of the investment of the fund; and the trustees shall be absolved of any responsibility for such fund. The custodian shall be authorized to disburse moneys from the fund only upon written order of the administrator. (Code 1933, § 114-901, enacted by Ga. L. 1977, p. 608, § 1; Ga. L. 1993, p. 1402, § 18.)

JUDICIAL DECISIONS

Cited in Assurance Co. of Am. v. Shepherd, 155 Ga. App. 36, 270 S.E.2d 268 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Processing of penalty fines against insurers and employers by board is not one of the purposes of the Subsequent Injury Trust Fund. 1980 Op. Att’y Gen. No. 80-124.

Subsequent Injury Trust Fund is not authorized to provide funding for personnel position at board to carry out specific functions of that agency. 1980 Op. Att’y Gen. No. 80-124.

Exemption of fund from payment into general fund. — The Subsequent Injury Trust Fund is not subject to the requirement that monies be paid into the general fund of the state treasury. 1993 Op. Att’y Gen. No. 93-28.

RESEARCH REFERENCES

ALR. — Workmen’s compensation: compensation as affected by external infection from, or subsequent incident of, original injury, 7 ALR 1186; 102 ALR 790.

Workmen’s compensation: construction and effect of provisions in relation to new or new and further disability, 72 ALR 1125.

34-9-353. Surety bonds of administrator and custodian.

The administrator and the custodian, before entering upon the performance of their duties, shall each execute and file an official surety bond of not less than \$50,000.00. The bonds shall be approved as to form and sufficiency by the Attorney General. The bonds shall be payable to the Subsequent Injury Trust Fund and conditioned upon the faithful performance of the respective duties of the administrator and custodian. The premium for the bonds shall be paid out of the moneys of the Subsequent Injury Trust Fund. (Code 1933, § 114-902, enacted by Ga. L. 1977, p. 608, § 1.)

34-9-354. Creation and appointment of board of trustees; duties; term of office of members and chairman; oath of office.

(a) There is created a Board of Trustees of the Subsequent Injury Trust Fund composed of five members who shall serve for a term of six years each. One member shall be selected from each of the following fields: the insurance industry; rehabilitation professionals; management; labor; and the public at large. The Commissioner of Insurance and the executive director of the State Board of Workers' Compensation shall be ex officio members of the board of trustees. The ex officio members shall serve without compensation in an advisory capacity only.

(b) The board of trustees shall be appointed by the Governor, and each member shall serve until his successor is appointed and qualified.

(c) One member shall be appointed for a period of two years, one member for a period of three years, one member for a period of four years, one member for a period of five years, and one member for a period of six years. Thereafter, each member shall be appointed for a full term of six years or the remainder of an unexpired term.

(d) The duties of the board of trustees shall include, but not necessarily be limited to, the:

(1) Appointment of the administrator of the fund and the setting of the compensation of the administrator;

(2) Establishment of policies, procedures, rules, and regulations incidental to the fund's operations; and

(3) Approval of the administrative budget of the fund.

(e) The board of trustees shall elect one of its members as chairman, who shall serve for a period of two years.

(f) The members of the board of trustees shall be required to take and subscribe before the Governor an oath to discharge the duties of their office faithfully and impartially. This oath shall be in addition to the oath required of all civil officers. (Code 1933, §§ 114-903, 114-904, enacted by Ga. L. 1977, p. 608, § 1; Ga. L. 1982, p. 3, § 34; Ga. L. 1988, p. 468, § 1.)

Code Commission notes. — Pursuant to "Commissioner" in the third sentence of subsection (a), in 1988, "Commissioner of Insurance" was substituted for "Insurance Com-

34-9-355. Appointment of administrator; merit system coverage; administration of article; members of retirement system.

(a) The board of trustees shall appoint the administrator of the fund, and he shall serve at the pleasure of the trustees and without term of office. All officials, personnel, and employees of the Board of Trustees of the

Subsequent Injury Trust Fund are placed in the classified service of the state merit system unless otherwise excluded under the authority of Code Sections 45-20-1 through 45-20-11 and 45-20-14 or other statutory authority; provided, however, that except for purposes of determining compensation, the administrator shall not be in the classified service of the state merit system.

(b) The administrator shall administer this article under such policies and rules and regulations as may be adopted by the trustees and shall be authorized to hire such personnel as may be necessary to carry out the purposes of the fund.

(c) All employees of the fund shall be deemed to be employees of the state and, as such, members of the Employees' Retirement System of Georgia. (Code 1933, § 114-908, enacted by Ga. L. 1977, p. 608, § 1; Ga. L. 1979, p. 891, §§ 1, 2; Ga. L. 1982, p. 3, § 34.)

34-9-356. Payment of travel expenses of board members, administrator, and employees; per diem allowance of board members.

(a) The members of the board of trustees, the administrator, and the employees of the fund shall be entitled to receive their actual necessary expenses while traveling on the business of the fund, but the expenses shall be sworn to by such person incurring the same.

(b) The expenses of members of the board of trustees shall be approved by the chairman of the board of trustees, and the expenses of the employees of the fund shall be approved by the administrator.

(c) The members of the board of trustees shall receive a per diem for each day that the board of trustees is in session which is equal to the per diem allowance paid to members of the General Assembly. The per diem allowance of the members of the board of trustees shall be paid from the operating budget of the administrator. (Code 1933, § 114-906, enacted by Ga. L. 1977, p. 608, § 1; Ga. L. 1985, p. 1426, § 2.)

34-9-357. Payment of costs of administration; submission and approval of annual budget; audit of funds.

(a) The entire cost of the administration of the fund shall be paid from the assets of the fund.

(b) The administrator shall annually submit to the board of trustees, under such rules and regulations as the board of trustees may prescribe, a budget of the costs of administration of the fund for the fiscal year. The board of trustees shall submit the proposed budget to the Office of Planning and Budget for comment prior to approval.

(c) Upon approval by the board of trustees, a copy of the operating budget shall be filed with the custodian of the fund who, on July 1, shall

transfer to the administrator's operating account such funds as are required by the budget less any amounts remaining in the operating account from prior years.

(d) Funds held by the administrator in the operating account shall not in any way be deemed to be appropriated funds but shall be audited annually in the manner provided for other state departments and agencies. (Code 1933, § 114-905, enacted by Ga. L. 1977, p. 608, § 1; Ga. L. 1982, p. 3, § 34.)

34-9-358. Payment of assessments to fund by insurers and self-insurers; calculations.

(a) Prior to January 1, 2010, each insurer and self-insurer under this chapter shall, under regulations prescribed by the board of trustees, make payments to the fund in an amount equal to that proportion of 175 percent of the total disbursement made from the fund during the preceding calendar year less the amount of the net assets in the fund as of December 31 of the preceding calendar year which the total workers' compensation claims paid by the insurer or self-insurer bears to the total workers' compensation claims paid by all insurers and self-insurers during the preceding calendar year.

(b) On or after January 1, 2010, each insurer and self-insurer under this chapter shall, under regulations prescribed by the board of trustees, make payments to the fund in an amount equal to that proportion of 175 percent of the total disbursement made from the fund during the preceding calendar year as of December 31 of the preceding calendar year which the total workers' compensation claims paid by the insurer or self-insurer bears to the total workers' compensation claims paid by all insurers and self-insurers during the preceding calendar year but not to exceed \$100 million. The administrator is authorized to create and maintain a reserve of surplus moneys as may be deemed necessary by the board of trustees in order to ensure sufficient moneys will be available for the payment of all claims that are to be paid by the fund in accordance with Code Section 34-9-368.

(c) The administrator is authorized to reduce or suspend assessments for the fund when a completed actuarial survey shows further assessments are not needed for all bona fide claims that are to be paid by the fund.

(d)(1) When further assessments are not needed as all eligible workers' compensation claims for which the fund is liable in accordance with Code Section 34-9-368 have been paid and all related administrative costs have been accrued or paid and a balance remains in the fund, all insurers and self-insurers in this state who have maintained workers' compensation insurance in this state for any time during the preceding three years from the date that the last claim has been paid shall be entitled to a pro rata

refund of assessments previously collected and unexpended in the remaining fund balance.

(2) The calculation for such pro rata refund to be paid by the fund to each individual insurer and self-insurer shall be determined by the following formula:

The balance remaining in the fund shall be the numerator and shall be divided by the total amount of assessments for workers' compensation coverage paid by all insurers and self-insurers during the three-year period, which shall be the denominator. The quotient of the numerator and denominator shall be multiplied by the total amount of assessments that are paid by the individual insurer or self-insurer during the three-year period. The product of those numbers shall represent the amount to be paid to such insurer or self-insurer as its pro rata refund from the balance remaining in the fund.

(3) Nothing in this subsection shall preclude the board of trustees from authorizing a loss portfolio transfer of any unresolved claims.

(e) An employer who has ceased to be a self-insurer prior to the end of the calendar year shall be liable to the fund for the assessment of the calendar year. Such employer who has ceased to be a self-insurer shall continue to be liable to the fund for assessments in subsequent calendar years so long as payments are made on any workers' compensation claims made while in self-insured status.

(f) The initial assessment of each insurer or self-insurer for the purpose of generating revenue to begin operation of the fund shall be in the amount of one-half of 1 percent of the workers' compensation premiums collected by the insurer for the preceding calendar years from an employer who is subject to this chapter or the equivalent of such in the case of a self-insurer. (Code 1933, § 114-910, enacted by Ga. L. 1977, p. 608, § 1; Ga. L. 1982, p. 3, § 34; Ga. L. 1995, p. 642, § 12; Ga. L. 2007, p. 268, § 1/SB 131; Ga. L. 2008, p. 349, § 1/HB 1186.)

The 2007 amendment, effective May 18, 2007, added the fourth sentence to this Code section.

The 2008 amendment, effective July 1, 2008, designated the existing provisions as subsections (a), (c), (e), and (f); in subsection (a), substituted "Prior to January 1, 2010, each insurer" for "Each insurer" at the beginning; added subsection (b); in subsection (c), added "for all bona fide claims that are to be paid by the fund" at the end; and added subsection (d).

Editor's notes. — Ga. L. 1995, p. 642,

§ 13, not codified by the General Assembly, provides for severability.

Ga. L. 2007, p. 268, § 2, not codified by the General Assembly, provides that the amendment to this Code section is intended to authorize the Subsequent Injury Trust Fund to continue to make assessments against employers who were formerly self-insured and later obtained workers' compensation coverage. It is not intended to authorize assessments for time periods prior to May 18, 2007.

Law reviews. — For annual survey of

workers' compensation, see 38 Mercer L. Rev. 431 (1986).

For note on the 1995 amendment of this

Code section, see 12 Ga. St. U.L. Rev. 280 (1995).

JUDICIAL DECISIONS

Cited in *Neese v. Subsequent Injury Trust Fund*, 164 Ga. App. 136, 296 S.E.2d 427 (1982); *Georgia Subsequent Injury Trust*

Fund v. Bottle Whse., Inc., 209 Ga. App. 244, 433 S.E.2d 84 (1993).

34-9-359. Reports by employers of compensation and benefits paid; failure to pay assessments.

(a) As soon as practicable after January 1 but not later than January 31 of each calendar year, the administrator shall forward to each insurer and self-insured employer a questionnaire asking for the total amount of compensation, medical benefits, and rehabilitation benefits paid by each insurer and self-insured employer during the preceding calendar year. This report is to be completed and returned to the administrator no later than March 1 of the same calendar year in which the request for this information is submitted. Failure to submit the report to the administrator of the fund by March 1 shall result in an automatic penalty of \$50.00 per day for each day the report is delinquent or 10 percent of the assessment, whichever is greater. This penalty will be added to the assessment.

(b) Any assessment levied or established in accordance with this article in a specified amount as may be determined pursuant to this article shall constitute a personal debt of every employer or insurer so assessed and shall be due and payable to the Subsequent Injury Trust Fund when payment is called for by the administrator. In the event of failure to pay any assessment upon the date determined by the administrator, the administrator may file a complaint for collection against the employer or insurer in a court of competent jurisdiction.

(c) In the event any employer or insurer duly assessed fails to pay to the administrator on behalf of the Subsequent Injury Trust Fund the amount so assessed on or before the date specified by the administrator, the administrator is authorized to add to the unpaid assessment an amount not exceeding 10 percent of the unpaid assessment and reasonable attorney's fees to defray the cost of enforcing collection. (Code 1933, § 114-909, enacted by Ga. L. 1977, p. 608, § 1; Ga. L. 1985, p. 1426, § 3.)

OPINIONS OF THE ATTORNEY GENERAL

When "payment" occurs. — Although the employer issued its check the day before the assessment was due, the mere fact that the check was written or in the mail will not

support a claim that "payment" occurred prior to the time it was received; actual physical delivery of the assessment amount must control. 1986 Op. Att'y Gen. No. 86-39.

34-9-360. Reimbursement of employer or insurer for subsequent injury compensation payments; amounts of and prerequisites to reimbursement from fund.

(a) If an employee who has a permanent impairment incurs a subsequent injury or disease arising out of and in the course of employment, which subsequent injury results in liability for the disability arising from merger of the subsequent injury with the preexisting permanent impairment, the employer or insurer shall in the first instance pay all compensation provided by this chapter. The employer or insurer shall be reimbursed from the Subsequent Injury Trust Fund for all weekly income benefits payments payable after 104 weeks of payment.

(b) An employer or insurer who has paid medical and rehabilitation expenses on behalf of the employee who comes under this article shall be entitled to reimbursement from the fund on the following basis:

(1) Fifty percent reimbursement of all medical and rehabilitation expenses which exceed \$5,000.00 but do not exceed \$10,000.00;

(2) One hundred percent reimbursement of all medical and rehabilitation expenses paid which exceed \$10,000.00.

(c) As a prerequisite to reimbursement from the fund, the insurer shall be required to certify that the medical and indemnity reserves have been reduced to the threshold limits of reimbursement.

(d) When the same employer in a claim accepted by the fund for reimbursement returns the injured worker to work with the same employer, the employer shall not be subject to further indemnity or medical deductibles in the event the employee suffers a new accident that merges with the same prior impairment that previously resulted in fund acceptance of the prior reimbursement claim. This provision does not apply if the employee returns to work for a different employer or there has been a break in service by the employee.

(e) As a prerequisite to reimbursement from the fund, there must be evidence of payment of workers' compensation benefits in accordance with Code Section 34-9-221 or an award of the State Board of Workers' Compensation directing the employer to pay weekly income benefits as a result of the subsequent injury.

(f) The fund shall reimburse only those indemnity, medical, and rehabilitation expenses that the employer or insurer was legally obligated to pay to the employee or claimant. The fund shall reimburse such expenses at a rate not exceeding the usual and customary charges. The administrator of the fund may refer any medical or rehabilitation expense to the State Board of Workers' Compensation for review and recommendation and, in the event of a dispute between the fund and the employer or insurer, the

questioned medical and rehabilitation expense shall be referred to the State Board of Workers' Compensation for approval. This subsection shall apply to any claim filed against the fund on and after July 1, 1987. (Code 1933, § 114-912, enacted by Ga. L. 1977, p. 608, § 1; Ga. L. 1985, p. 1426, § 4; Ga. L. 1987, p. 820, § 1.)

Cross references. — Consideration given to this Code section whenever an experience modification factor is applied to the premium of an employer's policy of workers'

compensation insurance, § 34-9-137. Employee's right to benefits upon sustaining of injury which merges with prior injury to produce total disability, § 34-9-241.

JUDICIAL DECISIONS

Cited in Georgia Subsequent Injury Trust Fund v. Consolidated Freightways, Inc., 224 Ga. App. 899, 482 S.E.2d 508 (1997).

34-9-361. Employer's knowledge of employee's preexisting permanent impairment.

It shall be incumbent upon the employer to establish that the employer had reached an informed conclusion prior to the occurrence of the subsequent injury or occupational disease that the preexisting impairment is permanent and is likely to be a hindrance or obstacle to employment or reemployment. Where, however, the employer establishes knowledge of the preexisting permanent impairment prior to the subsequent injury, there shall be a presumption that the employer considered the condition to be permanent and to be, or likely to be, a hindrance or obstacle to employment where the condition is one of the following:

- (1) Epilepsy;
- (2) Diabetes;
- (3) Arthritis which is an obstacle or hindrance to employment or reemployment;
- (4) Amputated foot, leg, arm, or hand;
- (5) Loss of sight of one or both eyes or a partial loss of uncorrected vision of more than 75 percent bilaterally;
- (6) Residual disability from poliomyelitis;
- (7) Cerebral palsy;
- (8) Multiple sclerosis;
- (9) Parkinson's disease;
- (10) Cardiovascular disorders;
- (11) Tuberculosis;

(12) Mental retardation, provided the employee's intelligence quotient is such that he falls within the lowest 2 percent of the general population; provided, however, that it shall not be necessary for the employer to know the employee's actual intelligence quotient or actual relative ranking in relation to the intelligence quotient of the general population;

(13) Psychoneurotic disability following confinement for treatment in a recognized medical or mental institution for a period in excess of six months;

(14) Hemophilia;

(15) Sickle cell anemia;

(16) Chronic osteomyelitis;

(17) Ankylosis of major weight-bearing joints;

(18) Hyperinsulism;

(19) Muscular dystrophy;

(20) Total occupational loss of hearing as defined in Code Section 34-9-264;

(21) Compressed air sequelae;

(22) Ruptured intervertebral disc; or

(23) Any permanent condition which, prior to the occurrence of the subsequent injury, constitutes a 20 percent impairment of a foot, leg, hand, or arm, or of the body as a whole. (Code 1933, § 114-914, enacted by Ga. L. 1977, p. 608, § 1.)

Code Commission notes. — Pursuant to § 28-9-5, in 1988, a hyphen was placed between the words "weight bearing" in paragraph (17).

JUDICIAL DECISIONS

Cited in Subsequent Injury Trust Fund v. Hanson Indus., 211 Ga. App. 700, 440 S.E.2d 89 (1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 363.

C.J.S. — 99 C.J.S., Workers' Compensation, §§ 306, 328.

34-9-362. Notice by employer or insurer of claim against fund; request for a hearing.

(a) An employer or insurer shall notify the administrator of the fund of any possible claim against the fund as soon as practicable, but in no event

later than 78 calendar weeks following the injury or the payment of an amount equivalent to 78 weeks of income or death benefits, whichever occurs last.

(b) The claim must be filed in accordance with the requirements of subsection (a) of this Code section prior to the final settlement of the claim.

(c) Failure to comply with the provisions of subsections (a) and (b) of this Code section will constitute a bar to recovery from the Subsequent Injury Trust Fund.

(d) For those notices of claim filed with the fund on or before July 1, 2006, the employer or insurer shall have until June 30, 2009, to obtain a reimbursement agreement issued by the fund or the claim for reimbursement shall be deemed automatically denied.

(e) For those notices of claim filed with the fund after July 1, 2006, the employer or insurer shall have three years from the date the notice was received by the fund to obtain a reimbursement agreement issued by the fund or the claim for reimbursement shall be deemed automatically denied.

(f) Notwithstanding subsections (d) and (e) of this Code section, if compensability of the underlying workers' compensation claim is at issue before the State Board of Workers' Compensation, then the employer or insurer shall have three years from the date of final adjudication of compensability by the State Board of Workers' Compensation or any appellate court to obtain a reimbursement agreement issued by the fund or the claim for reimbursement shall be deemed automatically denied.

(g) Upon actual or statutory automatic denial pursuant to subsection (d), (e), or (f) of this Code section, the employer or insurer shall have 20 days from the date of denial to request a hearing with the State Board of Workers' Compensation pursuant to Code Section 34-9-100; otherwise recovery shall be barred. (Code 1933, § 114-916, enacted by Ga. L. 1977, p. 608, § 1; Ga. L. 1985, p. 1426, § 5; Ga. L. 2006, p. 898, § 1/HB 1405.)

The 2006 amendment, effective July 1, 2006, deleted "In those claims where the employer or insurer is contemplating filing against the fund," at the beginning of subsection (b); and added subsections (d) through (g).

JUDICIAL DECISIONS

Mistake of law. — There is no statutory provision authorizing the employer and insurer to urge their own unilateral mistake of law regarding the timeliness of notification as a basis for securing reimbursement from the fund. *Georgia Subsequent Injury Trust Fund v. ITT-Rayonier, Inc.*, 198 Ga. App. 467, 402 S.E.2d 54 (1991).

Timeliness of claim. — Because the employer already paid over 78 weeks of benefits

to a claimant for a back injury, the employer's claim for reimbursement from the subsequent injury fund was not timely even though it was filed within 78 weeks of a determination that the employer was responsible for medical expenses related to a neck injury suffered by claimant in the same incident. *Georgia Subsequent Injury Trust Fund v. Consolidated Freightways, Inc.*, 224 Ga. App. 899, 482 S.E.2d 508 (1997).

OPINIONS OF THE ATTORNEY GENERAL

Failure to file timely claim as bar. — An employer or insurer who fails to file a reimbursement claim with the Subsequent Injury Trust Fund within 78 weeks of income benefits paid to its claimant is barred as a matter of law from pursuing that reimbursement claim against the Subsequent Injury Trust Fund. 1986 Op. Att'y Gen. No. 86-40.

Withdrawal of claim equivalent to failure to file. — Where the employer/insurer timely filed its claim, but subsequently withdrew that claim by advising the trust fund that it would not be making a claim for reimbursement in the case, this action

amounted to a complete relinquishment and withdrawal of the notice required by O.C.G.A. § 34-9-262, and the employer/insurer could not properly file a belated claim for reimbursement against the Subsequent Injury Trust Fund at a date after the 78-week period. 1986 Op. Att'y Gen. No. 86-40.

Effect of failure to notify fund of settlement. — The Subsequent Injury Trust Fund lacks legal authority to deny reimbursement before it has accepted a reimbursement claim when an employer/insurer fails to notify the Trust Fund of a settlement with a claimant. 1986 Op. Att'y Gen. No. 86-48.

34-9-363. Agreements for reimbursement from fund; hearing by State Board of Workers' Compensation in absence of agreement; compromise settlements.

(a) When any employer or insurer and the administrator reach an agreement with respect to reimbursement under this article, it shall be reduced to writing and submitted to the State Board of Workers' Compensation for approval. The board shall consider such an agreement upon receipt thereof and, if it finds it to meet the provisions of this article, shall approve the agreement and issue its order directing the agreed reimbursement.

(b) If the employer or the insurer fails to reach an agreement with the administrator in regard to reimbursement under this article, either party may make application to the State Board of Workers' Compensation for a hearing in regard to the matters at issue. Such matters shall then be determined in the manner provided for other workers' compensation proceedings and appeals.

(c) Failure of an employer or insurer to file for a hearing with the State Board of Workers' Compensation within 90 days after the receipt of a formal denial from the Subsequent Injury Trust Fund shall constitute a bar to recovery from the fund.

(d) The administrator, under the policy or rules and regulations of the board of trustees, shall have the authority to enter into compromise settlements. (Code 1933, § 114-907, enacted by Ga. L. 1977, p. 608, § 1; Ga. L. 1985, p. 1426, § 6.)

JUDICIAL DECISIONS

Fund not liable for attorneys' fees. — The language of O.C.G.A. § 34-9-363(b) does not serve to incorporate the terms of

O.C.G.A. § 34-9-108(b)(1) so as to authorize an award of attorneys' fees in a proceeding against the fund; reversing *Muscogee Iron*

Works v. Ward, 216 Ga. App. 636, 455 S.E.2d 363 (1995). Georgia Subsequent Injury Trust Fund v. Muscogee Iron Works, 265 Ga. 790, 462 S.E.2d 367 (1995).

34-9-363.1. Duty to notify administrator of proposed settlement agreements after reimbursement agreement has been reached; approval of such settlement agreements.

(a) After the employer or insurer and the administrator of the Subsequent Injury Trust Fund reach an agreement with respect to reimbursement and either the reimbursement agreement is approved by the State Board of Workers' Compensation or the State Board of Workers' Compensation otherwise orders reimbursement pursuant to Code Section 34-9-363, the employer or the insurer shall have a continuing obligation to keep the administrator of the Subsequent Injury Trust Fund informed as to any proposed settlement agreement, pursuant to Code Section 34-9-15, between the employee and the employer or the insurer.

(b) The employer or the insurer shall obtain the approval from the administrator of the Subsequent Injury Trust Fund for any and all settlement agreements between the employee and the employer or the insurer in all cases where a reimbursement agreement between the employer or the insurer and the Subsequent Injury Trust Fund exists prior to the submitting of the settlement agreement to the State Board of Workers' Compensation for approval; provided, however, that if the employer or insurer fails to obtain the approval from the administrator of the Subsequent Injury Trust Fund for such a settlement agreement, but the State Board of Workers' Compensation approves such agreement, the reimbursement agreement between the employer or the insurer and the Subsequent Injury Trust Fund shall become null and void, and the State Board of Workers' Compensation shall, upon the petition of the administrator of the Subsequent Injury Trust Fund, issue an order rescinding the reimbursement agreement; provided, further, that nothing in this Code section shall prohibit the parties from reaching a compromise settlement as to reimbursement from the Subsequent Injury Trust Fund, upon approval of the State Board of Workers' Compensation. (Code 1933, § 114-918, enacted by Ga. L. 1981, p. 836, § 1; Ga. L. 1992, p. 6, § 34.)

Law reviews. — For article surveying developments in Georgia workers' compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981).

JUDICIAL DECISIONS

Necessity for approval of reimbursement agreement. — If a reimbursement agreement between an employer and the Subsequent Injury Trust Fund had been submitted to, but not yet approved by, the State Board of Worker's Compensation, the employer was required to submit a settlement

agreement with its employee first to the Fund for approval, rather than submitting it directly to the Board. *Altermatts Painting v. Subsequent Injury Trust Fund*, 219 Ga. App. 357, 464 S.E.2d 922 (1995), *aff'd*, 266 Ga. 866, 471 S.E.2d 877 (1996).

Cited in *Bekaert Steel Wire Corp. v. Geor-*

gia Subsequent Injury Trust Fund, 191 Ga. App. 490, 382 S.E.2d 197 (1989).

OPINIONS OF THE ATTORNEY GENERAL

Denial of reimbursement before claim accepted. — The Subsequent Injury Trust Fund does not have legal authority to deny reimbursement before it has accepted the

reimbursement claim of an employer/insurer when an employer/insurer fails to inform the Trust Fund of a settlement with a claimant. 1986 Op. Att'y Gen. No. 86-48.

34-9-364. Apportionment or denial of reimbursement for expenses paid by employer or insurer.

The administrator of the fund may apportion or deny the employer or insurer reimbursement from the fund for medical expense provided by Code Section 34-9-360 where there are clear and unequivocal facts to establish that the subsequent injury to the permanently impaired employee was not caused by or in any way related to the employee's preexisting disability. The apportionment by the administrator shall be subject to the approval of the State Board of Workers' Compensation. (Code 1933, § 114-913, enacted by Ga. L. 1977, p. 608, § 1.)

JUDICIAL DECISIONS

Administrative law judge was correct in declining to apply O.C.G.A. § 34-9-364, which would have required apportionment of medical expenses resulting from the merger of the preexisting and subsequent injuries where there were clear and unequivocal facts to establish that the subsequent injury to the permanently impaired employee was not caused by or in any way related to the employee's preexisting disability.

ity. Subsequent Injury Trust Fund v. Knight Ridder Newspapers-Macon Tel. & News, 203 Ga. App. 458, 416 S.E.2d 887 (1992), cert. denied, 506 U.S. 1084, 113 S. Ct. 1061, 122 L. Ed. 2d 366 (1993).

Cited in Subsequent Injury Trust Fund v. Knight-Ridder Newspapers-Macon Tel. & News, 207 Ga. App. 368, 427 S.E.2d 844 (1993).

34-9-365. Injuries to which article is applicable.

The effective date of this article is March 23, 1977, but it shall apply only to injuries occurring on or after July 1, 1977. (Ga. L. 1977, p. 608, § 3.)

RESEARCH REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d, Workers' Compensation, § 362 et seq.

34-9-366. Binding of fund to questions determined in proceedings to which it was not a party.

The fund shall not be bound as to any question of law or fact by reason of an award or an adjudication to which it was not a party. (Code 1933, § 114-917, enacted by Ga. L. 1977, p. 608, § 1.)

JUDICIAL DECISIONS

Fund is specifically protected from any res judicata effect of awards to which it was not a party. *Subsequent Injury Trust Fund v. Alterman Foods, Inc.*, 162 Ga. App. 428, 291 S.E.2d 758 (1982).

Award to employee does not have res

judicata effect as to claim by employer against Subsequent Injury Trust Fund, since the same parties are not involved in both proceedings. *Subsequent Injury Trust Fund v. Alterman Foods, Inc.*, 162 Ga. App. 428, 291 S.E.2d 758 (1982).

34-9-367. Liability of fund for interest or attorney's fees.

The Subsequent Injury Trust Fund shall not be liable for any interest on sums due claiming parties nor shall it be liable for attorney's fees due attorneys of the claiming parties except where it is proven by a preponderance of evidence that the Subsequent Injury Trust Fund has failed or refused to accept a valid claim for reimbursement as provided for under this chapter in whole or in part without reasonable grounds; in such a circumstance, the party seeking reimbursement may be entitled to attorney's fees as provided under subsection (b) of Code Section 34-9-108. (Code 1933, § 114-915, enacted by Ga. L. 1977, p. 608, § 1; Ga. L. 1982, p. 3, § 34; Ga. L. 1996, p. 1291, § 15.)

Code Commission notes. — Pursuant to § 28-9-5, in 1988, "attorney's" was substituted for "attorneys".

Law reviews. — For annual survey of law of worker's compensation, see 56 Mercer L. Rev. 479 (2004).

For review of 1996 workers' compensation legislation, see 13 Ga. St. U. L. Rev. 233 (1996).

JUDICIAL DECISIONS

Liability for attorney's fees. — Attorney's fees of an employer or insurer are not recoverable from the fund. *Georgia Subsequent*

Injury Trust Fund v. Muscogee Iron Works, 265 Ga. 790, 462 S.E.2d 367 (1995) (decided prior to 1996 amendment).

RESEARCH REFERENCES

ALR. — Workers' compensation: availability, rate, or method of calculation of interest

on attorney's fees or penalties, 79 ALR5th 201.

34-9-368. Reimbursement of self-insured employers or insureds; actuarial study required; dissolution of Subsequent Injury Trust Fund.

(a) The Subsequent Injury Trust Fund shall not reimburse a self-insured employer or an insurer for a subsequent injury for which a claim is made for an injury occurring after June 30, 2006. The Subsequent Injury Trust Fund shall continue to reimburse self-insured employers or insurers for claims for injuries occurring on and prior to June 30, 2006, which qualify for reimbursement.

(b) Self-insured employers and insurers shall continue to pay assessments pursuant to Code Section 34-9-358 to the extent necessary to fund claims for injuries occurring on and prior to June 30, 2006.

(c) Upon or in contemplation of the final payment of all claims filed for subsequent injuries for which claims are filed for injuries occurring on and prior to June 30, 2006, the board of trustees shall adopt and implement resolutions providing for the final dissolution of the Subsequent Injury Trust Fund. Such resolutions shall become effective when all claims made for injuries occurring on and prior to June 30, 2006, have been fully paid or otherwise resolved and shall include provisions for:

(1) The termination of assessments against insurers or self-insurers;

(2) The pro rata refund of assessments previously collected and unexpended, consistent with the provisions of subsection (d) of Code Section 34-9-358;

(3) The termination of employment of the employees of the fund or the transfer of employment of any employees to any other state agency desiring to accept them;

(4) A final accounting of the financial affairs of the fund; and

(5) The transfer of the books, records, and property of the fund to the custody of the State Board of Workers' Compensation.

Upon the completion of all matters provided for in such resolutions, but not later than December 31, 2020, the Subsequent Injury Trust Fund and the members of its board of trustees shall be discharged from their duties except for such personnel necessary to administer any remaining claims. (Code 1981, § 34-9-368, enacted by Ga. L. 2004, p. 152, § 1; Ga. L. 2005, p. 1489, § 1/HB 200; Ga. L. 2008, p. 349, § 2/HB 1186.)

The 2008 amendment, effective July 1, 2008, added “, consistent with the provisions of subsection (d) of Code Section 34-9-358” at the end of paragraph (c)(2).

Law reviews. — For annual survey of workers' compensation law, see 57 Mercer L. Rev. 419 (2005).

ARTICLE 10

SELF-INSURERS GUARANTY TRUST FUND

34-9-380. Purpose of article.

It is the purpose of this article through the establishment of a guaranty trust fund to provide for the continuation of workers' compensation benefits due and unpaid, excluding penalties, fines, and attorneys' fees, when a self-insured employer becomes insolvent. (Code 1981, § 34-9-380, enacted by Ga. L. 1990, p. 770, § 1.)

34-9-381. Definitions.

As used in this article, the term:

(1) "Applicant" means an employee entitled to workers' compensation benefits.

(2) "Board" means the State Board of Workers' Compensation.

(3) "Board of trustees" means the board of trustees of the fund.

(4) "Fund" means the Self-insurers Guaranty Trust Fund established by this article.

(5) "Insolvent self-insurer" means a self-insurer who files for relief under the federal Bankruptcy Act, a self-insurer against whom involuntary bankruptcy proceedings are filed, or a self-insurer for whom a receiver is appointed in a federal or state court of this or any other jurisdiction and who is determined to be insolvent by rules and regulations promulgated by the board of trustees and approved by the board.

(6) "Participant" means a self-insurer who is a member of the fund and exclusive of those entities described in Article 5 of this chapter.

(7) "Self-insurer" means a private employer, including any hospital authority created pursuant to the provisions of Article 4 of Chapter 7 of Title 31, the "Hospital Authorities Law," that has been authorized to self-insure its payment of workers' compensation benefits pursuant to this chapter, except any governmental self-insurer or other employer who elects to group self-insure pursuant to Code Section 34-9-152, or captive insurers as provided for in Chapter 41 of Title 33, or employers who, pursuant to any reciprocal agreements or contracts of indemnity executed prior to March 8, 1960, created funds for the purpose of satisfying the obligations of self-insured employers under this chapter.

(8) "Trustee" means a member of the Self-insurers Guaranty Trust Fund board of trustees. (Code 1981, § 34-9-381, enacted by Ga. L. 1990, p. 770, § 1; Ga. L. 1995, p. 638, § 1.)

U.S. Code. — The federal Bankruptcy Act, referred to in paragraph (5), appears as Title 11 of the United States Code.

34-9-382. Establishment of Self-insurers Guaranty Trust Fund; use of fund; application to be accepted in fund.

(a) There is established a Self-insurers Guaranty Trust Fund for the sole purpose of making payments in accordance with this article. The fund shall be administered by an administrator appointed by the chairman of the board of trustees with the approval of the board of trustees. All moneys in the fund shall be held in trust and shall not be money or property of the state or the participants. The board of trustees shall be authorized to invest the moneys of the fund in the same manner as provided by law for investments in government backed securities.

(b) All returns on investments shall be retained by the fund. The funds of the Self-insurers Guaranty Trust Fund shall be for the purposes of compensating employees who are eligible to receive workers' compensation benefits from their employers pursuant to the provisions of this chapter when, pursuant to this Code section, the board has determined that compensation benefits due are unpaid or interrupted due to the insolvency of a participant. Moneys in the fund may be used to compensate an employee for any type of injury or occupational disease or death, including medical or rehabilitation expenses which are compensable under this chapter against a participant, and all claims for related administrative fees, operating costs of the board of trustees, attorneys' fees incurred by the board of trustees or at its direction, and other costs reasonably incurred by the board of trustees. Payment from the Self-insurers Guaranty Trust Fund shall be made in accordance with this chapter.

(c) As a condition of self-insurance, a private employer, except any governmental self-insurer or other employer who elects to group self-insure pursuant to Code Section 34-9-152, captive insurers as provided for in Chapter 41 of Title 33, or employers who, pursuant to any reciprocal agreements or contracts of indemnity executed prior to March 8, 1960, created funds for the purpose of satisfying the obligations of self-insured employers under this chapter, must make application to and be accepted in the Self-insurers Guaranty Trust Fund. (Code 1981, § 34-9-382, enacted by Ga. L. 1990, p. 770, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Corporation operating facilities for hospital authority may not self-insure. — A private, nonprofit corporation that is leasing and operating health care facilities on behalf

of a hospital authority may not self-insure its workers' compensation liability as an "entity" of the authority. 1993 Op. Att'y Gen. No. 93-10.

34-9-383. Membership of board of trustees of fund.

(a) Each member of the board of trustees shall be an employee of a participant. The board of trustees shall consist of a chairperson and six trustees elected by the participants. The board of trustees shall initially be appointed by the Governor not later than August 1, 1990. Three of the initial trustees shall be appointed for terms of office which shall end on January 1, 1993, and the chairperson and the three other initial trustees shall be appointed for terms of office which shall end on January 1, 1995. Thereafter, each trustee shall be elected to a four-year term and shall continue to serve unless otherwise ineligible under subsection (b) of this Code section. No later than 90 days prior to the end of any member's term of office, the chairperson shall select a nominating committee from among the participants to select candidates for election by the participants for the following term. In the event the chairperson fails to complete his or her term of office, a successor will be elected by the board of trustees to fill the unexpired term of office.

(b) A vacancy in the office of any elected member of the board of trustees shall occur upon resignation, death, conviction of a felony, or when the employer no longer qualifies as a self-insured participant or the trustee is no longer an employee of a participant. The board of trustees may remove any member from office on a formal finding of incompetence, neglect of duty, or malfeasance in office. Within 30 days after the office of any elected member becomes vacant for any reason, the board of trustees shall elect a successor to fill that office for the unexpired term. (Code 1981, § 34-9-383, enacted by Ga. L. 1990, p. 770, § 1; Ga. L. 1995, p. 638, § 2.)

34-9-384. General powers of board of trustees.

The board of trustees shall possess all powers necessary and convenient to accomplish the objectives prescribed by this article, including, but not limited to, the following:

(1) Not later than 90 days from its appointment, the board of trustees must make and submit to the board for approval such bylaws, rules, regulations, and resolutions as are necessary to carry out its responsibilities, including, but not limited to, the establishment of an application fee. The board of trustees may carry out its responsibilities directly or by contract or other instrument and may purchase such services, borrow money, purchase excess insurance, levy penalties and fines, and collect such funds as it deems necessary to effectuate its activities and protect the members of the board of trustees and its employees. The board of trustees shall appoint, retain, and employ such persons as it deems necessary to achieve the purposes of the board of trustees. All expenses incurred pursuant to this provision shall be paid from the fund;

(2) The board of trustees shall meet not less than quarterly and shall meet at other times upon the call of the chairperson, issued to the

trustees in writing not less than 48 hours prior to the day and hour of the meeting, or upon a request for a meeting presented in writing to the chairperson not less than 72 hours prior to the proposed day and hour of the meeting and signed by at least a majority of the trustees, whereupon the chairperson shall provide notice issued in writing to the trustees not less than 48 hours prior to the meeting and shall convene the meeting at the time and place stated in the request;

(3) Four trustees shall constitute a quorum to transact business at any meeting, and the affirmative vote of four trustees shall be necessary for any action taken by the board of trustees. No vacancy shall otherwise impair the rights of the remaining trustees to exercise all of the powers of the board of trustees;

(4) The board of trustees shall serve without compensation, but each member shall be entitled to be reimbursed for necessary and actual expenses incurred in the discharge of his or her official duties; and

(5) The board of trustees shall have the right to bring and defend actions only in the name of the fund. Neither the trustees nor their employers shall be liable individually for matters arising from or out of the conduct of the affairs of the fund. (Code 1981, § 34-9-384, enacted by Ga. L. 1990, p. 770, § 1; Ga. L. 1998, p. 128, § 34; Ga. L. 1998, p. 227, § 1.)

34-9-385. Bankruptcy of participants.

(a) Any participant who files for relief under the federal Bankruptcy Act or against whom bankruptcy proceedings are filed or for whom a receiver is appointed shall file written notice of such fact with the board and the board of trustees within 30 days of the occurrence of such event.

(b) Any person who files an application for adjustment of a claim against a participant who has filed for relief under the federal Bankruptcy Act or against whom bankruptcy proceedings have been filed or for whom a receiver has been appointed must file a written notice of such fact with the board and the board of trustees within 30 days of such person's knowledge of the event.

(c) Upon receipt of any notice as provided in subsection (a) or (b) of this Code section, the board shall determine whether the participant is insolvent according to procedures established by the board of trustees and approved by the board. Such determination shall be made within a reasonable time after the date the board and board of trustees receive notification as provided in subsection (a) or (b) of this Code section.

(d) When a participant is determined to be an insolvent self-insurer, the board of trustees is empowered to and shall assume on behalf of the participant its outstanding workers' compensation obligations excluding

penalties, fines, and claimant's attorneys' fees assessed pursuant to subsection (b) of Code Section 34-9-108 and shall take all steps necessary to collect, recover, and enforce all outstanding securities, indemnity, insurance, or bonds furnished by such participant guaranteeing the payment of compensation provided in this chapter for the purpose of paying outstanding obligations of the participant. The board shall convert and deposit into the fund such securities and any amounts received under agreements of surety, guaranty, insurance, or otherwise on behalf of the participant. Any amounts remaining from such securities, indemnity, insurance, bonds, guaranties, and sureties, following payment of all compensation costs and related administrative fees of the board of trustees including attorneys' fees, and following exhaustion of all amounts assessed and received pursuant to subsections (a) and (c) of Code Section 34-9-121 and any applicable rule of the board may be refunded by the fund as directed by the board of trustees, subject to the approval of the board, to the appropriate party one year from the date of final payment, provided no outstanding liabilities remain against the fund.

(e) The board of trustees shall be a party in interest in all proceedings involving workers' compensation claims against a participant whose workers' compensation obligations have been paid or assumed by the board of trustees and shall be subrogated to the rights of the participant. In such proceedings the board of trustees shall assume and may exercise all rights and defenses of the participant, including, but not limited to:

(1) The right to appear, defend, and appeal claims;

(2) The right to receive notice of, investigate, adjust, compromise, settle, and pay claims; and

(3) The right to investigate, handle, and controvert claims.

(f) In any proceeding in bankruptcy in which the payment of benefits has been stayed, the board of trustees, through a designated representative, shall appear and move to lift the stay so that the orderly administration of claims can proceed.

(g) The board of trustees shall notify all employees who have pending claims against a participant for workers' compensation benefits which are subject to the provisions of this article of the name, address, and telephone number of the party administering and defending their claim.

(h) The board may, in its discretion, direct that the Self-insurers Guaranty Trust Fund honor and pay, in whole or in part, the contractual fee arrangement between an attorney and a claimant pursuant to subsection (a) of Code Section 34-9-108, provided that application to honor the fee arrangement is made after notice pursuant to subsection (g) of this Code section and subject to consideration of objections by any party.

(i) No provision of this Code section shall impair any claims in the insolvent self-insurer's bankruptcy by any provider of services related to the

insolvent self-insurer's workers' compensation obligations, to the extent those claims remain unpaid, including but not limited to medical providers or attorneys representing either the insolvent self-insurer or claimants. (Code 1981, § 34-9-385, enacted by Ga. L. 1990, p. 770, § 1; Ga. L. 1998, p. 128, § 34; Ga. L. 1998, p. 1508, § 10.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1998, "of this Code Section" was substituted for "or this Code Section" at the end of subsection (c).

U.S. Code. — The federal Bankruptcy Act, referred to in subsections (a) and (b),

appears as Title 11 of the United States Code.

Law reviews. — For review of 1998 legislation relating to labor and industrial relations, see 15 Ga. St. U. L. Rev. 185 (1998).

34-9-386. Assessment of participants; liability of fund and participants for claims; revocation of participant's authority to be self-insured.

(a)(1) The board of trustees shall, commencing January 1, 1991, assess each participant in accordance with paragraph (2) of this subsection. Upon reaching a funded level of \$10 million, all annual assessments against participants who have paid at least three prior assessments shall cease except as specifically provided in paragraph (4) of this subsection.

(2) Assessment for each new participant in the first calendar year of participation shall be \$4,000.00. Thereafter, assessments shall be in accordance with paragraphs (3) and (4) of this subsection.

(3) After the first calendar year of participation, the assessment of each participant shall be made on the basis of a percentage of the total of indemnity benefits paid by, or on behalf of, each participant during the previous calendar year. Except as provided in paragraph (2) of this subsection for the first calendar year of participation and paragraph (4) of this subsection, a participant will not be assessed at any one time an amount in excess of 1.5 percent of the indemnity benefits paid by that participant during the previous calendar year or \$1,000.00, whichever is greater. The total amount of assessments, not including those set out in paragraph (4) of this subsection, in any calendar year against any one participant shall not exceed the amount of \$4,000.00.

(4) If after the full funded level of \$10 million has been attained, the fund is reduced to an amount below \$7 million as the result of the payment of claims, the administration of claims, or the costs of administration of the fund the board of trustees shall levy a special assessment in proportion to the assessment provided for in paragraph (3) of this subsection of the participants in an amount sufficient to increase the funded level to \$7 million; provided, however, that such special assessment in any calendar year against any one participant shall not exceed the amount of \$10,000.00.

(5) Funds obtained by such assessments shall be used only for the purposes set forth in this article and shall be deposited upon receipt by

the board of trustees into the fund. If payment of any assessment made under this article is not made within 30 days of the sending of the notice to the participant, the board of trustees is authorized to proceed in court for judgment against the participant, including the amount of the assessment, the costs of suit, interest, and reasonable attorneys' fees or proceed directly against the security pledged by the participant.

(b)(1) The fund shall be liable for claims arising out of injuries occurring after January 1, 1991; provided, however, no claim may be asserted against the fund until the funding level has reached \$1.5 million.

(2) All participants shall be required to maintain surety bonds or the board of trustees may, in its discretion, accept any irrevocable letter of credit or other acceptable forms of security in the amount of no less than \$100,000.00 until the board, after consultation with the board of trustees, has determined that the financial capability of the trust fund and the participant no longer warrants any form of security.

(c) A participant who ceases to be a self-insurer shall be liable for any and all assessments made pursuant to this Code section as long as indemnity compensation is paid for claims which originated when the participant was a self-insurer. Assessments of such a participant shall be based on the indemnity benefits paid by the participant during the previous calendar year.

(d) Upon refusal to pay assessments, penalties, or fines to the fund when due, the fund may treat the self-insurer as being in noncompliance with this chapter and the self-insurer shall be subject to revocation of its board authorization to self-insure. (Code 1981, § 34-9-386, enacted by Ga. L. 1990, p. 770, § 1; Ga. L. 1991, p. 94, § 34; Ga. L. 1995, p. 638, § 3.)

JUDICIAL DECISIONS

Cited in *In re Suwannee Swifty Stores, Inc.*, 223 Bankr. 834 (Bankr. M.D. Ga. 1998).

OPINIONS OF THE ATTORNEY GENERAL

Effect of bankruptcy on letter of credit. — An irrevocable letter of credit payable to the Self-Insurer's Guaranty Trust Fund pursuant to O.C.G.A. § 34-9-386(b)(2) is not "property of the estate" as defined in 11 U.S.C. § 541 and, therefore, would not come under the control of the trustee in bankruptcy. 1990 Op. Att'y Gen. No. 90-20.

34-9-387. Reimbursement and security deposit from participant for compensation obligations.

(a) The board of trustees shall have the right and obligation to obtain reimbursement from any participant for compensation obligations in the amount of the participant's compensation obligations assumed by the board of trustees and paid from the fund by the board of trustees as

directed by the board, including, but not limited to, claims for all benefits and reasonable administrative and legal costs. The amount of the claims for reimbursement of reasonable administrative and legal costs shall be subject to the approval of the board of trustees.

(b) The board of trustees shall have the right and obligation to use the security deposit of any participant, its excess insurance carrier, and of any other guarantor to pay the participant's workers' compensation obligation assumed by the board of trustees, including reasonable administrative and legal costs. The amount of the claims for reimbursement of reasonable administrative and legal costs shall be subject to the approval of the board of trustees.

(c) The board of trustees shall be a party in interest in any action or proceeding to obtain the security deposit of a participant for the payment of its compensation obligations, in any action or proceeding under the participant's excess insurance policy, and in any other action or proceeding to enforce an agreement of any security deposit, excess insurance carrier, and from any other guarantor to satisfy such obligations. (Code 1981, § 34-9-387, enacted by Ga. L. 1990, p. 770, § 1; Ga. L. 1998, p. 227, § 2.)

JUDICIAL DECISIONS

Cited in *In re Suwannee Swift Stores, Inc.*, 223 Bankr. 834 (Bankr. M.D. Ga. 1998).

34-9-388. Reports of participant's insolvency; participant's audits; review of applications for self-insurance and recommendations thereon.

(a) It shall be the duty of the board to report to the board of trustees when the board has reasonable cause to believe that any participant examined or being examined may be in danger of insolvency.

(b) The board shall, at the inception of a participant's self-insured status and at least annually thereafter, so long as the participant remains self-insured, furnish the board of trustees with a complete, original bound copy of each participant's audit performed in accordance with generally accepted auditing standards by an independent certified public accounting firm, three to five years of loss history, name of the person or company to administer claims and any other pertinent information submitted to the board to authenticate the participant's self-insured status. The board of trustees may contract for the services of a qualified certified public accountant or firm to review, analyze, and make recommendations on these documents. All financial information submitted by a participant shall be considered confidential and not public information.

(c) The board of trustees shall make reports and recommendations to the board upon any matter germane to the solvency, liquidation, or rehabilitation of any participant. The board of trustees shall examine the

same documents as required in subsection (b) of this Code section. Such reports and recommendations shall not be considered public documents.

(d) The board of trustees shall have the authority to review all applications for self-insurance and shall make recommendations to the board concerning the acceptance of the prospective self-insurer. If the board rejects in part or in whole the recommendations of the board of trustees, the board shall give written notice to the board of trustees ten days prior to accepting the application for self-insurance. (Code 1981, § 34-9-388, enacted by Ga. L. 1990, p. 770, § 1; Ga. L. 1995, p. 638, § 4; Ga. L. 1998, p. 227, § 3.)

34-9-389. State absolved of responsibility for debts incurred under fund.

The State of Georgia shall not be responsible for any debts incurred as a result of the operation or administration of this fund. (Code 1981, § 34-9-389, enacted by Ga. L. 1990, p. 770, § 1.)

ARTICLE 11

DRUG-FREE WORKPLACE PROGRAMS

Cross references. — Reduction in tax rate for employers with drug-free workplaces, § 34-8-156.

Law reviews. — For note on 1993 enactment of this article, see 10 Ga. St. U.L. Rev. 152 (1993).

Administrative rules and regulations. — Drug adjudication policy, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia Department of Labor, Employment Security Law, § 300-2-9.03.

JUDICIAL DECISIONS

Compliance with chapter not mandatory. — An employee who violates an employer's anti-drug policy may be disqualified from receiving unemployment benefits, even though the employer has not met the statu-

tory requirements for establishing a drug-free workplace program. Georgia-Pacific Corp. v. Ivey, 250 Ga. App. 181, 549 S.E.2d 471 (2001).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Relationship, § 170.

34-9-410. Legislative intent.

It is the intent of the General Assembly to promote drug-free workplaces in order that employers in this state be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work related acci-

dents resulting from substance abuse by employees. (Code 1981, § 34-9-410, enacted by Ga. L. 1993, p. 1512, § 2.)

34-9-411. Definitions.

As used in this article, the term:

(1) "Alcohol" means ethyl alcohol, hydrated oxide of ethyl, or spirits of wine, from whatever source or by whatever process produced.

(2) "Chain of custody" means the methodology of tracking specified materials, specimens, or substances for the purpose of maintaining control and accountability from initial collection to final disposition for all such materials, specimens, or substances and providing for accountability at each stage in handling, testing, and storing materials, specimens, or substances and reporting test results.

(3) "Confirmation test," "confirmed test," or "confirmed substance abuse test" means a second analytical procedure used to identify the presence of a specific drug or metabolite in a specimen. The confirmation test must be different in scientific principle from that of the initial test procedure. This confirmation method must be capable of providing requisite specificity, sensitivity, and quantitative accuracy.

(4) "Drug" means amphetamines, cannabinoids, cocaine, phencyclidine (PCP), methadone, methaqualene, opiates, barbiturates, benzodiazepines, propoxyphene, or a metabolite of any such substances. An employer may test an individual for any or all of these.

(5) "Employee" means any person who works for salary, wages, or other remuneration for an employer.

(6)(A) "Employee Assistance Program" means a worksite focused program designed to assist:

(i) Employer work organizations in addressing employee productivity issues; and

(ii) Employee clients in the identification and resolution of job performance problems associated with employees impaired by personal concerns, including, but not limited to, health, marital, family, financial, alcohol, drug, legal, emotional, stress, or other personal issues that may affect job performance.

(B) A minimum level of core services must include consultation and training and assistance to work organization leadership in policy development, organizational development, and critical incident management; professional, confidential, appropriate, and timely problem assessment services; constructive intervention and short-term problem resolution; referrals for appropriate diagnosis, treatment, and assis-

tance; follow-up, monitoring, and case management with providers and insurers; employee education and supervisory training; and quality assurance.

(C) An optimum level of core services must include, in addition to the minimum level core services, the designation of an individual who shall be responsible to administer the employer's Employee Assistance Program and to certify that the employer work organization's drug-free workplace program contains all elements of the drug-free workplace program required by Code Section 34-9-413 and that such program satisfies the annual certification requirements of Code Section 34-9-421; provided, however, that such individual shall have training and experience with Employee Assistance Programs in accordance with rules and regulations prescribed by the State Board of Workers' Compensation.

(7) "Employer" means a person or entity that is subject to the provisions of this chapter but shall not include the state or any department, agency, or instrumentality of the state; any county; any county or independent school system; any municipal corporation; or any employer which is self-insured for the purposes of this chapter.

(7.1) "Employer member of a group self-insurance fund" means any employer who is a member of a fund certified pursuant to Code Section 34-9-153.

(8) "Initial test" means a sensitive, rapid, and reliable procedure to identify negative and presumptive positive specimens. All initial tests shall use an immunoassay procedure or an equivalent procedure or shall use a more accurate scientifically accepted method approved by the National Institute on Drug Abuse as such more accurate technology becomes available in a cost-effective form.

(9) "Job applicant" means a person who has applied for a position with an employer and has been offered employment conditioned upon successfully passing a substance abuse test and may have begun work pending the results of the substance abuse test.

(10) "Nonprescription medication" means a drug or medication authorized pursuant to federal or state law for general distribution and use without a prescription in the treatment of human disease, ailments, or injuries.

(11) "Prescription medication" means a drug or medication lawfully prescribed by a physician for an individual and taken in accordance with such prescription.

(12) "Reasonable suspicion testing" means substance abuse testing based on a belief that an employee is using or has used drugs or alcohol in violation of the employer's policy drawn from specific objective and

articulable facts and reasonable inferences drawn from those facts in light of experience. Among other things, such facts and inferences may be based upon, but not limited to, the following:

(A) Observable phenomena while at work such as direct observation of substance abuse or of the physical symptoms or manifestations of being impaired due to substance abuse;

(B) Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance;

(C) A report of substance abuse provided by a reliable and credible source;

(D) Evidence that an individual has tampered with any substance abuse test during his or her employment with the current employer;

(E) Information that an employee has caused or contributed to an accident while at work; or

(F) Evidence that an employee has used, possessed, sold, solicited, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

(13) "Rehabilitation program" means an established program capable of providing expert identification, assessment, and resolution of employee drug or alcohol abuse in a confidential and timely service. This service shall in all cases be provided by persons licensed or appropriately certified as health professionals to provide drug or alcohol rehabilitative services.

(13.1) "Self-insured employer" means any employer certified pursuant to Code Section 34-9-127.

(14) "Specimen" means tissue, blood, breath, urine, or other product of the human body capable of revealing the presence of drugs or their metabolites or of alcohol.

(15) "Substance" means drugs or alcohol.

(16) "Substance abuse test" or "test" means any chemical, biological, or physical instrumental analysis administered for the purpose of determining the presence or absence of a drug or its metabolites or of alcohol.

(17) "Threshold detection level" means the level at which the presence of a drug or alcohol can be reasonably expected to be detected by an initial and confirmatory test performed by a laboratory meeting the standards specified in this article. The threshold detection level indicates the level at which a valid conclusion can be drawn that the drug or alcohol is present in the employee's specimen. (Code 1981, § 34-9-411,

enacted by Ga. L. 1993, p. 1512, § 2; Ga. L. 1998, p. 1501, § 8; Ga. L. 2001, p. 800, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1998, paragraph (14.1) was redesignated as paragraph (13.1). Pursuant to Code Section 28-9-5, in 2001, “stress, or” was substituted for “stress or” in division (6)(A)(ii).

34-9-412. Insurance premium discount.

If an employer work organization implements a drug-free workplace program substantially in accordance with subsections (a) and (b) of Code Section 34-9-413, the employer work organization shall qualify for certification for a premium discount under such employer’s workers’ compensation insurance policy as provided in Code Section 33-9-40.2. (Code 1981, § 34-9-412, enacted by Ga. L. 1993, p. 1512, § 2; Ga. L. 1997, p. 1581, § 4; Ga. L. 2001, p. 800, § 2.)

JUDICIAL DECISIONS

Cited in Georgia-Pacific Corp. v. Ivey, 250 Ga. App. 181, 549 S.E.2d 471 (2001).

34-9-412.1. Certification.

A self-insured employer or an employer member of a group self-insurance fund who implements a drug-free workplace program substantially in accordance with Code Section 34-9-413 and who complies with all other provisions of this article required of employers in order to qualify for insurance premium discounts shall be certified by the State Board of Workers’ Compensation as having a drug-free workplace program in compliance with this article. (Code 1981, § 34-9-412.1, enacted by Ga. L. 1998, p. 1501, § 9.)

34-9-413. Elements of program; applicable confidentiality standards.

(a) A drug-free workplace program must contain the following elements:

- (1) Written policy statement as provided in Code Section 34-9-414;
- (2) Substance abuse testing as provided in Code Section 34-9-415;
- (3) Resources of employee assistance providers maintained in accordance with Code Section 34-9-416;
- (4) Employee education as provided in Code Section 34-9-417; and
- (5) Supervisor training in accordance with Code Section 34-9-418.

(b) In addition to the requirements of subsection (a) of this Code section, a drug-free workplace program must be implemented in compliance with the confidentiality standards provided in Code Section 34-9-420.

(c) A drug-free workplace program may offer and include the optimum level core services as described in subparagraph (C) of paragraph (6) of Code Section 34-9-411. (Code 1981, § 34-9-413, enacted by Ga. L. 1993, p. 1512, § 2; Ga. L. 2001, p. 800, § 3.)

Code Commission notes. — Pursuant to 34-9-411” was substituted for “Code Section Code Section 28-9-5, in 2001, “Code Section 34-9-11” in subsection (c).

JUDICIAL DECISIONS

Cited in Georgia-Pacific Corp. v. Ivey, 250 Ga. App. 181, 549 S.E.2d 471 (2001).

34-9-414. Notice of testing; written policy statement.

(a) One time only, prior to testing, all employees and job applicants for employment must be given a notice of testing. In addition, all employees must be given a written policy statement from the employer which contains:

(1) A general statement of the employer’s policy on employee substance abuse which shall identify:

(A) The types of testing an employee or job applicant may be required to submit to, including reasonable suspicion or other basis used to determine when such testing will be required; and

(B) The actions the employer may take against an employee or job applicant on the basis of a positive confirmed test result;

(2) A statement advising an employee or job applicant of the existence of this article;

(3) A general statement concerning confidentiality;

(4) The consequences of refusing to submit to a drug test;

(5) A statement advising an employee of the Employee Assistance Program, if the employer offers such program, or advising the employee of the employer’s resource file of assistance programs and other persons, entities, or organizations designed to assist employees with personal or behavioral problems;

(6) A statement that an employee or job applicant who receives a positive confirmed test result may contest or explain the result to the employer within five working days after written notification of the positive test result; and

(7) A statement informing an employee of the provisions of the federal Drug-Free Workplace Act or Chapter 23 of Title 45, the “Drug-free Public Work Force Act of 1990,” if applicable to the employer.

(b) An employer not having a substance abuse testing program in effect on July 1, 1993, shall ensure that at least 60 days elapse between a general

one-time notice to all employees that a substance abuse testing program is being implemented and the beginning of the actual testing. An employer having a substance abuse testing program in place prior to July 1, 1993, shall not be required to provide a 60 day notice period.

(c) An employer shall include notice of substance abuse testing on vacancy announcements for those positions for which testing is required. A notice of the employer's substance abuse testing policy must also be posted in an appropriate and conspicuous location on the employer's premises, and copies of the policy must be made available for inspection by the employees or job applicants of the employer during regular business hours in the employer's personnel office or other suitable locations. (Code 1981, § 34-9-414, enacted by Ga. L. 1993, p. 1512, § 2.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1993, paragraph (a)(8) was redesignated as paragraph (a)(7) thereof, since this Code section was enacted

without a paragraph (a)(7), and in that paragraph, "Drug-free" was substituted for "Drug-Free".

JUDICIAL DECISIONS

Construction of § 34-9-17(b)(3) with § 34-9-414. — The rebuttable presumption of O.C.G.A. § 34-9-17(b)(3) that injury was caused by alcohol or drugs incorporates only the drug testing procedures of O.C.G.A. § 34-9-415, not the notice provisions of O.C.G.A. § 34-9-414. *Georgia Self-Insurers*

Guar. Trust Fund v. Thomas, 269 Ga. 560, 501 S.E.2d 818 (1998), reversing *Thomas v. Diamond Rug & Carpet Mills*, 226 Ga. App. 403, 486 S.E.2d 664 (1997).

Cited in *Georgia-Pacific Corp. v. Ivey*, 250 Ga. App. 181, 549 S.E.2d 471 (2001).

34-9-415. Conduct of testing; types of tests; random testing; procedures for specimen collection and testing; laboratory qualifications, procedures, and reports; confirmation tests.

(a) All testing conducted by an employer shall be in conformity with the standards and procedures established in this article and all applicable rules adopted by the State Board of Workers' Compensation pursuant to this article. However, an employer shall not have a legal duty under this article to request an employee or job applicant to undergo testing.

(b) An employer is required to conduct the following types of tests in order to qualify for the workers' compensation insurance premium discounts provided under Code Section 34-9-412 and Code Section 33-9-40.2:

(1) An employer must require job applicants to submit to a substance abuse test after extending an offer of employment. Testing at the employer worksite with on-site testing kits that satisfy testing criteria in this article shall be deemed suitable and acceptable postoffer testing. Limited testing of job applicants by an employer shall qualify under this paragraph if such testing is conducted on the basis of reasonable classifications of job positions;

(2) An employer must require an employee to submit to reasonable suspicion testing;

(3) An employer must require an employee to submit to a substance abuse test if the test is conducted as part of a routinely scheduled employee fitness-for-duty medical examination that is part of the employer's established policy or that is scheduled routinely for all members of an employment classification or group;

(4) If the employee in the course of employment enters an Employee Assistance Program or a rehabilitation program as the result of a positive test, the employer must require the employee to submit to a substance abuse test as a follow-up to such program. However, if an employee voluntarily entered the program, follow-up testing is not required. If follow-up testing is conducted, the frequency of such testing shall be at least once a year for a two-year period after completion of the program and advance notice of the testing date shall not be given to the employee;

(5) If the employee has caused or contributed to an on the job injury which resulted in a loss of worktime, the employer must require the employee to submit to a substance abuse test; and

(6) Urinalysis conducted by laboratories, testing at the employer worksite with on-site testing kits, or use of oral testing that satisfies testing criteria in this article shall be deemed suitable and acceptable substance abuse testing.

(c) Nothing in this Code section shall prohibit a private employer from conducting random testing or other lawful testing of employees.

(d) All specimen collection and testing under this Code section shall be performed in accordance with the following procedures:

(1) A specimen shall be collected with due regard to the privacy of the individual providing the specimen and in a manner reasonably calculated to prevent substitution or contamination of the specimen;

(2) Specimen collection shall be documented, and the documentation procedures shall include:

(A) Labeling of specimen containers so as to reasonably preclude the likelihood of erroneous identification of test results; and

(B) An opportunity for the employee or job applicant to record any information he or she considers relevant to the test, including identification of currently or recently used prescription or nonprescription medication or other relevant medical information. The providing of information shall not preclude the administration of the test, but shall be taken into account in interpreting any positive confirmed results;

(3) Specimen collection, storage, and transportation to the testing site shall be performed in a manner which will reasonably preclude specimen contamination or adulteration;

(4) Each initial test conducted under this Code section shall be conducted by a laboratory as described in subsection (e) of this Code section or conducted using an on-site testing kit or oral testing that satisfies the testing criteria in this article. Each confirmation test conducted under this Code section, not including the taking or collecting of a specimen to be tested, shall be conducted by a laboratory as described in subsection (e) of this Code section;

(5) A specimen for a test may be taken or collected by any of the following persons:

(A) A physician, a physician's assistant, a registered professional nurse, a licensed practical nurse, a nurse practitioner, or a certified paramedic who is present at the scene of an accident for the purpose of rendering emergency medical service or treatment;

(B) A qualified person certified or employed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists, or the Georgia Department of Human Resources;

(C) A qualified person certified or employed by a collection company;

(D) For the purpose of a pre-job offer screening only, a person trained and qualified to conduct on-site testing; or

(E) For the purpose of a pre-job offer screening only, a person trained and qualified to conduct oral testing, if an oral test is used;

(6) Within five working days after receipt of a positive confirmed test result from the laboratory, an employer shall inform an employee or job applicant in writing of such positive test result, the consequences of such results, and the options available to the employee or job applicant;

(7) The employer shall provide to the employee or job applicant, upon request, a copy of the test results;

(8) An initial test having a positive result must be confirmed by a confirmation test conducted in a laboratory in accordance with the requirements of this article;

(9) An employer who performs drug testing or specimen collection shall use chain of custody procedures to ensure proper record keeping, handling, labeling, and identification of all specimens to be tested. This requirement shall apply to all specimens, including specimens collected using on-site testing kits;

(10) An employer shall pay the cost of all drug tests, initial and confirmation, which the employer requires of employees;

(11) An employee or job applicant shall pay the cost of any additional tests not required by the employer; and

(12) If testing is conducted based on reasonable suspicion, the employer shall promptly detail in writing the circumstances which formed the basis of the determination that reasonable suspicion existed to warrant the testing. A copy of this documentation shall be given to the employee upon request and the original documentation shall be kept confidential by the employer pursuant to Code Section 34-9-420 and retained by the employer for at least one year.

(e)(1) No laboratory may analyze initial or confirmation drug specimens unless:

(A) The laboratory is approved by the National Institute on Drug Abuse or the College of American Pathologists;

(B) The laboratory has written procedures to ensure the chain of custody; and

(C) The laboratory follows proper quality control procedures including, but not limited to:

(i) The use of internal quality controls including the use of samples of known concentrations which are used to check the performance and calibration of testing equipment and periodic use of blind samples for overall accuracy;

(ii) An internal review and certification process for drug test results conducted by a person qualified to perform that function in the testing laboratory;

(iii) Security measures implemented by the testing laboratory to preclude adulteration of specimens and drug test results; and

(iv) Other necessary and proper actions taken to ensure reliable and accurate drug test results.

(2) A laboratory shall disclose to the employer a written test result report within seven working days after receipt of the sample. All laboratory reports of a substance abuse test result shall, at a minimum, state:

(A) The name and address of the laboratory which performed the test and the positive identification of the person tested;

(B) Positive results on confirmation tests only, or negative results, as applicable;

(C) A list of the drugs for which the drug analyses were conducted; and

(D) The type of tests conducted for both initial and confirmation tests and the minimum cut-off levels of the tests.

No report shall disclose the presence or absence of any drug other than a specific drug and its metabolites listed pursuant to this article.

(3) Laboratories shall provide technical assistance to the employer, employee, or job applicant for the purpose of interpreting any positive confirmed test results which could have been caused by prescription or nonprescription medication taken by the employee or job applicant.

(f) If an initial drug test is negative, the employer may in its sole discretion seek a confirmation test. Only laboratories as described in subsection (e) of this Code section shall conduct confirmation drug tests.

(g) All positive initial tests, regardless of the testing methodology used, shall be confirmed using the gas chromatography/mass spectrometry (GC/MC) method or an equivalent or more accurate scientifically accepted methods approved by the National Institute on Drug Abuse as such technology becomes available in a cost-effective form. (Code 1981, § 34-9-415, enacted by Ga. L. 1993, p. 1512, § 2; Ga. L. 1994, p. 97, § 34; Ga. L. 2001, p. 800, §§ 4, 5; Ga. L. 2007, p. 532, § 1/SB 96.)

The 2007 amendment, effective July 1, 2007, in subsection (b), deleted “and” at the end of paragraph (b)(4), substituted “; and” for a period at the end of paragraph (b)(5) and added paragraph (b)(6); substituted “test conducted under this Code section shall be conducted by a laboratory as described in subsection (e) of this Code section or conducted using an on-site testing kit or oral testing that satisfies the testing criteria in this article. Each confirmation” for “confirmation” in paragraph (d)(4); in paragraph (d)(5), deleted “or” from the end of subparagraph (d)(5)(B) and added subparagraphs (d)(5)(D) and (d)(5)(E); and

inserted “, regardless of the testing methodology used, ” near the beginning of subsection (g).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1993, “Department” was substituted for “Deapartment” in subparagraph (d)(5)(B) and a semicolon was substituted for the period at the end of subparagraph (d)(5)(C).

Pursuant to Code Section 28-9-5, in 2001, in the introductory paragraph of subsection (b), “Code Section 34-9-412” was substituted for “Code Section 34-9-12” and substituted a colon for a period at the end.

JUDICIAL DECISIONS

Construction with §§ 34-9-17(b)(3) and 34-9-414. — The rebuttable presumption of O.C.G.A. § 34-9-17(b)(3) incorporates only the applicable drug testing procedures of O.C.G.A. § 34-9-415, and is not dependent on other provisions of the workers’ compensation law (see O.C.G.A. § 34-9-1 et seq.), such as the notice provisions of O.C.G.A. § 34-9-414. *Georgia Self-Insurers Guar. Trust Fund v. Thomas*, 269 Ga. 560, 501 S.E.2d 818 (1998), reversing *Thomas v. Diamond Rug & Carpet Mills*, 226 Ga. App. 403, 486 S.E.2d 664 (1997).

Workers compensation award to an injured employee was set aside where the administrative law judge (ALJ) erred by ruling that the rebuttable presumption in

O.C.G.A. § 34-9-17(b)(3) could not arise because the employer/insurer failed to produce evidence that the drug and alcohol test that the employee refused would have been performed in the manner set forth in O.C.G.A. § 34-9-415. Because of this error, the ALJ further erred by failing to rule on the issues of whether the rebuttable presumption arose because the employee’s refusal to submit to the test was unjustified, and if so, whether the employee rebutted the presumption. The requirements and procedures of O.C.G.A. § 34-9-415 regulate testing to insure reliable, scientific tests. *Marine Port Terms., Inc. v. Dixon*, 252 Ga. App. 340, 556 S.E.2d 246 (2001).

RESEARCH REFERENCES

ALR. — Supreme Court's views on mandatory testing for drugs or alcohol, 145 ALR Fed. 335.

34-9-416. Employee Assistance Programs.

(a) If an employer has an Employee Assistance Program, the employer must inform the employee of the benefits and services of the Employee Assistance Program. In addition, the employer must provide the employee with notice of the policies and procedures regarding access to and utilization of the program.

(b) If an employer does not have an Employee Assistance Program, the employer must maintain a resource file of providers of other employee assistance including drug and alcohol abuse programs, mental health providers, and other persons, entities, or organizations available to assist employees with personal or behavioral problems and must notify the employee in writing of the availability of this resource file. In addition, the employer shall post in a conspicuous place a current listing of providers of employee assistance in the area. Such listing of available providers shall be reviewed and updated by the employer during the month of July of each year at which time the employer shall, when necessary, correct and revise information on all providers listed. Employers shall take reasonable care to identify appropriate providers and supply accurate telephone and address information on the posted listing of providers at all times. (Code 1981, § 34-9-416, enacted by Ga. L. 1993, p. 1512, § 2; Ga. L. 2001, p. 800, § 6.)

34-9-417. Education program on substance abuse.

(a) During the initial year of certification as provided in Code Section 34-9-412.1, an employer must provide all employees with a semiannual education program on substance abuse, in general, and its effects on the workplace, specifically. During the initial year, the first hour of the education program must include but is not limited to the following information:

(1) The explanation of the disease model of addiction for alcohol and drugs;

(2) The effects and dangers of the commonly abused substances in the workplace; and

(3) The company's policies and procedures regarding substance abuse in the workplace and how employees who wish to obtain substance abuse treatment can do so.

(b) During the second and any consecutive subsequent years of certification, an employer must provide all employees with an annual education

program. (Code 1981, § 34-9-417, enacted by Ga. L. 1993, p. 1512, § 2; Ga. L. 2001, p. 800, § 7.)

Code Commission notes. — Pursuant to sentence of the introductory language (now Code Section 28-9-5, in 1993, “semiannual” subsection (a)). was substituted for “semi-annual” in the first

34-9-418. Supervisor training on substance abuse.

(a) During the initial year of certification as provided in Code Section 34-9-412.1 and in addition to the education program provided in Code Section 34-9-417, an employer must provide all supervisory personnel with a minimum of two hours of supervisor training, which must include but is not limited to the following information:

- (1) How to recognize signs of employee substance abuse;
- (2) How to document and corroborate signs of employee substance abuse; and
- (3) How to refer substance abusing employees to the proper treatment providers.

(b) During the second and any consecutive subsequent years of certification, an employer must provide all supervisory personnel with a minimum of one hour of such supervisory training. (Code 1981, § 34-9-418, enacted by Ga. L. 1993, p. 1512, § 2; Ga. L. 2001, p. 800, § 8.)

34-9-419. Physician-patient relationship not created; authorized work rules; applicability of article; medical screening or other tests authorized; employer not required to establish program.

(a) No physician-patient relationship is created between an employee or job applicant and an employer, medical review officer, or any person performing or evaluating a drug test solely by the establishment, implementation, or administration of a drug-testing program.

(b) Nothing in this article shall be construed to prevent an employer from establishing reasonable work rules related to employee possession, use, sale, or solicitation of drugs, including convictions for drug related offenses, and taking action based upon a violation of any of those rules.

(c) Nothing in this article shall be construed to operate retroactively, and nothing in this article shall abrogate the right of an employer under state or federal law to conduct drug tests, or implement employee drug-testing programs; provided, however, only those programs that meet the criteria outlined in this article qualify for reduced workers’ compensation insurance premiums under Code Section 33-9-40.2.

(d) Nothing in this article shall be construed to prohibit an employer from conducting medical screening or other tests required, permitted, or

not disallowed by any statute, rule, or regulation for the purpose of monitoring exposure of employees to toxic or other unhealthy materials in the workplace or in the performance of job responsibilities. Such screening or tests shall be limited to the specific materials expressly identified in the statute, rule, or regulation, unless prior written consent of the employee is obtained for other tests.

(e) No cause of action shall arise in favor of any person based upon the failure of an employer to establish or conduct a program or policy for substance abuse testing. (Code 1981, § 34-9-419, enacted by Ga. L. 1993, p. 1512, § 2.)

34-9-420. Confidentiality of information.

(a) All information, interviews, reports, statements, memoranda, and test results, written or otherwise, received by the employer through a substance abuse testing program are confidential communications, but may be used or received in evidence, obtained in discovery, or disclosed in any civil or administrative proceeding, except as provided in subsection (d) of this Code section.

(b) Employers, laboratories, medical review officers, employee assistance programs, drug or alcohol rehabilitation programs, and their agents who receive or have access to information concerning test results shall keep all information confidential. Release of such information under any other circumstance shall be solely pursuant to a written consent form signed voluntarily by the person tested, unless such release is compelled by an agency of the state or a court of competent jurisdiction or unless deemed appropriate by a professional or occupational licensing board in a related disciplinary proceeding. The consent form must contain at a minimum:

- (1) The name of the person who is authorized to obtain the information;
- (2) The purpose of the disclosure;
- (3) The precise information to be disclosed;
- (4) The duration of the consent; and
- (5) The signature of the person authorizing release of the information.

(c) Information on test results shall not be released or used in any criminal proceeding against the employee or job applicant. Information released contrary to this subsection shall be inadmissible as evidence in any such criminal proceeding.

(d) Nothing contained in this article shall be construed to prohibit the employer or laboratory conducting a test from having access to employee

test information when consulting with legal counsel when the information is relevant to its defense in a civil or administrative matter. (Code 1981, § 34-9-420, enacted by Ga. L. 1993, p. 1512, § 2.)

34-9-421. Rules and regulations.

The State Board of Workers' Compensation shall promulgate by rule or regulation procedures and forms for the certification of employers who establish and maintain a drug-free workplace which complies with the provisions of this article. The board shall be authorized to charge a fee for the certification of a drug-free workplace program in an amount which shall approximate the administrative costs to the board of such certification. Certification of an employer shall be required for each year in which a premium discount is granted. The State Board of Workers' Compensation shall be authorized to promulgate rules and regulations necessary for the implementation of this article. (Code 1981, § 34-9-421, enacted by Ga. L. 1993, p. 1512, § 2.)

CHAPTER 10

LABOR POOLS

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|----------|---|----------|--|
| Sec. | | Sec. | |
| 34-10-1. | Definitions. | 34-10-4. | Penalties for violation of chapter. |
| 34-10-2. | Prohibited acts or practices. | 34-10-5. | Civil action authorized. |
| 34-10-3. | Consent form for exposure to hazardous chemicals; enforcement of chapter. | 34-10-6. | Compliance with other state or federal laws. |

Editor’s notes. — Former Chapter 10 of this title, pertaining to private employment agencies, was repealed effective June 30, 1987, pursuant to the termination provisions of former Code Section 34-10-16. As provided in former Code Section 34-10-16, the State Employment Agency Advisory Council was terminated on July 1, 1986. As provided in former Code Section 43-2-8, the chapter was continued in effect for the duration of

the termination period only for the purpose of concluding the affairs of the council and was repealed as of the last day of the termination period (June 30, 1987).
The former chapter, consisting of Code Sections 34-10-1 through 34-10-16, was part of the original Code enactment (Ga. L. 1981, Ex. Sess., p. 8) and was based on Ga. L. 1974, p. 567, Ga. L. 1984, p. 393, § 1, and Ga. L. 1985, p. 355, § 1.

34-10-1. Definitions.

As used in this chapter, the term:

- (1) “Hazardous chemical” means any chemical, which is a physical hazard or a health hazard, as those terms are defined in Code Section 45-22-2.
- (2) “Labor pool” means a business entity which operates by:
 - (A) Contracting with other entities or persons to supply them with temporary employees for short-term assignments of casual labor;
 - (B) Hiring persons to fulfill these contracts for short-term assignments of casual labor; and
 - (C) Employing each individual employee no longer than the time period required to complete the assignment for which that individual employee was hired, although an individual may be eligible for rehire when additional temporary assignments are available.

A business entity which fulfills any contracts in accordance with this paragraph is a labor pool, even if the entity also conducts other business.

- (3) “Labor pool” does not include a temporary help service that requires advanced applications, job interviews and references.
- (4) “Short-term assignment of casual labor” means a work assignment for a term of 40 hours or less involving work for which neither entity nor

person contracting or arranging for temporary employees requires any of the following from such employees:

(A) A professional or occupational license which requires for its issuance a demonstration of knowledge or proficiency and which is issued by the State of Georgia or a political subdivision of the state;

(B) A high school diploma or its equivalent;

(C) Education beyond high school;

(D) Vocational education;

(E) Demonstrated proficiency with a specified type of machinery; or

(F) Training before the assignment or on the job which exceeds one hour.

This paragraph shall not be construed as prohibiting or limiting the placement of a skilled employee on a short-term assignment of casual labor as long as such skill or education is not a requirement of the assignment.

(5) "Work-site employer" means any business entity or employing unit with which a labor pool contracts or otherwise agrees to furnish temporary workers for short-term assignments of casual labor. (Code 1981, § 34-10-1, enacted by Ga. L. 1992, p. 1936, § 1; Ga. L. 1994, p. 1152, § 1.)

Editor's notes. — Ga. L. 1994, p. 1152, § 7, not codified by the General Assembly, provides that the Act shall be repealed in its entirety July 1, 1997, if funds have not been specifically appropriated for purposes of the Act on or before such date.

Ga. L. 1997, p. 888, § 3, not codified by

the General Assembly, amends Ga. L. 1994, p. 1152, § 7 to provide that Ga. L. 1994, p. 1152 shall be repealed in its entirety July 1, 2000, if funds have not been specifically appropriated for purposes of that Act on or before such date. Ga. L. 1994, p. 1152 was funded at the 2000 regular session.

34-10-2. Prohibited acts or practices.

A labor pool or work-site employer shall be prohibited from engaging in any of the following acts or practices:

(1) Charging a temporary employee a rental fee or any other type of fee for supplying any type of equipment to be used by the temporary employee in performing a work assignment;

(2) Charging a temporary employee a transportation fee for the transporting of such employee from the business premises of the labor pool or other point of embarkation to or from a work assignment;

(3) Failing to inform a person who is to be placed on a work assignment involving exposure to hazardous chemicals that such assignment involves the exposure of such person to hazardous chemicals and

failing to obtain such person’s consent on the form described in Code Section 34-10-3;

(4) Failing to provide a pay stub or register to the temporary employee to indicate the number of hours worked, the rate of pay, and any deduction therefrom; or

(5) Paying a temporary employee in any medium other than cash or check; provided, however, that any check must be redeemable at full value. (Code 1981, § 34-10-2, enacted by Ga. L. 1992, p. 1936, § 1; Ga. L. 1994, p. 1152, § 2.)

Editor’s notes. — Ga. L. 1994, p. 1152, § 7, not codified by the General Assembly, provides that the Act shall be repealed in its entirety July 1, 1997, if funds have not been specifically appropriated for purposes of the Act on or before such date.

Ga. L. 1997, p. 888, § 3, not codified by

the General Assembly, amends Ga. L. 1994, p. 1152, § 7 to provide that Ga. L. 1994, p. 1152 shall be repealed in its entirety July 1, 2000, if funds have not been specifically appropriated for purposes of that Act on or before such date. Ga. L. 1994, p. 1152 was funded at the 2000 regular session.

JUDICIAL DECISIONS

Liability for violations of O.C.G.A. § 34-10-2 is not limited only to “labor pools”; plaintiffs may recover from a consultant hired by a labor pool if the jury finds

plaintiff was a “person responsible” for a violation. *Sakas v. Settle Down Enters., Inc.*, 90 F. Supp. 2d 1267 (N.D. Ga. 2000).

RESEARCH REFERENCES

ALR. — Authority of state, municipality, or other governmental entity to accept late

bids for public works contracts, 49 ALR5th 747.

34-10-3. Consent form for exposure to hazardous chemicals; enforcement of chapter.

(a) The Department of Labor shall promulgate by rule or regulation the language and format of a consent form to be provided and used by a labor pool to inform persons that a work assignment involves the exposure to hazardous chemicals and to obtain such person’s consent as required in paragraph (3) of Code Section 34-10-2.

(b) The Commissioner of Labor shall have the power and authority to adopt or rescind such rules or regulations and to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as deemed necessary or suitable to effectuate and enforce the provisions of this chapter.

(c) Any labor pool or work-site employer which is found by the department, after notice and an opportunity for a hearing, to have willfully violated any provision of this chapter shall be subject to an administrative fine not to exceed \$1,000.00 for each separate violation. Each day during which any such violation occurs shall constitute a separate violation.

(d) Any determination by the department that a labor pool or work-site employer has willfully violated any provision of this chapter shall be subject to appeal. Any hearing conducted pursuant to this Code section shall be conducted in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Code 1981, § 34-10-3, enacted by Ga. L. 1992, p. 1936, § 1; Ga. L. 1994, p. 1152, § 3.)

Editor's notes. — Ga. L. 1994, p. 1152, § 7, not codified by the General Assembly, provides that the Act shall be repealed in its entirety July 1, 1997, if funds have not been specifically appropriated for purposes of the Act on or before such date.

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34-10-4. Penalties for violation of chapter.

(a) Any person convicted of a violation of paragraph (1), (2), (4), or (5) of Code Section 34-10-2 shall be guilty of a misdemeanor and shall be punished as provided in Code Section 17-10-3, relating to punishment for misdemeanor offenses.

(b) Any person convicted of a violation of paragraph (3) of Code Section 34-10-2 shall be guilty of a misdemeanor of a high and aggravated nature and shall be punished by imprisonment for a term not to exceed 12 months or a fine of not less than \$1,000.00 or more than \$5,000.00, or both. (Code 1981, § 34-10-4, enacted by Ga. L. 1992, p. 1936, § 1; Ga. L. 1994, p. 1152, § 4.)

Editor's notes. — Ga. L. 1994, p. 1152, § 7, not codified by the General Assembly, provides that the Act shall be repealed in its entirety July 1, 1997, if funds have not been specifically appropriated for purposes of the Act on or before such date.

Ga. L. 1997, p. 888, § 3, not codified by

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RESEARCH REFERENCES

ALR. — State or local government's liability to subcontractors, laborers, or

materialmen for failure to require general contractor to post bond, 54 ALR5th 649.

34-10-5. Civil action authorized.

Any person damaged by a violation of Code Section 34-10-2 shall have the right to bring a civil action in a court of competent jurisdiction against the person or persons responsible for such violation. In any action commenced pursuant to this Code section, the plaintiff shall be entitled to recover actual damages, reasonable attorneys' fees, costs of litigation, and punitive dam-

ages where appropriate. (Code 1981, § 34-10-5, enacted by Ga. L. 1992, p. 1936, § 1.)

34-10-6. Compliance with other state or federal laws.

Nothing in this chapter shall be construed to relieve any business entity or employing unit which is subject to any of the provisions of this chapter from the responsibility of said business entity or employing unit to comply with any other provision of state or federal law, including, but not specifically limited to, the federal Occupational Safety and Health Act or with any county or municipal law, rule, or ordinance which is not in direct conflict with any provision of this chapter. (Code 1981, § 34-10-6, enacted by Ga. L. 1994, p. 1152, § 5.)

Editor's notes. — Ga. L. 1994, p. 1152, § 7, not codified by the General Assembly, provides that the Act shall be repealed in its entirety July 1, 1997, if funds have not been specifically appropriated for purposes of the Act on or before such date.

Ga. L. 1997, p. 888, § 3, not codified by

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CHAPTER 11

REGULATION OF BOILERS AND PRESSURE VESSELS

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| 34-11-1. | Short title. | | stroyed certificates of competency. |
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OPINIONS OF THE ATTORNEY GENERAL

State owned and operated boilers and pressure vessels are not subject to the regulatory provisions of O.C.G.A. § 34-11-1 et seq. 1985 Op. Att'y Gen. No. 85-57.

RESEARCH REFERENCES

Am. Jur. 2d. — 42 Am. Jur. 2d, Inspection Laws, § 1 et seq.
Am. Jur. Trials. — Boiler Explosion Cases, 13 Am. Jur. Trials 343.
C.J.S. — 53 C.J.S., Licenses, § 1 et seq.

34-11-1. Short title.

This chapter shall be known and may be cited as the “Boiler and Pressure Vessel Safety Act” and, except as otherwise provided in this chapter, shall apply to all boilers and pressure vessels. (Code 1981, § 34-11-1, enacted by Ga. L. 1984, p. 1227, § 1.)

34-11-2. Definitions.

As used in this chapter, the term:

(1) Reserved.

(2) “Boiler” means a closed vessel in which water or other liquid is heated, steam or vapor is generated, or steam is superheated or in which any combination of these functions is accomplished, under pressure or vacuum, for use externally to itself, by the direct application of energy from the combustion of fuels or from electricity, solar, or nuclear energy. The term “boiler” shall include fired units for heating or vaporizing liquids other than water where these units are separate from processing systems and are complete within themselves. The term “boiler” is further defined as follows:

(A) “Heating boiler” means a steam or vapor boiler operating at pressures not exceeding 15 psig or a hot water boiler operating at pressures not exceeding 160 psig or temperatures not exceeding 250 degrees Fahrenheit.

(B) “High pressure, high temperature water boiler” means a water boiler operating at pressures exceeding 160 psig or temperatures exceeding 250 degrees Fahrenheit.

(C) “Power boiler” means a boiler in which steam or other vapor is generated at a pressure of more than 15 psig.

(3) “Certificate of inspection” means an inspection, the report of which is used by the chief inspector to determine whether or not a certificate as provided by subsection (c) of Code Section 34-11-15 may be issued.

(4) “Commissioner” means the Commissioner of Labor.

(5) “Department” means the Department of Labor.

(6) “Pressure vessel” means a vessel other than those vessels defined in paragraph (2) of this Code section in which the pressure is obtained from an external source or by the application of heat. (Code 1981, § 34-11-2, enacted by Ga. L. 1984, p. 1227, § 1; Ga. L. 1987, p. 1349, § 1; Ga. L. 2001, p. 873, § 11.)

34-11-3. Consulting on boilers and pressure vessels.

The Commissioner shall be authorized to consult with persons knowledgeable in the areas of construction, use, or safety of boilers and pressure vessels and to create committees composed of such consultants to assist the Commissioner in carrying out his or her duties under this chapter. (Code 1981, § 34-11-3, enacted by Ga. L. 1984, p. 1227, § 1; Ga. L. 1985, p. 213, § 1; Ga. L. 1989, p. 443, § 2; Ga. L. 2001, p. 873, § 12.)

34-11-4. Definitions, rules, and regulations for safe construction, installation, inspection, maintenance, and repair.

(a)(1) The Department of Labor shall formulate definitions, rules, and regulations for the safe construction, installation, inspection, maintenance, and repair of boilers and pressure vessels in this state.

(2) The definitions, rules, and regulations so formulated for new construction shall be based upon and at all times follow the generally accepted nation-wide engineering standards, formulas, and practices established and pertaining to boiler and pressure vessel construction and safety; and the Department of Labor may adopt an existing published codification thereof, known as the Boiler and Pressure Vessel Code of the American Society of Mechanical Engineers, with the amendments and interpretations thereto made and approved by the council of the society, and may likewise adopt the amendments and interpretations subsequently made and published by the same authority. When so adopted, the same shall be deemed to be incorporated into and shall constitute a part of the whole of the definitions, rules, and regulations of the Department of Labor. Amendments and interpretations to the code so adopted shall be effective immediately upon being promulgated, to the end that the definitions, rules, and regulations shall at all times follow the generally accepted nation-wide engineering standards.

(3) The Department of Labor shall formulate the rules and regulations for the inspection, maintenance, and repair of boilers and pressure vessels which were in use in this state prior to the date upon which the first rules and regulations under this chapter pertaining to existing installations become effective or during the 12 month period immediately thereafter. The rules and regulations so formulated shall be based upon and at all times follow generally accepted nation-wide engineering standards and practices and may adopt sections of the Inspection Code of the National Board of Boiler and Pressure Vessel Inspectors or API 510 of the American Petroleum Institute, as applicable.

(b) The rules and regulations and any subsequent amendments thereto formulated by the Department of Labor shall, immediately following a hearing upon not less than 20 days' notice as provided in this chapter, be approved and published and when so promulgated shall have the force and effect of law, except that the rules applying to the construction of new boilers and pressure vessels shall not become mandatory until 12 months after their promulgation by the Department of Labor. Notice of the hearing shall give the time and place of the hearing and shall state the matters to be considered at the hearing. Such notice shall be given to all persons directly affected by such hearing. In the event all persons directly affected are unknown, notice may be perfected by publication in a newspaper of general circulation in this state at least 20 days prior to such hearing.

(c) Subsequent amendments to the rules and regulations adopted by the Department of Labor shall be permissive immediately and shall become mandatory 12 months after their promulgation. (Code 1981, § 34-11-4, enacted by Ga. L. 1984, p. 1227, § 1; Ga. L. 1985, p. 213, § 2; Ga. L. 2001, p. 873, § 13.)

34-11-5. Effect on new construction and installation.

No boiler or pressure vessel which does not conform to the rules and regulations of the Department of Labor governing new construction and installation shall be installed and operated in this state after 12 months from the date upon which the first rules and regulations under this chapter pertaining to new construction and installation shall have become effective, unless the boiler or pressure vessel is of special design or construction and is not inconsistent with the spirit and safety objectives of such rules and regulations, in which case a special installation and operating permit may at its discretion be granted by the Department of Labor. (Code 1981, § 34-11-5, enacted by Ga. L. 1984, p. 1227, § 1; Ga. L. 1985, p. 213, § 3.)

34-11-6. Maximum allowable working pressure.

(a) The maximum allowable working pressure of a boiler carrying the ASME Code symbol or of a pressure vessel carrying the ASME or API-ASME symbol shall be determined by the applicable sections of the code under which it was constructed and stamped. Subject to the concurrence of the enforcement authority at the point of installation, such a boiler or pressure vessel may be rerated in accordance with the rules of a later edition of the ASME Code and in accordance with the rules of the National Board Inspection Code or API 510, as applicable.

(b) The maximum allowable working pressure of a boiler or pressure vessel which does not carry the ASME or the API-ASME Code symbol shall be computed in accordance with the Inspection Code of the National Board of Boiler and Pressure Vessel Inspectors.

(c) This chapter shall not be construed as in any way preventing the use, sale, or reinstallation of a boiler or pressure vessel referred to in this Code section, provided it has been made to conform to the rules and regulations of the department governing existing installations and provided, further, that it has not been found upon inspection to be in an unsafe condition. (Code 1981, § 34-11-6, enacted by Ga. L. 1984, p. 1227, § 1; Ga. L. 2001, p. 873, § 14.)

34-11-7. Exceptions.

(a) This chapter shall not apply to the following boilers and pressure vessels:

(1) Boilers and pressure vessels under federal control or under regulations of Title 49 of the Code of Federal Regulations, Parts 192 and 193;

(2) Pressure vessels used for transportation and storage of compressed or liquefied gases when constructed in compliance with specifications of

the United States Department of Transportation and when charged with gas or liquid, marked, maintained, and periodically requalified for use, as required by appropriate regulations of the United States Department of Transportation;

(3) Pressure vessels located on vehicles operating under the rules of other state or federal authorities and used for carrying passengers or freight;

(4) Air tanks installed on the right of way of railroads and used directly in the operation of trains;

(5) Pressure vessels that do not exceed:

(A) Five cubic feet in volume and 250 psig pressure; or

(B) One and one-half cubic feet in volume and 600 psig pressure; or

(C) An inside diameter of six inches with no limitation on pressure;

(6) Pressure vessels having an internal or external working pressure not exceeding 15 psig with no limit on size;

(7) Pressure vessels with a nominal water-containing capacity of 120 gallons or less for containing water under pressure, including those containing air, the compression of which serves only as a cushion;

(8) Pressure vessels containing water heated by steam or any other indirect means when none of the following limitations are exceeded:

(A) A heat input of 200,000 BTU per hour;

(B) A water temperature of 210 degrees Fahrenheit; and

(C) A nominal water-containing capacity of 120 gallons;

(9) Hot water supply boilers which are directly fired with oil, gas, or electricity when none of the following limitations are exceeded:

(A) Heat input of 200,000 BTU per hour;

(B) Water temperature of 210 degrees Fahrenheit; and

(C) Nominal water-containing capacity of 120 gallons.

These exempt hot water supply boilers shall be equipped with ASME-National Board approved safety relief valves;

(10) Pressure vessels in the care, custody, and control of research facilities and used solely for research purposes which require one or more details of noncode construction or which involve destruction or reduced life expectancy of those vessels;

(11) Pressure vessels or other structures or components that are not considered to be within the scope of ASME Code, Section VIII;

(12) Boilers and pressure vessels operated and maintained for the production and generation of electricity; provided, however, that any person, firm, partnership, or corporation operating such a boiler or pressure vessel has insurance or is self-insured and such boiler or pressure vessel is regularly inspected in accordance with the minimum requirements for safety as defined in the ASME Code by an inspector who has been issued a certificate of competency by the Commissioner in accordance with the provisions of Code Section 34-11-10;

(13) Boilers and pressure vessels operated and maintained as a part of a manufacturing process; provided, however, that any person, firm, partnership, or corporation operating such a boiler or pressure vessel has insurance or is self-insured and such boiler or pressure vessel is regularly inspected in accordance with the minimum requirements for safety as defined in the ASME Code by an inspector who has been issued a certificate of competency by the Commissioner in accordance with the provisions of Code Section 34-11-10;

(14) Boilers and pressure vessels operated and maintained by a public utility; and

(15) Autoclaves used only for the sterilization of reusable medical or dental implements in the place of business of any professional licensed by the laws of this state.

(b) The following boilers and pressure vessels shall be exempt from the requirements of subsections (b), (c), and (d) of Code Section 34-11-14 and Code Sections 34-11-15 and 34-11-16:

(1) Boilers or pressure vessels located on farms and used solely for agricultural or horticultural purposes;

(2) Heating boilers or pressure vessels which are located in private residences or in apartment houses of less than six family units;

(3) Any pressure vessel used as an external part of an electrical circuit breaker or transformer;

(4) Pressure vessels on remote oil or gas-producing lease locations that have fewer than ten buildings intended for human occupancy per 0.25 square mile and where the closest building is at least 220 yards from any vessel;

(5) Pressure vessels used for storage of liquid propane gas under the jurisdiction of the state fire marshal, except for pressure vessels used for storage of liquefied petroleum gas, 2,000 gallons or above, which have been modified or altered; and

(6) Air storage tanks not exceeding 16 cubic feet (120 gallons) in size and under 250 psig pressure. (Code 1981, § 34-11-7, enacted by Ga. L. 1984, p. 1227, § 1; Ga. L. 1985, p. 213, § 4; Ga. L. 1986, p. 10, § 34; Ga.

L. 1987, p. 1349, § 2; Ga. L. 1988, p. 13, § 34; Ga. L. 1988, p. 314, § 1; Ga. L. 1989, p. 14, § 34; Ga. L. 1989, p. 465, § 1; Ga. L. 1990, p. 816, § 1; Ga. L. 1993, p. 434, § 1; Ga. L. 1995, p. 914, § 1.)

Code Commission notes. — Pursuant to § 28-9-5, in 1986, a hyphen was inserted in “water-containing” in subparagraph (a)(8)(C) and a hyphen was inserted in “gas-producing” in paragraph (b)(4).

Pursuant to § 28-9-5, in 1988, “liquefied” was substituted for “liquified” in paragraph (a)(2).

OPINIONS OF THE ATTORNEY GENERAL

Statutory reference in O.C.G.A. § 34-11-7(a)(13) prior to 1989 amendment was typographical error. — See 1988 Op. Att’y Gen. No. 88-24.

Combination potable water heater —

space heating units are covered by the Boiler and Pressure Vessel Safety Act, O.C.G.A. § 34-11-1 et seq., except to the extent those units are clearly exempted under O.C.G.A. § 34-11-7. 1989 Op. Att’y Gen. 89-24.

34-11-8. Chief inspector.

(a) The Commissioner may appoint to be chief inspector a citizen of this state or, if not available, a citizen of another state, who shall have had at the time of such appointment not less than five years’ experience in the construction, installation, inspection, operation, maintenance, or repair of high pressure boilers and pressure vessels as a mechanical engineer, steam operating engineer, boilermaker, or boiler inspector and who shall have passed the same kind of examination as that prescribed under Code Section 34-11-11. Such chief inspector may be removed for cause after due investigation by the board and its recommendation to the Commissioner.

(b) The chief inspector, if authorized by the Commissioner, is charged, directed, and empowered:

(1) To take action necessary for the enforcement of the laws of the state governing the use of boilers and pressure vessels to which this chapter applies and of the rules and regulations of the department;

(2) To keep a complete record of the name of each owner or user and his location and, except for pressure vessels covered by an owner or user inspection service, the type, dimensions, maximum allowable working pressure, age, and the last recorded inspection of all boilers and pressure vessels to which the chapter applies;

(3) To publish and make available to anyone requesting them copies of the rules and regulations promulgated by the department;

(4) To issue or to suspend or revoke for cause inspection certificates as provided for in Code Section 34-11-15; and

(5) To cause the prosecution of all violators of the provisions of this chapter. (Code 1981, § 34-11-8, enacted by Ga. L. 1984, p. 1227, § 1; Ga. L. 1985, p. 149, § 34; Ga. L. 1985, p. 213, § 5; Ga. L. 1987, p. 1349, § 3.)

34-11-9. Deputy inspectors.

The Commissioner may employ deputy inspectors who shall be responsible to the chief inspector and who shall have had at the time of appointment not less than three years' experience in the construction, installation, inspection, operation, maintenance, or repair of high pressure boilers and pressure vessels as a mechanical engineer, steam operating engineer, boilermaker, or boiler inspector and who shall have passed the examination provided for in Code Section 34-11-11. (Code 1981, § 34-11-9, enacted by Ga. L. 1984, p. 1227, § 1; Ga. L. 1985, p. 213, § 6.)

34-11-10. Special inspectors.

(a) In addition to the deputy inspectors authorized by Code Section 34-11-9, the Commissioner shall, upon the request of any company licensed to insure and insuring in this state boilers and pressure vessels or upon the request of any company operating pressure vessels in this state for which the owner or user maintains a regularly established inspection service which is under the supervision of one or more technically competent individuals whose qualifications are satisfactory to the department and causes said pressure vessels to be regularly inspected and rated by such inspection service in accordance with applicable provisions of the rules and regulations adopted by the department pursuant to Code Section 34-11-4, issue to any inspectors of said insurance company certificates of competency as special inspectors and to any inspectors of said company operating pressure vessels certificates of competency as owner or user inspectors, provided that each such inspector before receiving his certificate of competency shall satisfactorily pass the examination provided for by Code Section 34-11-11 or, in lieu of such examination, shall hold a commission or a certificate of competency as an inspector of boilers or pressure vessels for a state that has a standard of examination substantially equal to that of this state or a commission as an inspector of boilers and pressure vessels issued by the National Board of Boiler and Pressure Vessel Inspectors. A certificate of competency as an owner or user inspector shall be issued to an inspector of a company operating pressure vessels in this state only if, in addition to meeting the requirements stated in this Code section, the inspector is employed full time by the company and is responsible for making inspections of pressure vessels used or to be used by such company and which are not for resale.

(b) Such special inspectors or owner or user inspectors shall receive no salary from nor shall any of their expenses be paid by the state, and the continuance of their certificates of competency shall be conditioned upon their continuing in the employ of the boiler insurance company duly authorized as aforesaid or in the employ of the company so operating pressure vessels in this state and upon their maintenance of the standards imposed by this chapter.

(c) Such special inspectors or owner or user inspectors may inspect all boilers and pressure vessels insured or all pressure vessels operated by their respective companies; and, when so inspected, the owners and users of such boilers and pressure vessels shall be exempt from the payment to the state of the inspection fees as prescribed in rules and regulations promulgated by the Commissioner. (Code 1981, § 34-11-10, enacted by Ga. L. 1984, p. 1227, § 1; Ga. L. 1987, p. 1349, § 4; Ga. L. 1988, p. 13, § 34.)

Code Commission notes. — Pursuant to for “fulltime” in the last sentence of subsection 28-9-5, in 1988, “full time” was substituted tion (a).

34-11-11. Examination of inspectors.

The examination for chief, deputy, special, or owner or user inspectors shall be in writing and shall be held by the board or by an examining board appointed in accordance with the requirements of the National Board of Boiler and Pressure Vessel Inspectors, with at least two members present at all times during the examination. Such examination shall be confined to questions the answers to which will aid in determining the fitness and competency of the applicant for the intended service and may be those prepared by the National Board of Boiler and Pressure Vessel Inspectors. In case an applicant fails to pass the examination, he may appeal to the board for another examination which shall be given by the board after 90 days. The record of an applicant's examination shall be accessible to said applicant and his employer. (Code 1981, § 34-11-11, enacted by Ga. L. 1984, p. 1227, § 1.)

34-11-12. Suspension and revocation of inspector's certificate of competency; hearing; reinstatement.

(a) An inspector's certificate of competency may be suspended by the Commissioner after due investigation and recommendation by the department for the incompetence or untrustworthiness of the holder thereof or for willful falsification of any matter or statement contained in his or her application or in a report of any inspection made by him or her. Written notice of any such suspension shall be given by the Commissioner within not more than ten days thereof to the inspector and his or her employer. A person whose certificate of competency has been suspended shall be entitled to an appeal as provided in Code Section 34-11-19 and to be present in person and to be represented by counsel at the hearing of the appeal.

(b) If the department has reason to believe that an inspector is no longer qualified to hold his or her certificate of competency, the department shall provide written notice to the inspector and his or her employer of the department's determination and the right to an appeal as provided in Code Section 34-11-19. If, as a result of such hearing, the inspector has been determined to be no longer qualified to hold his or her certificate of

competency, the Commissioner shall thereupon revoke such certificate of competency forthwith.

(c) A person whose certificate of competency has been suspended shall be entitled to apply, after 90 days from the date of such suspension, for reinstatement of such certificate of competency. (Code 1981, § 34-11-12, enacted by Ga. L. 1984, p. 1227, § 1; Ga. L. 2001, p. 873, § 15.)

34-11-13. Replacement of lost or destroyed certificates of competency.

If a certificate of competency is lost or destroyed, a new certificate of competency shall be issued in its place without another examination. (Code 1981, § 34-11-13, enacted by Ga. L. 1984, p. 1227, § 1.)

34-11-14. Inspections.

(a) The Commissioner, the chief inspector, or any deputy inspector shall have free access, during reasonable hours, to any premises in the state where a boiler or pressure vessel is being constructed for use in, or is being installed in, this state for the purpose of ascertaining whether such boiler or pressure vessel is being constructed and installed in accordance with the provisions of this chapter.

(b)(1) On and after January 1, 1986, each boiler and pressure vessel used or proposed to be used within this state, except for pressure vessels covered by an owner or user inspection service as described in subsection (d) of this Code section or except for boilers or pressure vessels exempt under Code Section 34-11-7 (owners and users may request to waive this exemption), shall be thoroughly inspected as to their construction, installation, and condition as follows:

(A) Power boilers and high pressure, high temperature water boilers shall receive a certificate inspection annually which shall be an internal inspection where construction permits; otherwise it shall be as complete an inspection as possible. Such boilers shall also be externally inspected while under pressure, if possible;

(B) Low pressure steam or vapor heating boilers shall receive a certificate inspection biennially with an internal inspection every four years where construction permits;

(C) Hot water heating and hot water supply boilers shall receive a certificate inspection biennially with an internal inspection at the discretion of the inspector;

(D) Pressure vessels subject to internal corrosion shall receive a certificate inspection triennially with an internal inspection at the discretion of the inspector. Pressure vessels not subject to internal

corrosion shall receive a certificate of inspection at intervals set by the board; and

(E) Nuclear vessels within the scope of this chapter shall be inspected and reported in such form and with such appropriate information as the board shall designate.

(2) A grace period of two months beyond the periods specified in subparagraphs (A) through (D) of this paragraph may elapse between certificate inspections.

(3) The department may provide for longer periods between certificate inspection in its rules and regulations.

(4) Under the provisions of this chapter, the department is responsible for providing for the safety of life, limb, and property and therefore has jurisdiction over the interpretation and application of the inspection requirements as provided for in the rules and regulations which it has promulgated. The person conducting the inspection during construction and installation shall certify as to the minimum requirements for safety as defined in the ASME Code. Inspection requirements of operating equipment shall be in accordance with generally accepted practice and compatible with the actual service conditions, such as:

(A) Previous experience, based on records of inspection, performance, and maintenance;

(B) Location, with respect to personnel hazard;

(C) Quality of inspection and operating personnel;

(D) Provision for related safe operation controls; and

(E) Interrelation with other operations outside the scope of this chapter.

Based upon documentation of such actual service conditions by the owner or user of the operating equipment, the board may, in its discretion, permit variations in the inspection requirements.

(c) The inspections required in this chapter shall be made by the chief inspector, by a deputy inspector, by a special inspector, or by an owner or user inspector provided for in this chapter.

(d) Owner or user inspection of pressure vessels is permitted, provided the owner or user inspection service is regularly established and is under the supervision of one or more individuals whose qualifications are satisfactory to the board and said owner or user causes the pressure vessels to be inspected in conformance with the National Board Inspection Code or API 510, as applicable.

(e) If, at the discretion of the inspector, a hydrostatic test shall be deemed necessary, it shall be made by the owner or user of the boiler or pressure vessel.

(f) All boilers, other than cast iron sectional boilers, and pressure vessels to be installed in this state after the 12 month period from the date upon which the rules and regulations of the board shall become effective shall be inspected during construction as required by the applicable rules and regulations of the board by an inspector authorized to inspect boilers and pressure vessels in this state or, if constructed outside of the state, by an inspector holding a commission issued by the National Board of Boiler and Pressure Vessel Inspectors. (Code 1981, § 34-11-14, enacted by Ga. L. 1984, p. 1227, § 1; Ga. L. 1985, p. 213, § 7; Ga. L. 1987, p. 1349, § 5.)

34-11-15. Filing and maintenance of special investigator's report; issuance and suspension of inspection certificate.

(a) Each company employing special inspectors shall, within 30 days following each certificate inspection made by such inspectors, file a report of such inspection with the chief inspector upon appropriate forms as promulgated by the Commissioner. The filing of reports of external inspections, other than certificate inspections, shall not be required except when such inspections disclose that the boiler or pressure vessel is in a dangerous condition.

(b) Each company operating pressure vessels covered by an owner or user inspection service meeting the requirements of subsection (a) of Code Section 34-11-10 shall maintain in its files an inspection record which shall list, by number and such abbreviated description as may be necessary for identification, each pressure vessel covered by this chapter, the date of the last inspection of each pressure vessel, and the approximate date for the next inspection. The inspection record shall be available for examination by the chief inspector or his authorized representative during business hours.

(c) If the report filed pursuant to subsection (a) of this Code section shows that a boiler or pressure vessel is found to comply with the rules and regulations of the department, the chief inspector, or his or her duly authorized representative, shall issue to such owner or user an inspection certificate bearing the date of inspection and specifying the maximum pressure under which the boiler or pressure vessel may be operated. Such inspection certificate shall be valid for not more than 14 months from its date in the case of power boilers, 26 months in the case of heating and hot water supply boilers, and 38 months in the case of pressure vessels. In the case of those boilers and pressure vessels covered by subparagraphs (b)(1)(A) through (D) of Code Section 34-11-14, for which the department has established or extended the operating period between required inspections pursuant to the provisions of paragraphs (3) and (4) of subsection (b) of Code Section 34-11-14, the certificate shall be valid for a period of not more than two months beyond the period set by the department. Certificates for boilers shall be posted under glass, or similarly protected, in the room containing the boiler. Pressure vessel certificates shall be posted in

like manner, if convenient, or filed where they will be readily accessible for examination.

(d) No inspection certificate issued for an insured boiler or pressure vessel based upon a report of a special inspector shall be valid after the boiler or pressure vessel for which it was issued shall cease to be insured by a company duly authorized by this state to provide such insurance.

(e) The Commissioner or his authorized representative may at any time suspend an inspection certificate after showing cause that the boiler or pressure vessel for which it was issued cannot be operated without menace to the public safety or when the boiler or pressure vessel is found not to comply with the rules and regulations adopted pursuant to this chapter. Each suspension of an inspection certificate shall continue in effect until such boiler or pressure vessel shall have been made to conform to the rules and regulations of the department and until said inspection certificate shall have been reinstated.

(f) The Commissioner or his authorized representative may issue a written order for the temporary cessation of operation of a boiler or pressure vessel if it has been determined after inspection to be hazardous or unsafe. Operations shall not resume until such conditions are corrected to the satisfaction of the Commissioner or his authorized representative. (Code 1981, § 34-11-15, enacted by Ga. L. 1984, p. 1227, § 1; Ga. L. 1987, p. 1349, §§ 6-8; Ga. L. 1988, p. 13, § 34; Ga. L. 1991, p. 258, § 2; Ga. L. 2001, p. 873, § 16.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, “certificate” was substituted for “certificates” near the beginning of subsection (d).

34-11-15.1. Inspections of boilers and pressure vessels.

(a) Boilers and pressure vessels subject to operating certificate inspections by special, or owner or user, inspectors shall be inspected within 60 calendar days following the required reinspection date. Inspections not performed within this 60 calendar day period shall result in a civil penalty of \$500.00 for each boiler or pressure vessel not inspected.

(b)(1) Inspection fees due on boiler and pressure vessels subject to inspection by the chief or deputy inspectors or operating certificate fees due from inspections performed by special, or owner or user, inspectors shall be paid within 60 calendar days of completion of such inspections.

(2) Inspection fees or operating certificate fees unpaid within 60 calendar days shall bear interest at the rate of 1.5 percent per month or any fraction of a month. Interest shall continue to accrue until all amounts due, including interest, are received by the Commissioner.

(c) The Commissioner may waive the collection of the penalties and interest assessed as provided in subsections (a) and (b) of this Code section

when it is reasonably determined that the delays in inspection or payment were unavoidable or due to the action or inaction of the department. (Code 1981, § 34-11-15.1, enacted by Ga. L. 1991, p. 258, § 3.)

OPINIONS OF THE ATTORNEY GENERAL

Penalty assessed against entity employing own inspectors. — The entity requesting authorization from the commissioner to employ its own inspectors is responsible for ensuring that inspections pursuant to

O.C.G.A. § 34-11-15.1(a) are timely performed, and such entity should be assessed the civil penalty when inspections are not timely performed. 1991 Op. Att'y Gen. No. 91-17.

34-11-16. Requirement of valid inspection certificate for operation of a boiler or pressure vessel.

After 12 months for power boilers, 24 months for low pressure steam heating, hot water heating, and hot water supply boilers, and 36 months for pressure vessels following July 1, 1984, it shall be unlawful for any person, firm, partnership, or corporation to operate in this state a boiler or pressure vessel, except a pressure vessel covered by owner or user inspection service as provided for in Code Section 34-11-15, without a valid inspection certificate. The operation of a boiler or pressure vessel without such inspection certificate or at a pressure exceeding that specified in such inspection certificate or in violation of this chapter shall constitute a misdemeanor. (Code 1981, § 34-11-16, enacted by Ga. L. 1984, p. 1227, § 1; Ga. L. 1985, p. 149, § 34.)

34-11-17. Payment of inspection fees.

The owner or user of a boiler or pressure vessel required by this chapter to be inspected by the chief inspector or his deputy inspector shall pay directly to the chief inspector, upon completion of inspection, fees as prescribed in rules and regulations promulgated by the Commissioner; provided, however, that, with respect to pressure vessel certificates of inspection, such fees shall not exceed \$10.00 per annum. The chief inspector shall transfer all fees so received to the general fund of the state treasury. All funds so deposited in the state treasury are authorized to be appropriated by the General Assembly to the Commissioner of Labor. (Code 1981, § 34-11-17, enacted by Ga. L. 1991, p. 258, § 4.)

Editor's notes. — Former Code Section 34-11-17, pertaining to inspection fees, was enacted by Ga. L. 1984, p. 1227, § 1, and was repealed by Ga. L. 1987, p. 1349, § 9.

34-11-18. Bonding of chief and deputy inspectors.

The chief inspector shall furnish a bond in the sum of \$5,000.00 and each of the deputy inspectors employed and paid by the state shall furnish a bond in the sum of \$2,000.00 conditioned upon the faithful performance

of their duties and upon a true account of moneys handled by them, respectively, and the payment thereof to the proper recipient. (Code 1981, § 34-11-18, enacted by Ga. L. 1984, p. 1227, § 1.)

34-11-19. Appeals.

(a) Any person aggrieved by an order or an act of the Commissioner or the chief inspector under this chapter may, within 15 days of notice thereof, request a hearing before an administrative law judge of the Office of State Administrative Hearings, as provided by Code Section 50-13-41.

(b) Any person aggrieved by a decision of an administrative law judge may file an appeal pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Code 1981, § 34-11-19, enacted by Ga. L. 1984, p. 1227, § 1; Ga. L. 2001, p. 873, § 17.)

34-11-20. Limitations on authority of local governments to regulate boilers and pressure vessels.

No county, municipality, or other political subdivision shall have the power to make any laws, ordinances, or resolutions providing for the construction, installation, inspection, maintenance, and repair of boilers and pressure vessels within the limits of such county, municipality, or other political subdivision; and any such laws, ordinances, or resolutions heretofore made or passed shall be void and of no effect. (Code 1981, § 34-11-20, enacted by Ga. L. 1984, p. 1227, § 1.)

34-11-21. State liability not created.

Neither this chapter nor any provision of this chapter shall be construed to place any liability on the State of Georgia, the department, or the Commissioner with respect to any claim by any person, firm, or corporation relating in any way whatsoever to boilers and pressure vessels and any injury or damages arising therefrom. (Code 1981, § 34-11-21, enacted by Ga. L. 1987, p. 1349, § 10.)

34-11-22. Severability of provisions.

In the event any Code section, subsection, sentence, clause, or phrase of this chapter shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other Code sections, subsections, sentences, clauses, or phrases of this chapter, which shall remain of full force and effect, as if the Code section, subsection, sentence, clause, or phrase so declared or adjudged invalid or unconstitutional were not originally a part hereof. The General Assembly declares that it would have passed the remaining parts of this chapter if it had known that such part or

parts hereof would be declared or adjudged invalid or unconstitutional.
(Code 1981, § 34-11-22, enacted by Ga. L. 1987, p. 1349, § 10.)

CHAPTER 12

AMUSEMENT RIDE SAFETY

| Sec. | | Sec. | |
|-----------|--|-----------|--|
| 34-12-1. | Short title. | 34-12-11. | Owner recordkeeping. |
| 34-12-2. | Definitions. | 34-12-12. | Ride operators; minimum age. |
| 34-12-3. | Consultation with persons knowledgeable in area of amusement rides; creation of committees. | 34-12-13. | Accident reports. |
| 34-12-4. | Powers of board [Repealed]. | 34-12-14. | Liability insurance, bond, cash, or security coverage. |
| 34-12-5. | Departmental formulation of standards and regulations for rides; related powers and duties. | 34-12-15. | Variances. |
| 34-12-6. | Licensing of private inspectors. | 34-12-16. | Applicability of chapter. |
| 34-12-7. | Application for permit to operate rides; operation prior to issuance of permit; certificate of inspection. | 34-12-17. | Use of existing rides; period for compliance. |
| 34-12-8. | Amusement ride inspection; issuance of certificate of inspection. | 34-12-18. | Order for temporary cessation; injunction; penalties. |
| 34-12-9. | Waiver of ride inspection requirement. | 34-12-19. | Right of owner or operator to deny entry to rides; inspector's right of access. |
| 34-12-10. | Issuance of permits. | 34-12-20. | Liability of state, department, or Commissioner. |
| | | 34-12-21. | Regulation of amusement rides by counties, municipalities, and other political subdivisions. |

Administrative rules and regulations. — Amusement ride safety, Official Compilation of the Rules and Regulations of the State of

Georgia, Department of Labor, Safety Engineering, Chapter 300-8-1.

RESEARCH REFERENCES

Am. Jur. 2d. — 27A Am. Jur. 2d, Entertainment and Sports Law, § 4 et seq. 42 Am. Jur. 2d, Inspection Laws, § 1 et seq. 51 Am. Jur. 2d, Licenses and Permits, § 1 et seq.

Am. Jur. Proof of Facts. — Dangerous or Defective Amusement Ride, 25 POF2d 613.

C.J.S. — 53 C.J.S., Licenses, § 1 et seq. 86 C.J.S., Theaters and Shows, § 1 et seq.

ALR. — Products liability: mechanical amusement rides and devices, 77 ALR4th 1152.

Liability for injury to customer or patron from amusement device maintained by store or shopping center for use by customers, 40 ALR5th 807.

34-12-1. Short title.

This chapter shall be known and may be cited as the “Amusement Ride Safety Act.” (Code 1981, § 34-12-1, enacted by Ga. L. 1985, p. 1453, § 1.)

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 1C Am. Jur. Pleading and Practice Forms, Amusements and Exhibitions, § 2.

34-12-2. Definitions.

As used in this chapter, the term:

(1) Reserved.

(2) “Amusement ride” means any mechanical device, other than those regulated by the Consumer Products Safety Commission, which carries or conveys passengers along, around, or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement, pleasure, thrills, or excitement. Such term shall not include any such device which is not permanently fixed to a site.

(3) “Authorized person” means a competent person experienced and instructed in the work to be performed who has been given the responsibility to perform his duty by the owner or his representative.

(3.1) “Certificate fee” means the fee charged by the department for a certificate to operate an amusement ride.

(4) “Certificate of inspection” means a certificate issued by a licensed inspector that an amusement ride meets all relevant provisions of this chapter and the standards and regulations adopted pursuant thereto.

(5) “Commissioner” means the Commissioner of Labor.

(6) “Department” means the Department of Labor, which is designated to enforce the provisions of this chapter and to formulate and enforce standards and regulations.

(7) “Licensed inspector” means a registered professional engineer or any other person who is found by the department to possess the requisite training and experience to perform competently the inspections required by this chapter and who is licensed by the department to perform inspections of amusement rides.

(8) “Operator” means a person or persons actually engaged in or directly controlling the operation of an amusement ride.

(9) “Owner” means a person, including the state or any of its subdivisions, who owns an amusement ride or, in the event that the amusement ride is leased, the lessee.

(10) “Permit” means a permit to operate an amusement ride issued to an owner by the department.

(11) “Permit fee” means the fee charged by the department for a permit to operate an amusement ride.

(12) “Standards and regulations” means those standards and regulations formulated and enforced by the department. (Code 1981,

§ 34-12-2, enacted by Ga. L. 1985, p. 1453, § 1; Ga. L. 1986, p. 330, § 1; Ga. L. 1995, p. 366, § 1; Ga. L. 2001, p. 873, § 18.)

Code Commission notes. — Pursuant to Code Section § 28-9-5, in 1987, “the” was inserted in paragraph (5).

OPINIONS OF THE ATTORNEY GENERAL

“Amusement ride” construed. — The Department of Labor is required to inspect triple-passenger push-button controlled rides, but not playground equipment such as

“kid mazes” and “ball crawls” which do not have a mechanical device. 1990 Op. Att’y Gen. No. 90-43.

34-12-3. Consultation with persons knowledgeable in area of amusement rides; creation of committees.

The Commissioner shall be authorized to consult with persons knowledgeable in the area of the amusement ride industry and to create committees composed of such consultants to assist the Commissioner in carrying out his or her duties under this chapter. (Code 1981, § 34-12-3, enacted by Ga. L. 1985, p. 1453, § 1; Ga. L. 1989, p. 443, § 3; Ga. L. 2001, p. 873, § 19.)

34-12-4. Powers of board.

Reserved. Repealed by Ga. L. 2001, p. 873, § 19, effective July 1, 2001.

Editor’s notes. — This Code section was based on Code 1981, § 34-12-4, enacted by Ga. L. 1985, p. 1453, § 1.

34-12-5. Departmental formulation of standards and regulations for rides; related powers and duties.

(a) The department shall formulate standards and regulations, or changes to such standards and regulations, for the safe assembly, disassembly, repair, maintenance, use, operation, and inspection of all amusement rides. The standards and regulations shall be reasonable and based upon generally accepted engineering standards, formulas, and practices pertinent to the industry. Formulation and promulgation of such standards and regulations shall be subject to Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.” It is recognized that risks presented to the general public by amusement rides which are frequently assembled and disassembled are different from those presented by amusement rides which are not frequently assembled and disassembled. Accordingly, the department is authorized to formulate different standards and regulations with regard to such differing classes of amusement rides.

(b) The department shall:

- (1) Enforce all standards and regulations;
- (2) License inspectors for authorization to inspect amusement rides;
- (3) Issue permits upon compliance with this chapter and such standards and regulations adopted pursuant to this chapter; and
- (4) Establish a fee schedule for the issuance of permits for amusement rides. (Code 1981, § 34-12-5, enacted by Ga. L. 1985, p. 1453, § 1; Ga. L. 2001, p. 873, § 20.)

34-12-6. Licensing of private inspectors.

The department may license such private inspectors as may be necessary to carry out the provisions of this chapter. (Code 1981, § 34-12-6, enacted by Ga. L. 1985, p. 1453, § 1.)

34-12-7. Application for permit to operate rides; operation prior to issuance of permit; certificate of inspection.

(a) No amusement ride shall be operated, except for purposes of testing and inspection, until a permit for its operation has been issued by the department. The owner of an amusement ride shall apply for a permit to the department on a form furnished by the department providing such information as the department may require.

(b) No such application shall be complete without including a certificate of inspection from a licensed inspector that the amusement ride meets all relevant provisions of this chapter and the standards and regulations adopted pursuant thereto. The cost of obtaining the certificate of inspection from a licensed inspector shall be borne by the owner or operator. (Code 1981, § 34-12-7, enacted by Ga. L. 1985, p. 1453, § 1.)

34-12-8. Amusement ride inspection; issuance of certificate of inspection.

(a) All amusement rides shall be inspected annually, and may be inspected more frequently, by a licensed inspector at the owner's or operator's expense. If the amusement ride meets all relevant provisions of this chapter and the standards and regulations adopted pursuant to this chapter, the licensed inspector shall provide to the owner or operator a certificate of inspection. All new amusement rides shall be inspected before commencing public operation.

(b) Amusement rides and attractions may be required to be inspected by an authorized person each time they are assembled or disassembled in accordance with regulations and standards established under this chapter. (Code 1981, § 34-12-8, enacted by Ga. L. 1985, p. 1453, § 1; Ga. L. 1986, p. 10, § 34.)

Code Commission notes. — Pursuant to chapter” was substituted for “hereto” in Code Section § 28-9-5, in 1986, “to this subsection (a).

34-12-9. Waiver of ride inspection requirement.

The department may waive the requirement of subsection (a) of Code Section 34-12-8 if the owner of an amusement ride gives satisfactory proof to the department that the amusement ride has passed an inspection conducted by a federal agency or by another state whose standards and regulations for the inspection of such an amusement ride are at least as stringent as those adopted pursuant to this chapter. (Code 1981, § 34-12-9, enacted by Ga. L. 1985, p. 1453, § 1; Ga. L. 1995, p. 366, § 2.)

34-12-10. Issuance of permits.

The department shall issue a permit to operate an amusement ride to the owner thereof upon successful completion of a safety inspection of the amusement ride conducted by a licensed inspector and upon receiving an application for permit with a certificate of insurance. The permit shall be valid for the calendar year in which issued. (Code 1981, § 34-12-10, enacted by Ga. L. 1985, p. 1453, § 1; Ga. L. 1995, p. 366, § 3.)

34-12-11. Owner recordkeeping.

The owner shall maintain up-to-date maintenance, inspection, and repair records between inspection periods for each amusement ride in accordance with such standards and regulations as are adopted pursuant to this chapter. Such records shall contain a copy of all inspection reports commencing with the last annual inspection, a description of all maintenance performed, and a description of any mechanical or structural failures or operational breakdowns and the types of actions taken to rectify these conditions. (Code 1981, § 34-12-11, enacted by Ga. L. 1985, p. 1453, § 1.)

34-12-12. Ride operators; minimum age.

No person shall be permitted to operate an amusement ride unless he is at least 16 years of age. An operator shall be in attendance at all times that an amusement ride is in operation and shall operate no more than one amusement ride at any given time. (Code 1981, § 34-12-12, enacted by Ga. L. 1985, p. 1453, § 1.)

34-12-13. Accident reports.

The owner of the amusement ride shall report to the department any accident resulting in a fatality or an injury requiring immediate inpatient overnight hospitalization incurred during the operation of any amusement

ride. The report shall be in writing, shall describe the nature of the occurrence and injury, and shall be mailed by first-class mail no later than the close of the next business day following the accident. Accidents resulting in a fatality shall also be reported immediately to the department in person or by phone in accordance with regulations adopted by the department. (Code 1981, § 34-12-13, enacted by Ga. L. 1985, p. 1453, § 1; Ga. L. 2001, p. 873, § 21.)

Code Commission notes. — Pursuant to Code Section § 28-9-5, in 1988, “inpatient” was substituted for “in-patient” in the first sentence.

34-12-14. Liability insurance, bond, cash, or security coverage.

(a) No person shall operate an amusement ride unless at the time there is in existence:

(1) A policy of insurance in an appropriate amount determined by regulation insuring the owner and operator (if an independent contractor) against liability for injury to persons arising out of the operation of the amusement ride;

(2) A bond in a like amount; provided, however, that the aggregate liability of the surety under such bond shall not exceed the face amount thereof; or

(3) Cash or other security acceptable to the department.

(b) Regulations under this chapter shall permit appropriate deductibles or self-insured retention amounts to such policies of insurance. The policy or bond shall be procured from one or more insurers or sureties acceptable to the department. (Code 1981, § 34-12-14, enacted by Ga. L. 1985, p. 1453, § 1; Ga. L. 1988, p. 1632, § 1.)

34-12-15. Variances.

If any person would incur practical difficulties or unnecessary hardships in complying with the standards and regulations adopted pursuant to this chapter, or if any person is aggrieved by any order issued by the department, the person may make a written application to the department stating his grounds and applying for a variance. The department may grant such a variance in the spirit of the provisions of this chapter with due regard to the public safety. The granting or denial of a variance by the department shall be in writing and shall describe the conditions under which the variance is granted or the reasons for denial. A record shall be kept of all variances granted by the department and such record shall be open to inspection by the public. (Code 1981, § 34-12-15, enacted by Ga. L. 1985, p. 1453, § 1.)

34-12-16. Applicability of chapter.

This chapter shall not apply to any single-passenger coin operated amusement ride on a stationary foundation or to playground equipment such as swings, seesaws, slides, jungle gyms, rider propelled merry-go-rounds, moonwalks, and live rides. (Code 1981, § 34-12-16, enacted by Ga. L. 1985, p. 1453, § 1; Ga. L. 1988, p. 1632, § 2.)

OPINIONS OF THE ATTORNEY GENERAL

Non-mechanical devices exempt. — The Department of Labor is required to inspect triple-passenger push-button controlled rides, but not playground equipment such as “kid mazes” and “ball crawls” which do not have a mechanical device. 1990 Op. Att’y Gen. No. 90-43.

34-12-17. Use of existing rides; period for compliance.

This chapter shall not be construed so as to prevent the use of any existing amusement ride found to be in a safe condition and to be in conformance with the standards and regulations adopted pursuant to this chapter. Owners of amusement rides in operation on or before the effective date of this chapter shall comply with the provisions of this chapter and the standards and regulations adopted pursuant to this chapter within six months after the adoption of said standards and regulations. (Code 1981, § 34-12-17, enacted by Ga. L. 1985, p. 1453, § 1.)

34-12-18. Order for temporary cessation; injunction; penalties.

(a) The Commissioner or his authorized representative may issue a written order for the temporary cessation of operation of an amusement ride if it has been determined after inspection to be hazardous or unsafe. Operations shall not resume until such conditions are corrected to the satisfaction of the Commissioner or his authorized representative.

(b) In the event that an owner or operator knowingly allows the operation of an amusement ride after the issuing of a temporary cessation, the Commissioner or his authorized representative may initiate in the superior court any action for an injunction or writ of mandamus upon the petition of the district attorney or Attorney General. An injunction, without bond, may be granted by the superior court to the Commissioner for the purpose of enforcing this chapter.

(c)(1) Any person, firm, partnership, or corporation violating the provisions of this chapter shall be guilty of a misdemeanor. Each day of violation shall constitute a separate offense.

(2) In addition to the penalty provisions in paragraph (1) of this subsection, the Commissioner shall have the power, after notice and

hearing, to levy civil penalties as prescribed in the rules and regulations of the department in an amount not to exceed \$5,000.00 upon any person, firm, partnership, or corporation failing to adhere to the requirements of this chapter and the rules and regulations promulgated under this chapter. The imposition of a penalty for a violation of this chapter or the rules and regulations promulgated under this chapter shall not excuse the violation or permit it to continue. (Code 1981, § 34-12-18, enacted by Ga. L. 1985, p. 1453, § 1; Ga. L. 1988, p. 1632, § 3; Ga. L. 1995, p. 366, § 4.)

Cross references. — Punishment for misdemeanors generally, § 17-10-3.

34-12-19. Right of owner or operator to deny entry to rides; inspector's right of access.

The owner or operator of an amusement ride may deny entry to a person to an amusement ride if in the owner's or operator's opinion the entry may jeopardize the safety of such person or the safety of any other person. Nothing in this Code section will permit an owner or operator to deny an inspector access to an amusement ride when such inspector is acting within the scope of his duties under this chapter. (Code 1981, § 34-12-19, enacted by Ga. L. 1985, p. 1453, § 1; Ga. L. 1986, p. 10, § 34.)

Code Commission notes. — Pursuant to § 28-9-5, in 1986, "Code" was inserted preceding "section" in the second sentence.

34-12-20. Liability of state, department, or Commissioner.

Neither this chapter nor any provision of this chapter shall be construed to place any liability on the State of Georgia, the department, or the Commissioner with respect to any claim by any person, firm, or corporation relating in any way whatsoever to amusement rides and any injury or damages arising therefrom. (Code 1981, § 34-12-20, enacted by Ga. L. 1985, p. 1453, § 1.)

34-12-21. Regulation of amusement rides by counties, municipalities, and other political subdivisions.

No county, municipality, or other political subdivision shall have the power to pass ordinances, resolutions, or other requirements regulating the construction, installation, inspection, maintenance, repair, or operation of amusement rides within the limits of such county, municipality, or other political subdivision. Any such ordinances, resolutions, or other requirements heretofore passed shall be void and of no effect; provided, however, that the provisions of this Code section shall not apply to local zoning ordinances or ordinances regulating location, siting requirements, or other

development standards or conditions relative to amusement rides or their time of operation or noise levels generated. Nothing in this chapter preempts the imposition of regulatory fees or occupation taxes imposed by counties and municipalities pursuant to Chapter 13 of Title 48. (Code 1981, § 34-12-21, enacted by Ga. L. 1995, p. 366, § 5.)

CHAPTER 13

CARNIVAL RIDE SAFETY

| Sec. | | Sec. | |
|-----------|--|-----------|---|
| 34-13-1. | Short title. | 34-13-14. | Liability insurance, bond, or other security required. |
| 34-13-2. | Definitions. | 34-13-15. | Variances from standards and regulations. |
| 34-13-3. | Authority to consult. | 34-13-16. | Exempted rides. |
| 34-13-4. | Powers of advisory board [Repealed]. | 34-13-17. | Existing rides. |
| 34-13-5. | Safety standards and regulations; licensing of inspectors; ride permits; fees. | 34-13-18. | Order for temporary cessation; injunction; penalties. |
| 34-13-6. | Licensing of private inspectors. | 34-13-19. | Owner or operator denying individual entry to ride. |
| 34-13-7. | Permit required; application. | 34-13-20. | Posting of age, size, and weight requirements for rides. |
| 34-13-8. | Inspections. | 34-13-21. | Itinerant carnival rides to be continuously registered with in-state agent. |
| 34-13-9. | Waiver of inspection for rides inspected by other entity. | 34-13-22. | State liability not created. |
| 34-13-10. | Issuance of permit. | 34-13-23. | Regulation of carnival rides by counties, municipalities, and other political subdivisions. |
| 34-13-11. | Maintenance, inspection, and repair records. | | |
| 34-13-12. | Ride operators; minimum standards for operation of rides. | | |
| 34-13-13. | Accident reports. | | |

Administrative rules and regulations. — Georgia, Georgia Department Labor, Safety Carnival ride safety act, Official Compilation of the Rules and Regulations of the State of Engineering, Chapter 300-8-2.

RESEARCH REFERENCES

Am. Jur. 2d. — 27A Am. Jur. 2d, Entertainment and Sports Law, § 4 et seq. 42 Am. Jur. 2d, Inspection Laws, § 1 et seq. 51 Am. Jur. 2d, Licenses and Permits, § 1 et seq.

C.J.S. — 53 C.J.S., Licenses, § 1 et seq. 86 C.J.S., Theaters and Shows, § 1 et seq.

ALR. — Products liability: mechanical amusement rides and devices, 77 ALR4th 1152.

34-13-1. Short title.

This chapter shall be known and may be cited as the “Carnival Ride Safety Act.” (Code 1981, § 34-13-1, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1990, p. 1945, § 1.)

34-13-2. Definitions.

As used in this chapter, the term:

- (1) Reserved.

(2) “Authorized person” means a competent person experienced and instructed in the work to be performed who has been given the responsibility to perform his duty by the owner or the owner’s representative.

(3) “Carnival ride” means any mechanical device, other than amusement rides regulated under Chapter 12 of this title, known as the “Amusement Ride Safety Act,” which carries or conveys passengers along, around, or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement, pleasure, thrills, or excitement. Such term shall not include any such device which is permanently fixed to a site.

(3.1) “Certificate fee” means the fee charged by the department for a certificate to operate a carnival ride.

(4) “Certificate of inspection” means a certificate issued by a licensed inspector that a carnival ride meets all relevant provisions of this chapter and the standards and regulations adopted pursuant thereto.

(5) “Commissioner” means the Commissioner of Labor.

(6) “Department” means the Department of Labor, which is designated to enforce the provisions of this chapter and to formulate and enforce standards and regulations.

(7) “Licensed inspector” means a registered professional engineer or any other person who is found by the department to possess the requisite training and experience to perform competently the inspections required by this chapter and who is licensed by the department to perform inspections of carnival rides.

(8) “Operator” means a person or persons actually engaged in or directly controlling the operation of a carnival ride.

(9) “Owner” means a person, including the state or any of its subdivisions, who owns a carnival ride or, in the event that the carnival ride is leased, the lessee.

(10) “Permit” means a permit to operate a carnival ride issued to an owner by the department.

(11) “Permit fee” means the fee charged by the department for a permit to operate a carnival ride.

(12) “Standards and regulations” means those standards and regulations formulated and enforced by the department. (Code 1981, § 34-13-2, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1990, p. 1945, § 1; Ga. L. 1992, p. 6, § 34; Ga. L. 1995, p. 366, § 6; Ga. L. 2001, p. 873, § 22.)

Code Commission notes. — Pursuant to Code Section § 28-9-5, in 1987, “the” was inserted in paragraph (5).

34-13-3. Authority to consult.

The Commissioner shall be authorized to consult with persons knowledgeable in the area of the carnival ride industry and to create committees composed of such consultants to assist the Commissioner in carrying out his or her duties under this chapter. (Code 1981, § 34-13-3, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1989, p. 443, § 4; Ga. L. 1990, p. 1945, § 1; Ga. L. 2001, p. 873, § 23.)

34-13-4. Powers of advisory board.

Reserved. Repealed by Ga. L. 2001, p. 873, § 23, effective July 1, 2001.

Editor’s notes. — This Code section was based on Code 1981, § 34-13-4, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1990, p. 1945, § 1.

34-13-5. Safety standards and regulations; licensing of inspectors; ride permits; fees.

(a) The department shall formulate standards and regulations, or changes to such standards and regulations, for the safe assembly, disassembly, repair, maintenance, use, operation, and inspection of all carnival rides. The standards and regulations shall be reasonable and based upon generally accepted engineering standards, formulas, and practices pertinent to the industry. Formulation and promulgation of such standards and regulations shall be subject to Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.” No rule, regulation, or standard promulgated or adopted pursuant to this chapter shall become effective prior to January 1, 1987.

(b) The department shall:

- (1) Enforce all standards and regulations;
- (2) License inspectors for authorization to inspect carnival rides; and
- (3) Issue permits upon compliance with this chapter and such standards and regulations adopted pursuant to this chapter.

(c) The owner or operator of a carnival ride required to be inspected shall pay fees as prescribed in rules and regulations promulgated by the Commissioner. The chief inspector shall transfer all fees so received to the general fund of the state treasury. All funds so deposited in the state treasury are authorized to be appropriated by the General Assembly to the Commissioner of Labor. (Code 1981, § 34-13-5, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1990, p. 1945, § 1; Ga. L. 1991, p. 258, § 5; Ga. L. 2001, p. 873, § 24.)

34-13-6. Licensing of private inspectors.

The department may license such private inspectors as may be necessary to carry out the provisions of this chapter. (Code 1981, § 34-13-6, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1990, p. 1945, § 1.)

34-13-7. Permit required; application.

No carnival ride shall be operated in any calendar year, except for purposes of testing and inspection, until a permit for its operation has been issued by the department. The owner of a carnival ride shall apply for a permit to the department on a form furnished by the department, providing such information as the department may require. (Code 1981, § 34-13-7, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1988, p. 950, § 1; Ga. L. 1990, p. 1945, § 1.)

34-13-8. Inspections.

All carnival rides and attractions shall be inspected annually and may be inspected more frequently by the Office of Safety Engineering of the department at the owner's or operator's expense. If the carnival ride meets all relevant provisions of this chapter and the standards and regulations adopted pursuant to this chapter, the licensed inspector shall provide to the owner or operator a certificate of inspection. All new carnival rides shall be inspected before commencing public operation. (Code 1981, § 34-13-8, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1990, p. 1945, § 1; Ga. L. 1991, p. 258, § 6.)

Code Commission notes. — Pursuant to Code Section § 28-9-5, in 1986, in the second sentence "to this chapter" was substituted for "hereto".

Pursuant to Code Section § 28-9-5, in 1988, "owner's" was substituted for "owner" in the first sentence.

34-13-9. Waiver of inspection for rides inspected by other entity.

The department may waive the requirement of Code Section 34-13-8 if the owner of a carnival ride gives satisfactory proof to the department that the carnival ride has passed an inspection conducted by a federal agency or by another state whose standards and regulations for the inspection of such a carnival ride are at least as stringent as those adopted pursuant to this chapter. (Code 1981, § 34-13-9, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1990, p. 1945, § 1; Ga. L. 1995, p. 366, § 7.)

34-13-10. Issuance of permit.

The department shall issue a permit to operate a carnival ride to the owner thereof upon successful completion of a safety inspection by a

licensed inspector, upon completion by the owner of the application for a permit, and upon presentation of a certificate of inspection or waiver thereof by the department. The permit shall be valid for the calendar year in which issued. (Code 1981, § 34-13-10, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1988, p. 950, § 2; Ga. L. 1990, p. 1945, § 1.)

Code Commission notes. — Pursuant to Code Section § 28-9-5, in 1988, “upon” was inserted preceding “presentation” near the end of the first sentence.

34-13-11. Maintenance, inspection, and repair records.

The owner shall maintain up-to-date maintenance, inspection, and repair records between inspection periods for each carnival ride in accordance with such standards and regulations as are adopted pursuant to this chapter. Such records shall contain a copy of all inspection reports commencing with the last annual inspection, a description of all maintenance performed, and a description of any mechanical or structural failures or operational breakdowns and the types of actions taken to rectify these conditions. (Code 1981, § 34-13-11, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1990, p. 1945, § 1.)

34-13-12. Ride operators; minimum standards for operation of rides.

(a) No person shall be permitted to operate a carnival ride unless he is at least 16 years of age. An operator shall be in attendance at all times that a carnival ride is in operation and shall operate no more than one carnival ride at any given time.

(b) No carnival ride shall be operated at standards below those recommended by the manufacturer of such carnival ride or below the standards adopted or variants approved by the department, whichever is greater. (Code 1981, § 34-13-12, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1990, p. 1945, § 1.)

34-13-13. Accident reports.

The owner of the carnival ride shall report to the department any accident incurred during the operation of any carnival ride resulting in a fatality or an injury requiring medical attention from a licensed medical facility. The report shall be in writing, shall describe the nature of the occurrence and injury, and shall be delivered in person or mailed by first-class mail no later than the close of the next business day following the accident. Accidents resulting in a fatality shall also be reported immediately to the department in person or by phone in accordance with regulations adopted by the department. (Code 1981, § 34-13-13, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1988, p. 950, § 3; Ga. L. 1990, p. 1945, § 1; Ga. L. 2001, p. 873, § 25.)

34-13-14. Liability insurance, bond, or other security required.

(a) No person shall operate a carnival ride unless at the time there is in existence:

(1) A policy of insurance in an amount not less than \$1 million (if an independent contractor) against liability for injury to persons arising out of the operation of the carnival ride;

(2) A bond in a like amount; provided, however, that the aggregate liability of the surety under such bond shall not exceed the face amount thereof; or

(3) Cash or other security acceptable to the department.

(b) Regulations under this chapter shall permit appropriate deductibles or self-insured retention amounts to such policies of insurance. The policy or bond shall be procured from one or more insurers or sureties acceptable to the department. (Code 1981, § 34-13-14, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1988, p. 950, § 4; Ga. L. 1990, p. 1945, § 1; Ga. L. 1991, p. 94, § 34.)

34-13-15. Variances from standards and regulations.

If any person would incur practical difficulties or unnecessary hardships in complying with the standards and regulations adopted pursuant to this chapter, or if any person is aggrieved by any order issued by the department, the person may make a written application to the department stating his grounds and applying for a variance. The department may grant such a variance in the spirit of the provisions of this chapter with due regard to the public safety. The granting or denial of a variance by the department shall be in writing and shall describe the conditions under which the variance is granted or the reasons for denial. A record shall be kept of all variances granted by the department and such record shall be open to inspection by the public. (Code 1981, § 34-13-15, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1990, p. 1945, § 1.)

34-13-16. Exempted rides.

This chapter shall not apply to any single-passenger coin operated carnival ride on a stationary foundation or to playground equipment such as swings, seesaws, slides, jungle gyms, rider propelled merry-go-rounds, moonwalks, and live rides. (Code 1981, § 34-13-16, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1988, p. 950, § 5; Ga. L. 1990, p. 1945, § 1.)

34-13-17. Existing rides.

This chapter shall not be construed so as to prevent the use of any existing carnival ride found to be in a safe condition and to be in

conformance with the standards and regulations adopted pursuant to this chapter. Owners of carnival rides in operation on or before March 26, 1986, shall comply with the provisions of this chapter and the standards and regulations adopted pursuant to this chapter within six months after the adoption of said standards and regulations. (Code 1981, § 34-13-17, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1990, p. 1945, § 1.)

Code Commission notes. — Pursuant to 1986,” was substituted for “the effective date Code Section § 28-9-5, in 1986, “March 26, of this chapter” in the second sentence.

34-13-18. Order for temporary cessation; injunction; penalties.

(a) The Commissioner or his authorized representative may issue a written order for the temporary cessation of operation of a carnival ride if it has been determined after inspection to be hazardous or unsafe. Operations shall not resume until such conditions are corrected to the satisfaction of the Commissioner or his authorized representative.

(b) In the event that an owner or operator knowingly allows the operations of a carnival ride after the issuing of a temporary cessation, the Commissioner or his authorized representative may initiate in the superior court any action for an injunction or writ of mandamus upon the petition of the district attorney or Attorney General. An injunction, without bond, may be granted by the superior court to the Commissioner for the purpose of enforcing this chapter.

(c)(1) Any person, firm, partnership, or corporation violating the provisions of this chapter shall be guilty of a misdemeanor. Each day of violation shall constitute a separate offense.

(2) In addition to the penalty provisions in paragraph (1) of this subsection, the Commissioner shall have the power, after notice and hearing, to levy civil penalties as prescribed in the rules and regulations of the department in an amount not to exceed \$5,000.00 upon any person, firm, partnership, or corporation failing to adhere to the requirements of this chapter and the rules and regulations promulgated under this chapter. The imposition of a penalty for a violation of this chapter or the rules and regulations promulgated under this chapter shall not excuse the violation or permit it to continue. (Code 1981, § 34-13-18, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1988, p. 950, § 6; Ga. L. 1990, p. 1945, § 1; Ga. L. 1995, p. 366, § 8.)

Cross references. — Punishment for misdemeanors generally, § 17-10-3.

34-13-19. Owner or operator denying individual entry to ride.

The owner or operator of a carnival ride may deny entry to a person to a carnival ride if in the owner's or operator's opinion the entry may

jeopardize the safety of such person or the safety of any other person. Nothing in this Code section will permit an owner or operator to deny an inspector access to a carnival ride when such inspector is acting within the scope of his duties under this chapter. (Code 1981, § 34-13-19, enacted by Ga. L. 1986, p. 330, § 2; Ga. L. 1990, p. 1945, § 1.)

34-13-20. Posting of age, size, and weight requirements for rides.

(a) The owner or operator of a carnival ride shall post a clearly visible sign at the location of each ride and at the location of tickets sales for each ride which states any age, weight, or height requirements of the ride which are necessary as a safeguard against injury.

(b) It shall be unlawful for any owner or operator to permit entry to a carnival ride to any person who does not meet the posted age, size, and weight requirements for such ride. (Code 1981, § 34-13-20, enacted by Ga. L. 1990, p. 1945, § 1.)

Code Commission notes. — Pursuant to § 28-9-5, in 1990, a misspelling of the word “requirements” in subsection (b) was corrected.

Editor’s notes. — Ga. L. 1990, p. 1945, § 1, designated the former provisions of this Code section as Code Section 34-13-22.

34-13-21. Itinerant carnival rides to be continuously registered with in-state agent.

The owner of any itinerant carnival ride which is located within the state must continuously maintain in this state a registered agent of record, which agent may be an individual who resides in the state and whose business address is identical with the address of the owner’s required office. (Code 1981, § 34-13-21, enacted by Ga. L. 1990, p. 1945, § 1.)

34-13-22. State liability not created.

Neither this chapter nor any provision of this chapter shall be construed to place any liability on the State of Georgia, the department, or the Commissioner with respect to any claim by any person, firm, or corporation relating in any way whatsoever to carnival rides and any injury or damages arising therefrom. (Code 1981, § 34-13-20, enacted by Ga. L. 1986, p. 330, § 2; Code 1981, § 34-13-22, as redesignated by Ga. L. 1990, p. 1945, § 1.)

Editor’s notes. — Ga. L. 1990, p. 1945, § 1 redesignated the former provisions of Code Section 34-13-20 as this Code section.

34-13-23. Regulation of carnival rides by counties, municipalities, and other political subdivisions.

No county, municipality, or other political subdivision shall have the power to pass ordinances, resolutions, or other requirements regulating the construction, installation, inspection, maintenance, repair, or operation of carnival rides within the limits of such county, municipality, or other political subdivision. Any such ordinances, resolutions, or other requirements heretofore passed shall be void and of no effect; provided, however, that the provisions of this Code section shall not apply to local zoning ordinances or ordinances regulating location, siting requirements, or other development standards or conditions relative to carnival rides or their time of operation or noise levels generated. Nothing in this chapter preempts the imposition of regulatory fees or occupation taxes imposed by counties and municipalities pursuant to Chapter 13 of Title 48. (Code 1981, § 34-13-23, enacted by Ga. L. 1995, p. 366, § 9.)

CHAPTER 14

GOVERNOR'S EMPLOYMENT AND TRAINING COUNCIL

Sec.

- 34-14-1. Creation of council; funding.
34-14-2. Powers and duties of council;
authority to consult.

34-14-1. Creation of council; funding.

(a) Pursuant to the federal Job Training Partnership Act, P.L. 97-300, as amended, particularly by the federal Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, there is created the Governor's Employment and Training Council, referred to in this chapter as the council. The council shall conform to the requirements of federal law, shall be appointed by the Governor, and shall serve at the pleasure of the Governor.

(b) The council shall be funded as provided by federal law and shall have personnel and appropriations as are provided in the state general appropriations Act. (Code 1981, § 34-14-1, enacted by Ga. L. 1989, p. 443, § 5.)

Code Commission notes. — Pursuant to Code Section § 28-9-5, in 1989, the subsection (a) designation was added.

U.S. Code. — The federal Job Training Partnership Act, referred to in subsection

(a), appears as 29 U.S.C. § 1501 et seq. The federal Omnibus Trade and Competitiveness Act of 1988, also referred to in subsection (a), appears as various sections throughout the United States Code.

34-14-2. Powers and duties of council; authority to consult.

(a) The council shall have such powers and duties as provided by federal law and state law.

(b) When carrying out duties of an advisory nature to assist the Commissioner of Labor pursuant to state law, the council shall be authorized to consult with and form committees with persons knowledgeable in the subject matter at issue in order to carry out effectively its duties. Such consultants shall serve without compensation but shall be reimbursed for travel and other reasonable and necessary expenses incurred while attending meetings of or on behalf of the council, provided such travel and other expenses are approved by the Commissioner of Labor. (Code 1981, § 34-14-2, enacted by Ga. L. 1989, p. 443, § 5.)

CHAPTER 15

TRANSFER OF DIVISION OF REHABILITATION SERVICES TO
DEPARTMENT OF LABOR

| Article 1 | | Sec. | |
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| General Provisions | | | |
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| 34-15-2. | July transfer of Division of Rehabilitation Services to the Department of Labor. | 34-15-16. | Authorization to retain title; authorization to sell; surplus; receipts; deposit of funds received. |
| 34-15-3. | Duties of the director of the Division of Rehabilitation Services of the Department of Labor. | 34-15-17. | Confidentiality; penalty. |
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Article 2

Vending Facilities on State Property

| | |
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ARTICLE 1

GENERAL PROVISIONS

34-15-1. Definitions.

As used in this chapter, the term or terms:

(1) “Blind person” means a person who has:

(A) Not more than 20/200 central visual acuity in the better eye after correction; or

(B) An equally disabling loss of the visual field.

(2) “Commissioner” means the Commissioner of Labor.

(3) “Department” means the Department of Labor.

(4) “Director” means the official of the division who is charged with the administration of its functions under this chapter.

(5) "Disability to employment" means a physical or mental condition which constitutes, contributes to, or, if not corrected, will probably result in an impairment of occupational performance.

(6) "Division" means the Division of Rehabilitation Services of the Department of Labor.

(7) "Occupational license" means any license, permit, or other written authority required by any governmental unit to be obtained in order to engage in an occupation.

(8) "Person with disabilities" means an individual having a physical or mental impairment that substantially limits one or more of the major life activities.

(9) "Prosthetic appliance" means any artificial device necessary to support or take the place of a part of the body or to increase the acuity of a sense organ.

(10) "Regulations" means regulations made by the Commissioner and promulgated in the manner prescribed by law.

(11) "Rehabilitation center" means a facility operated for the purpose of assisting in the rehabilitation of persons with disabilities which provides one or more of the following types of services:

(A) Testing, fitting, or training in the use of prosthetic devices;

(B) Prevocational or conditioning therapy;

(C) Physical, corrective, or occupational therapy; or

(D) Adjustment training or evaluation or control of special disabilities; or a facility in which a coordinated approach is made to the physical, mental, and vocational evaluation of persons with disabilities and an integrated program of physical restoration and relating training is provided under competent professional supervision and direction.

(12) "Rehabilitation training" means all necessary training provided to a person with disabilities to compensate for his or her disability to employment, including, but not limited to, manual preconditioning, relating, vocational, and supplementary training and training provided for the purpose of developing occupational skills and capacities.

(13) "Vocational rehabilitation" and "vocational rehabilitation services" mean any service, provided directly or through public or private instrumentalities, found by the director to be necessary to compensate a person with disabilities for his or her disability to employment and to enable such individual to engage in a remunerative occupation.

(14) "Workshop" means a place where any manufacture or handwork is carried on and which is operated for the primary purpose of providing

rehabilitative activities, including the use of monetary rewards as an incentive practice for persons with disabilities unable to engage in the competitive labor market. Persons receiving services in workshops shall not be considered as employees of the state for workers' compensation, retirement, or any other purposes. (Code 1981, § 34-15-1, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-2. July transfer of Division of Rehabilitation Services to the Department of Labor.

(a) The Division of Rehabilitation Services within the Department of Human Resources, including the disability adjudication section and the Roosevelt Warm Springs Institute for Rehabilitation, is transferred to the Department of Labor on July 1, 2001, and that division shall become the Division of Rehabilitation Services of the Department of Labor on July 1, 2001. The functions, duties, programs, institutions, and authority of the Division of Rehabilitation Services which were vested in the Department of Human Resources on June 30, 2001, are vested in the Department of Labor effective July 1, 2001. The division shall be administered by a director appointed by the Commissioner. The policy-making functions which were vested in the Board of Human Resources or the Department of Human Resources pertaining to the Division of Rehabilitation Services are vested in the Commissioner of Labor effective July 1, 2001.

(b) The Department of Labor shall, from July 1, 2001, assume possession and control of all records, papers, equipment, supplies, office space, and all other tangible property possessed and controlled by the Department of Human Resources as of June 30, 2001, in the Department of Human Resources' administration of the Division of Rehabilitation Services. All funds attributable to the Division of Rehabilitation Services and its programs and institutions from state, federal, and any other public or private source, shall be transferred to the Department of Labor on July 1, 2001.

(c) The Department of Human Resources shall calculate, in consultation with the Department of Labor, the amount of all funds of or attributable to the Division of Rehabilitation Services and its programs and institutions from any source that are used to provide administrative or other services within the Department of Human Resources, including funds from the disability adjudication section, the cost allocation system, and any indirect costs funding from the federal government or any other source. The amount calculated shall be transferred to the Department of Labor on July 1, 2001. Any changes or amendments made to the structure or placement of division programs and institutions, the allocation and expenditure of division funds, division rules, regulations, policies and procedures, or the administrative orders of the Department of Human Resources pertaining to the division, between May 1, 2000, and July 1, 2001, shall be made in consultation with the Commissioner of Labor. In addition, on and after May

1, 2000, the Department of Human Resources shall make available to the Department of Labor all records and information of the Department of Human Resources and the Division of Rehabilitation Services which relate to the functions, duties, and administration of the division, to assist in the orderly transfer of the division to the Department of Labor.

(d) All officers, employees, and agents of the Division of Rehabilitation Services who, on June 30, 2001, are engaged in the performance of a function or duty which shall be vested in the Division of Rehabilitation Services of the Department of Labor on July 1, 2001, by this chapter, shall be automatically transferred to the Department of Labor on July 1, 2001. An equivalent number of positions or funds of the Department of Human Resources which provide administrative support to the Division of Rehabilitation Services shall be transferred to the Department of Labor on July 1, 2001. Such persons shall be subject to the employment practices and policies of the Department of Labor on and after July 1, 2001, but consistent with the compensation and benefits of other employees of that department holding positions substantially the same as the transferred employees, the compensation and benefits of such transferred employees shall not be reduced. Employees who are subject to the State Merit System of Personnel Administration and who are transferred to the Division of Rehabilitation Services of the Department of Labor shall retain all existing rights under the State Merit System of Personnel Administration. Retirement rights of such transferred employees existing under the Employees' Retirement System of Georgia or other public retirement systems on June 30, 2001, shall not be impaired or interrupted by the transfer of such employees, and membership in any such retirement system shall continue in the same status possessed by the transferred employees on June 30, 2001. Accrued annual and sick leave shall be retained by said employees as employees of the Department of Labor. The Department of Human Resources shall be responsible for payment of the accrued Fair Labor Standards Act compensatory time possessed by said employees. Such accrued compensatory time shall be used by or paid to said employees prior to July 1, 2001.

(e)(1) The Division of Rehabilitation Services of the Department of Labor is the designated state unit for the vocational rehabilitation program.

(2) The Division of Rehabilitation Services of the Department of Labor shall conform to federal standards in all respects necessary for receiving federal grants and the Commissioner of the Department of Labor is authorized and empowered to effect such changes as may, from time to time, be necessary in order to comply with such standards.

(3) The Division of Rehabilitation Services of the Department of Labor is authorized to employ, on a full or part-time basis, such medical, psychiatric, social work, supervisory, institutional, and other professional personnel and such clerical and other employees as may be necessary to

discharge the duties of the division under this chapter. The division is also authorized to contract for such professional services as may be necessary.

(4) Classified employees of the Division of Rehabilitation Services of the Department of Labor under this chapter shall in all instances be employed and dismissed in accordance with rules and regulations of the State Merit System of Personnel Administration.

(5) All personnel of the Division of Rehabilitation Services of the Department of Labor are authorized to be members of the Employees' Retirement System of Georgia as provided in Chapter 2 of Title 47. All rights, credits, and funds in that retirement system which are possessed by state personnel transferred by provisions of this chapter to the Department of Labor, or otherwise had by persons at the time of employment with that department, are continued and preserved, it being the intention of the General Assembly that such persons shall not lose any rights, credits, or funds to which they may be entitled prior to becoming employees of the Division of Rehabilitation Services of the Department of Labor.

(f) The Department of Labor shall succeed to all rules, regulations, policies, procedures, and administrative orders of the Department of Human Resources which are in effect on June 30, 2001, and which relate to the functions of the Division of Rehabilitation Services. Such rules, regulations, policies, procedures, and administrative orders shall remain in effect until amended, repealed, superseded, or nullified by proper authority or as otherwise provided by law.

(g) The rights, privileges, entitlements, and duties of parties to contracts, leases, agreements, and other transactions entered into before July 1, 2001, by the Department of Human Resources or the Division of Rehabilitation Services pertaining to the Division of Rehabilitation Services transferred to the Department of Labor by this chapter shall continue to exist; and none of these rights, privileges, entitlements, and duties are impaired or diminished by reason of the transfer of the functions to the Department of Labor. In all such instances, the Department of Labor shall be substituted for the Department of Human Resources or the Division of Rehabilitation Services, and the Department of Labor shall succeed to the rights and duties under such contracts, leases, agreements, and other transactions.

(h) The Division of Rehabilitation Services of the Department of Labor shall conform all service delivery regions to the state service delivery regions provided in subsection (a) of Code Section 50-4-7. (Code 1981, § 34-15-2, enacted by Ga. L. 2000, p. 1137, § 1.)

Code Commission notes. — Pursuant to subsection becomes effective” and “May 1, Code Section 28-9-5, in 2000 and 2001, “May 2000,” was substituted for “this subsection 1, 2000,” was substituted for “the date this becomes effective,” in subsection (c).

34-15-3. Duties of the director of the Division of Rehabilitation Services of the Department of Labor.

In carrying out his or her duties under this chapter, the director of the Division of Rehabilitation Services of the Department of Labor:

(1) Shall, with the approval of the Commissioner, prepare such regulations for promulgation by the Commissioner as he or she finds necessary to carry out the purposes of this chapter;

(2) Shall, with the approval of the Commissioner, prepare such policies and procedures as he or she finds necessary for the purposes of this chapter and establish appropriate subordinate administrative units within the division;

(3) Shall recommend to the Commissioner for appointment such personnel as he or she deems necessary for the efficient performance of the functions of the division;

(4) Shall prepare and submit to the Commissioner annual reports of activities and expenditures and, prior to each regular session of the General Assembly, estimates of sums required for carrying out this chapter and estimates of the amounts to be made available for this purpose from all sources;

(5) Shall make certification for disbursement, in accordance with regulations, of funds available for carrying out the purposes of this chapter;

(6) May, with the approval of the Commissioner, delegate to any officer or employee of the division such of his or her powers and duties, except the making of regulations and the appointment of personnel, as he or she finds necessary to carry out the purposes of this chapter; and

(7) Is designated as the administrator of a program provided under Section 221 of the federal Social Security Act, relating to disability adjudication services. The director shall receive, notwithstanding any other provision of law and in addition to his or her regular compensation, such compensation and allowance as may be augmented from grants by the appropriate federal agency in such amount as is determined by the federal agency to be commensurate with the duties imposed by Section 221 of the federal Social Security Act. (Code 1981, § 34-15-3, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-4. Provision of services to persons with disabilities.

The department, through the division, shall provide the services authorized by this chapter to persons with disabilities determined to be eligible therefor; and, in carrying out the purposes of this chapter, the division is authorized, among other things:

(1) To cooperate with other departments, agencies, and institutions, both public and private, in providing the services authorized by this chapter to persons with disabilities; in studying the problems involved therein; and in establishing, developing, and providing, in conformity with the purposes of this chapter, such programs, facilities, and services as may be necessary or desirable;

(2) To enter into reciprocal agreements with other states to provide for the services authorized by this chapter to residents of the state concerned;

(3) To conduct research and compile statistics relating to the provision of services or the need of services by persons with disabilities;

(4) To license blind persons or other persons with disabilities to operate vending facilities under its supervision and control, subject to the terms and conditions provided in regulations, policies, and procedures issued pursuant to paragraphs (1) and (2) of Code Section 34-15-3, on:

(A) State property;

(B) County or municipal property;

(C) Federal property, pursuant to delegation of authority under the Randolph-Sheppard Act (20 U.S. Code, Section 107b) (49 Stat. 1559) and any amendment thereto or any act of Congress relating to this subject; and

(D) Private property; and

(5) To provide for the establishment, supervision, and control of suitable business enterprises to be operated by persons with disabilities. (Code 1981, § 34-15-4, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-5. Authorization to utilize funds.

The Division of Rehabilitation Services is authorized to utilize funds made available from appropriations by Congress, by gifts or grants from private sources, by appropriations of the General Assembly, or by transfer of funds from other state departments for the purpose of establishing and operating rehabilitation centers and workshops. (Code 1981, § 34-15-5, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-6. Cooperation to carry out the purposes of federal statutes.

The department, through the division, is empowered and directed to cooperate, pursuant to agreements with the federal government, in carrying out the purposes of any federal statutes pertaining to the purposes of this chapter. The department is authorized to adopt such methods of administration as are found by the federal government to be necessary for

the proper and efficient operation of such agreements and to comply with such conditions as may be necessary to secure the full benefits of such federal statutes and appropriations, to administer any legislation pursuant thereto enacted by this state, to direct the disbursement and administer the use of all funds provided by the federal government or this state for the purposes of this chapter, and to do all things necessary to ensure the vocational rehabilitation of persons with disabilities. (Code 1981, § 34-15-6, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-7. Office of Treasury and Fiscal Services designated custodian of federal moneys.

The Office of Treasury and Fiscal Services is designated as custodian of all moneys received from the federal government for the purpose of carrying out any federal statutes pertaining to the purpose of this chapter. The Office of Treasury and Fiscal Services shall make disbursements from such funds and all state funds available for such purposes, upon certification in the manner provided in paragraph (5) of Code Section 34-15-3. (Code 1981, § 34-15-7, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-8. Budget estimates.

Budget estimates of the amount of appropriations needed each fiscal year for vocational rehabilitation services and for the administration of the programs under this chapter shall be submitted by the director to the Commissioner and, upon approval by the Commissioner, shall be included in the estimates made by the Commissioner to the Office of Planning and Budget. In the event federal funds are available to the state for vocational rehabilitation purposes, the Division of Rehabilitation Services is authorized to comply with such requirements as may be necessary to obtain said federal funds in the maximum amount and most advantageous proportion possible insofar as this may be done without violating other provisions of the state law and Constitution. In the event Congress fails in any year to appropriate funds for grants-in-aid to the state for vocational rehabilitation purposes, the Commissioner shall include as a part of his or her budget a request for adequate state funds for vocational rehabilitation purposes. (Code 1981, § 34-15-8, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-9. Accepting and use of gifts.

The director is authorized and empowered, with the approval of the Commissioner, to accept and use gifts made unconditionally, by will or otherwise, for carrying out the purposes of this chapter. Gifts made under such conditions as are proper and consistent with this chapter may be so accepted and shall be held, invested, reinvested, and used in accordance with the conditions of the gift. (Code 1981, § 34-15-9, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-10. Residency requirement; financial need.

(a) Vocational rehabilitation services shall be provided to any qualified individual who is a bona fide resident of the state.

(b) The financial need of eligible persons with disabilities will be considered in the provision of vocational rehabilitation services to the extent allowed by federal or other state law. (Code 1981, § 34-15-10, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-11. Independent living program.

The Division of Rehabilitation Services of the Department of Labor is the designated state unit for the independent living program. The independent living program is authorized to provide or contract for the provision of such services as may be needed to enable persons with disabilities to attain the maximum degree of independent living. The powers delegated and authorized in this Code section for the division shall be in addition to those previously authorized by any other law. The department is authorized to cooperate with any federal agency in the administration of such a program. (Code 1981, § 34-15-11, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-12. Entitlement to hearing if aggrieved.

Any individual applying for or receiving vocational rehabilitation services who is aggrieved by any action or inaction of the division shall be entitled, in accordance with regulations, to a hearing in accordance with Chapter 13 of Title 50, the “Georgia Administrative Procedure Act,” and in accordance with applicable federal laws and regulations. (Code 1981, § 34-15-12, enacted by Ga. L. 2000, p. 1137, § 1.)

Code Commission notes. — Pursuant to inserted following “Georgia Administrative Code Section 28-9-5, in 2000, a comma was Procedure Act”.

34-15-13. Rights not transferable; exempt from creditors.

Any rights of persons with disabilities to maintenance under this chapter shall not be transferable or assignable at law or in equity and shall be exempt from the claims of creditors. (Code 1981, § 34-15-13, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-14. Coverage by a hospitalization or medical insurance policy.

Where a person with disabilities who receives vocational rehabilitation services is covered by a hospitalization or medical insurance policy, the Division of Rehabilitation Services shall be subrogated to the rights of such person with disabilities to recover in an amount not to exceed the cost of

vocational rehabilitation services rendered by the Division of Rehabilitation Services, exclusive of those services for which eligibility is not predicated on the need for financial assistance. Where the person with disabilities receives vocational rehabilitation services without disclosing that he or she is covered by a hospitalization or medical insurance policy, he or she shall be liable therefor to the Division of Rehabilitation Services in an amount not to exceed the cost of rehabilitation services rendered, exclusive of those services for which eligibility is not predicated on the need for financial assistance, or in an amount not to exceed the insurance reimbursement received, whichever is the lesser. (Code 1981, § 34-15-14, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-15. Lien upon causes of actions; procedure for perfecting lien; notice; fee; releases and covenants not to sue.

Where a person with disabilities who receives vocational rehabilitation services is entitled to recover damages for said injuries, the Division of Rehabilitation Services shall have a lien, in an amount not to exceed the cost of rehabilitation services rendered, upon any and all causes of action accruing to the individual to whom such services were furnished, or to the legal representative of such individual, on account of injuries giving rise to such cause of action and which necessitated such rehabilitation services, subject, however, to any attorney's lien. In order to perfect such lien, the Division of Rehabilitation Services shall file in the office of the clerk of the superior court of the county wherein the individual resides, a verified statement setting forth the name and address of such individual; the name and address of the Division of Rehabilitation Services; the amount claimed to be due for such vocational rehabilitation services; and, to the best of claimant's knowledge, the names and addresses of all persons, firms, or corporations claimed by such injured individual, or the legal representative of such individual, to be liable for damages arising from such injuries. The Division of Rehabilitation Services shall also, within one day after the filing of such claim or lien, mail a copy thereof to any person, firm, or corporation so claimed to be liable for such damages to the addresses as given in such statement. The filing of such claim or lien shall be notice thereof to all persons, firms, or corporations liable for such damages, whether or not they are named in such claim or lien. The clerk of the court shall endorse thereon the date and hour of filing in the hospital lien book, along with the name of the claimant, the injured person, the amount claimed, and the names and addresses of those claimed to be liable for damages. Such information shall be recorded in the name of the injured individual. The clerk shall be paid \$1.00 as his fee for such filing. No release for such cause or causes of action or any judgment thereon, or any covenant not to sue thereon, shall be valid or effectual as against such lien unless the holder thereof shall join therein or execute a release of such lien; and the claimant of such lien may enforce the lien by an action against the person,

firm, or corporation liable for such damages. (Code 1981, § 34-15-15, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-16. Authorization to retain title; authorization to sell; surplus; receipts; deposit of funds received.

The division is authorized to retain title to any property, tools, instruments, training supplies, equipment, or other items of value acquired for use of persons with disabilities and to repossess and transfer them for the use of other persons with disabilities. The Commissioner is authorized to offer for sale any items acquired in the operation of the program under this chapter when they are no longer necessary or to exchange them for necessary items which may be used to greater advantage. When any such surplus equipment is sold or exchanged, a receipt for it shall be taken from the purchaser showing the consideration given for such equipment and shall be forwarded to the Office of Treasury and Fiscal Services; and any funds received by the division pursuant to any such transactions shall be deposited in the state treasury in the appropriate federal or state rehabilitation account and shall be available for expenditures for any purposes consistent with this chapter. (Code 1981, § 34-15-16, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-17. Confidentiality; penalty.

It shall be unlawful, except for purposes directly connected with the administration of the vocational rehabilitation program and in accordance with regulations, policies, and procedures, for any person or persons to solicit, disclose, receive, or make use of or authorize, knowingly permit, participate in, or acquiesce in the use of any list of, or names of, or any information concerning persons applying for or receiving vocational rehabilitation, directly or indirectly derived from the records. Any person who violates any provision of this Code section shall be guilty of a misdemeanor. (Code 1981, § 34-15-17, enacted by Ga. L. 2000, p. 1137, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting of offenders not required. fingerprinting. 2000 Op. Att'y Gen. No. 2000-11.
— A violation of O.C.G.A. § 34-15-17 is not an offense designated as one that requires

34-15-18. Governing prohibitions.

Employees of the department engaged in functions under this chapter shall be governed by the prohibitions in the rules and regulations of the State Personnel Board and the federal Office of Personnel Management from participation in political activity. (Code 1981, § 34-15-18, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-19. Rights of General Assembly to amend or repeal chapter.

The General Assembly reserves the right to amend or repeal all or any part of this chapter at any time, and there shall be no vested private right of any kind against such amendment or repeal. All the rights, privileges, or immunities conferred by this chapter or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal this chapter at any time. (Code 1981, § 34-15-19, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-20. Delivery of deaf-blind services and techniques leading to maximum independence; integration.

(a) The Division of Rehabilitation Services of the Department of Labor shall oversee the delivery of deaf-blind services and techniques provided by an organization pursuant to subsection (c) of this Code section that lead to maximum independence and employment for individuals with both a hearing and a vision loss. These services shall include, but not be limited to, transition of deaf-blind youth from education to the work force; identification of deaf-blind individuals in Georgia; communication access for varying groups of individuals and their unique needs; training deaf-blind individuals in orientation and mobility, rehabilitation, and Braille; utilization of support service providers to function as sighted guides, communication facilitators, and providers of transportation; support and increase in the number of qualified sign language interpreters working with deaf-blind individuals; use of adaptive technologies, such as computers, telebrailers, and TTY devices; strategies and techniques to assist deaf-blind individuals in obtaining the highest level of independence possible; and peer support which provides access to information, people, and places.

(b) The division shall, to the greatest extent possible, integrate the services and techniques required pursuant to subsection (a) of this Code section into its standard practices and procedures with the objective of providing appropriate services in an appropriate manner to individuals in the deaf-blind community.

(c) Subject to appropriations by the General Assembly, the Division of Rehabilitation Services shall retain an organization knowledgeable on deaf-blind issues to provide the services and techniques included in subsection (a) of this Code section to deaf-blind individuals and to provide comprehensive training to division staff on such services and techniques required pursuant to subsection (a) of this Code section. Such organization shall be retained no later than six months after funding from appropriations by the General Assembly has been made available for expenditure by the department. (Code 1981, § 34-15-20, enacted by Ga. L. 2007, p. 257, § 1/SB 49; Ga. L. 2008, p. 324, § 34/SB 455.)

Effective date. — This Code section became effective July 1, 2007.

The 2008 amendment, effective May 12, 2008, part of an Act to revise, modernize, and correct the Code, substituted “work force” for “workforce” in the second sentence of subsection (a).

Cross references. — Deaf person defined, § 30-1-1. Individualized education program for blind students with evaluation of Braille skills, § 30-7-3. Blindness, education, screening, and treatment program, § 31-1-23.

ARTICLE 2

VENDING FACILITIES ON STATE PROPERTY

34-15-40. Definitions.

As used in this article, the term:

(1) “State property” means any building, land, or other real property owned, leased, or occupied by any department, commission, board, bureau, agency, public corporation, or other instrumentality of the state, including, but not limited to, the Georgia Building Authority, and any other real property in which the state has a legal or beneficial interest; provided, however, the term “state property” shall not include any property, real or personal, owned or leased or otherwise under the jurisdiction of the Board of Regents of the University System of Georgia, the Georgia Education Authority (University), or any county or independent school system of this state.

(2) “Vending facility” means vending stands, vending machines, snack bars, cart service, shelters, counters, and such other appropriate facilities and equipment as may be necessary for the sale of articles or services by licensed blind persons or other persons with disabilities, as prescribed by rules and regulations adopted by the department. (Code 1981, § 34-15-40, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-41. Declaration of public policy; income.

To effectuate the purposes of this article, it is declared to be public policy of the state that on any state property where the Commissioner of Labor determines it to be feasible to establish a vending facility to be operated by a licensed operator as provided in this article and where the agency or department or custodian of such property determines that such facility can be established without undue inconvenience to the operation being carried on in such state building or property, the preference accorded in this article shall require that such vending facility site not be deemed available for letting to competitive bidders for revenue-producing purposes unless the Commissioner declines to establish on such site a vending facility for blind persons or other persons with disabilities. The income to the agency controlling the space for such facility sites shall generally not be expected

to exceed reimbursement for the cost of providing such facility site space and the services connected therewith; but in any case where such income exceeds those purposes, it shall be paid into the state treasury, subject to certification and audit. (Code 1981, § 34-15-41, enacted by Ga. L. 2000, p. 1137, § 1.)

34-15-42. Operation of vending facilities on state property; preference for licensed disabled persons.

For the purpose of providing blind persons or other persons with disabilities with remunerative employment, enlarging their economic opportunities, and stimulating them to greater effort in striving to make themselves self-supporting, such blind persons or other persons with disabilities who are licensed by the Division of Rehabilitation Services of the Department of Labor shall be authorized to operate vending facilities on any state property where such vending facilities may be properly and satisfactorily operated by blind persons or other persons with disabilities. In authorizing the operation of vending facilities on state property, preference shall be given, so far as feasible, to blind persons or other persons with disabilities licensed by the Division of Rehabilitation Services of the Department of Labor as provided in this article; and the head of each department or agency in control of the maintenance, operation, and protection of state property shall, after consultation with the Commissioner and with the approval of the Governor, prescribe regulations designed to assure such preference (including assignment of vending machine income to achieve and protect such preference) for such licensed blind persons or other persons with disabilities without unduly inconveniencing such departments and agencies or adversely affecting the interests of the state. (Code 1981, § 34-15-42, enacted by Ga. L. 2000, p. 1137, § 1.)

APPENDIX

RULES AND REGULATIONS OF THE STATE BOARD OF WORKERS' COMPENSATION

| Rule | | Rule | |
|--------|--|------|---|
| 2. | Procedure to Elect Coverage, Reject Coverage or Revoke Exemption. | 201. | Panel of Physicians. |
| 13. | Termination of Dependency. | 202. | Examinations. |
| 15. | Stipulated Settlements. | 203. | Payment of Medical Expenses; Procedure When Amount of Expenses are Disputed. |
| 24. | Procedure for Enforcement Division to Request a Hearing. | 204. | Subsequent Non-Work Related Injury; Chain of Causation; Burden of Proof. |
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| | | 384. | Powers of the Board of Trustees. |
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| | | 388. | Duties of the Board to Board of trustees. |

Effective date. — The revised rules and regulations of the State Board of Workers' Compensation, which appear in this appendix, became effective July 1, 1998, and superseded the previous rules and regulations of the Board in their entirety.

Rule 2. Procedure to Elect Coverage, Reject Coverage or Revoke Exemption.

(a) Corporate officers and limited liability company members electing to be exempt from coverage or electing to revoke exemption and reinstate coverage shall file Form WC-10 with the insurer, if there is an insurer, and, if none, then with the Board.

(b) Farm labor employers electing coverage or electing to revoke previously elected coverage shall file Form WC-10 with the insurer, if there is an insurer, and, if none, then with the Board. If an employer elects to revoke previously elected coverage, the employer must give written notice to each affected employee and must maintain adequate documentation of such notice.

(c) A partner or sole proprietor electing coverage or electing to revoke previously elected coverage shall file Form WC-10 with the insurer, if there is an insurer, and, if none, then with the Board.

Rule 13. Termination of Dependency.

(a) The employer/insurer may terminate dependency benefits on the basis of a meretricious relationship only by order of the Board.

(b) In all other cases of termination of dependency, Rule 61(b)(3) shall apply.

Rule 15. Stipulated Settlements.

(a) The party submitting the stipulation shall:

(1) file the original with a copy for each party to the agreement; If filing electronically, file one original and no copies.

(2) at the top page of each stipulation list the names, addresses, and telephone numbers of all parties to the agreement, the ICMS Board claim number(s) of the employee, the dates of accident covered by the agreement where a Board file has been created by a Form WC-1 or Form WC-14, the names and addresses of all attorneys with a designation of which parties they represent, and the Federal tax identification number of the employee's attorney. For dates of accident where a Board file has not been created but covered by the stipulation, such dates of accident shall only be listed in the body of the agreement;

(3) submit 9 1/2 x 12 1/2 envelopes addressed to each party to the agreement; If filing electronically, do not submit envelopes.

(4) attach a copy of the Form WC-1 for each date of accident covered by the settlement;

(5) attach a copy of the fee contract of counsel for the employee/claimant; and,

(6) attach the most recent medical report or summary which describes the medical condition of the employee, including a very brief statement of the surgical history, if any, if that history is not already specified within the stipulation. The entire medical record should NOT be attached.

(7) when submitting a stipulation for approval by electronic mail, the stipulation must be submitted separately from supporting documentation.

(8) approval of a stipulation may be sent by electronic mail to the parties and attorneys of record. Whenever electronic transmission is not available, approval will be sent by mail.

(9) For all stipulations, at the top of the first page of the stipulation, the first five inches shall be left blank for the approval stamp;

(10) All stipulations shall be limited to no more than 25 pages, including supporting documents, unless prior approval is given by the Board or the Settlement Division.

(b) A stipulation which provides for liability of the employer or insurer shall:

(1) state the legal and/or factual matters about which the parties disagree; and,

(2) state that all incurred medical expenses which were reasonable and necessary have been or will be paid by the employer/insurer. If the parties have agreed for medical treatment to be provided for a specific period in the future, then the stipulation must so state, and must further specify whether the agreement is limited to certain specific providers, and whether those providers may refer to others if needed. Furthermore, the stipulation shall provide that the parties will petition the Board for a change of physician in the event that a specifically named physician is unable to render services, and the parties cannot agree. If the stipulation does not contain a provision that medical expenses may be incurred for a specific period in the future after the approval of the stipulation, then the stipulation must contain a statement which explains why that provision is not necessary.

(c) The insurer shall certify that it has complied with O.C.G.A. § 34-9-15 by having sent a copy of the proposed settlement to the employer prior to any party having signed it.

(d) If the agreement provides for a structured settlement to be paid by a party other than the employer or the insurer, then the stipulation must

contain a provision that the employer and insurer will be liable for the agreement in the event of the default or failure of that third party to pay. In addition, if the stipulated settlement agreement provides for a Medicare Set-Aside (MSA), the stipulated settlement agreement shall contain a provision as to the actual cost of the MSA.

(e) Unless otherwise specified in the attorney fee contract filed with the Board and in the terms of the stipulation, the proceeds of the approved stipulated settlement agreement shall be sent directly to the employee or claimant. If an attorney is to be paid, the stipulation must state the amount of the fee, and itemize all expenses which should be reimbursed. Further, an attorney shall not receive an attorney's fee as a portion or percentage of any medical treatment or expenses, or any money designated for medical treatment or expenses. Expenses and attorney fees shall be paid in a check payable to the attorney only, and proceeds due to the employee shall be paid in a check payable to the employee only and the attorney shall certify that the expenses comply with Rule 1.8(e) of the Georgia Rules of Professional Responsibility and Board Rule 108.

(f) A Form WC-1 shall be filed with every no-liability stipulation for each date of accident covered in that stipulation. In all no-liability settlements where the claimant is represented by counsel, the attorney must submit a Form WC-15 certifying that any fee charged is fair and reasonable and does not exceed twenty five percent as allowed under the provisions of O.C.G.A. § 34-9-108 and Board Rule 108.

(g) Stipulations which contain waivers or releases of causes of action over which the Board has no jurisdiction will not be approved by the Board.

(h) The Board may hear evidence or make informal inquiry regarding any settlement.

Note as to revisions. — The revision effective July 1, 2006, added the third sentence in subsection (e), and inserted "Form WC-1 and" near the beginning of subsection (f).

The revision effective July 1, 2007, in paragraph (a)(2), substituted "ICMS Board claim number(s)" for "claim number" near the beginning, inserted "where a Board file has been created by a Form WC-1 or Form WC-14" near the middle, and added "For dates of accident where a Board file has not been created but covered by the stipulation, such dates of accident shall only be listed in the body of the agreement" at the end; in

paragraph (a)(4), deleted "and WC-4" following "Form WC-1"; in subsection (d), added the last sentence; in subsection (e), added "and the attorney shall certify that the expenses comply with Rule 1.8(e) of the Georgia Rules of Professional Responsibility and Board Rule 108" at the end of the last sentence; and in subsection (f), substituted "Form WC-1 shall be filed" for "Form WC-1 and final completed Form WC-4 must be filed" in the first sentence, and made a punctuation change in the second sentence.

The revision effective July 1, 2008, added paragraphs (a)(9) and (a)(10).

Rule 24. Procedure for Enforcement Division to Request a Hearing.

(a) The Fraud and Compliance Unit created pursuant to OCGA 34-9-24 shall be known as the Enforcement Division of the State Board of Workers' Compensation.

(b) A request for an action or proceeding may be filed by the State Board of Workers' Compensation Enforcement Division to determine the assessment of civil penalties against any person or entity who has violated the provisions of Chapter 9 of Title 34. The request shall be filed on Form WC-24 and then assigned to an Administrative Law Judge for review. Hearings shall be conducted pursuant to O.C.G.A. § 34-9-102 and Board Rule 102. In addition, venue may be determined as provided by law pertaining to that person or entity.

(c) Any party appealing a decision of the Administrative Law Judge shall do so pursuant to O.C.G.A. §§ 34-9-103 and 34-9-105, and Board Rules 103 and 105.

(d) During an investigation of alleged noncompliance with the provisions of Chapter 9 of Title 34, the Enforcement Division of the State Board of Workers' Compensation may issue a notice for verification of coverage directing the employer, within fifteen days of the date of the notice, to provide either proof of workers' compensation coverage or proof as to why the employer is not subject to the Act. This notice shall be considered a directive of the Board.

Note as to revisions. — The revision effective July 1, 2006, substituted "workers'" for "worker's" in subsection (d).

on evidence, see 50 Mercer L. Rev. 229 (1998). For annual survey article discussing developments in the law of evidence, see 51 Mercer L. Rev. 279 (1999).

Law reviews. — For annual survey article

Rule 40. Offices and Addresses of the Board; Sessions.

The offices of the State Board of Workers' Compensation are located as follows:

Atlanta: 270 Peachtree Street, N.W.
Suite 400
Atlanta, GA 30303-1299
Phone: (404) 656-3875
1-800-533-0682
www.sbwg.georgia.gov

Albany: Suite 203, Albany Towers
235 Roosevelt Avenue
Albany, GA 31701
Phone: (229) 430-4280

P.O. Box 1649
Albany, GA 31702

| | |
|--------------|--|
| Augusta: | 1056 Claussen Road Suite 224 Augusta, GA 30907 Phone: (706) 667-4062 |
| Columbus: | Heritage Tower, Suite 200 18 9th Street Columbus, GA 31901 Phone: (706) 649-1103 |
| Covington: | 6253 Highway 278, N.E. Fred's Plaza Covington, GA 30014 Phone: (770) 784-3133 |
| Dalton: | Suite 315 415 East Walnut Avenue Dalton, GA 30721-4406 Phone: (706) 272-2284 |
| Gainesville: | Suite 402 311 Green Street, N.W. Gainesville, GA 30501-3366 Phone: (770) 535-5713 |
| Macon: | 110 Holiday Drive, N. Suite A Macon, GA 31210-1802 Phone: (478) 471-2051 |
| Rome: | 512 Riverside Parkway Rome, GA 30161-2940 Phone: (706) 295-6781 |
| Savannah: | Suite 601 Seven East Congress St. Savannah, GA 31401 Phone: (912) 651-6222 |

The Board shall meet in Atlanta, or elsewhere as necessary, at the call of the Board.

Note as to revisions. — The revision effective July 1, 2008, in the address for “Covington”, substituted “Fred’s Plaza” for “Price Cutter Plaza”, and in the address for “Rome”, substituted “512 Riverside Parkway” for “104 East 5th Avenue” and “30601-2940” for “30601-3128”.

Rule 48. Reserved.**Rule 60. Adoption and Amendment of Rules of the Board; Assignment of Identification Numbers for Claimants; Form of Documents Submitted to Board; Enforcement Powers.**

(a) The rules of the Board are subject to amendment at any time. The Board may adopt additional rules whenever deemed necessary. However, except in extraordinary circumstances, rule changes will only be considered and adopted annually, to be effective on July 1 of each year.

(b) Prior to the adoption, amendment, or repeal of any rule, other than interpretive rules or general statements of policy, the Board shall:

(i) Provide a copy of the proposed rule to the Chairperson of the Board's Advisory Council.

(ii) Provide a copy of the proposed rule to the Chairman of the Senate Industry and Labor Committee and the Chairman of the House Industrial Relations Committee. At the request of the Chairman of the Senate Industry and Labor Committee or the Chairman of the House Industrial Relations Committee, the Board shall hold a hearing on the proposed changes.

(c) Upon receipt of notice of a work-related injury, the Board shall assign a claim number. All subsequently filed forms, reports, or any other correspondence or documents related to or concerning such work-related injury shall have affixed thereto the assigned claim number, date of injury, and claimant's name. Failure to include this information with the filing may result in the rejection of the filing with the Board.

(d) Written instructions on all workers' compensation forms are deemed to be included in these rules.

(e) The Board shall have the power to issue writs of fieri facias in order to collect fines imposed by any member of the Board or any Administrative Law Judge against any person. Such writs may be enforced in the same manner as a similar writ issued by a superior court.

(f) Pleadings, forms, documents, or other filings may be filed with the Board by facsimile transmission or by electronic mail only to Board designated ICMS fax numbers or electronic mail addresses. No pleadings, forms, documents or other filings, with the exception of a notice of claim filed on the final day allowed pursuant to statute, will be accepted by facsimile transmission or electronic mail to non-designated ICMS fax or numbers or electronic mail addresses unless specifically permitted or requested by the Board. The name of the person permitting or requesting the facsimile transmission or electronic mail shall be provided simultaneously. The certificate of service, showing concurrent service upon the

opposing party by facsimile transmission or electronic mail, if available, shall be a part of any facsimile transmission or electronic mail. Failure to include a certificate of service shall invalidate the filing. All facsimiles or electronic mail transmissions must be identical to the originals and must be legible. The Board, within its discretion, may transmit documents by facsimile or electronic transmission.

(g)(1) Pursuant to Code Section 10-12-2 et seq., when a signature is required for any electronic filing with the Board, the party or attorney shall type his or her name in the appropriate fields on the document or Board form submitted for filing. Submission of a filing in this manner shall constitute evidence of legal signature by those individuals whose names appear on the filing.

(2) Any party or attorney challenging the authenticity of an electronically filed document or electronic signature on that filing must file an objection to the document within 15 days of receiving the notice of the electronic filing. The burden shall be on the party challenging the authenticity of the signature.

(h) In order to create a workers' compensation ICMS file at the Board, a Form WC-1 or Form WC-14 shall be filed with the Board. Any document or form filed with the Board, when either a Form WC-1 or Form WC-14 has not been previously filed, shall be rejected by the Board.

(i) Only the original of any form, document, or other correspondence shall be filed with the Board. Duplicate originals shall not be filed with the Board. Where providing a courtesy copy to an Administrative Law Judge or the Board, that document shall be identified clearly and prominently as a courtesy copy.

(j) Service upon a party or attorney of any form, document, or other correspondence shall be by electronic mail. Whenever electronic mail is not available, service shall be by U.S. mail.

Note as to revisions. — The revision effective July 1, 2007, added subsections (h) and (i). The revision effective July 1, 2008, added subsection (j).

Rule 61. Publication of Notice of Operation Under Act; Forms.

(a) All employers operating under the Georgia Workers' Compensation Law shall post notice as hereinafter provided upon durable material publicly and permanently in a conspicuous place in each business location. Upon request, the Board will furnish suitable notices free of charge. The notice shall be in such form that it can be understood by all employees and read as follows:

This business operates under the Georgia Workers' Compensation Law.

WORKERS MUST REPORT ALL ACCIDENTS IMMEDIATELY TO THE EMPLOYER BY ADVISING THE EMPLOYER PERSONALLY, OR AN AGENT, REPRESENTATIVE, BOSS, SUPERVISOR OR FOREMAN OF THE EMPLOYER.

If the worker is hurt or injured at work, the employer/insurer shall pay medical and rehabilitation expenses within the limits of the law. In some cases, the employer will also be required to pay a part of the worker's lost wages.

Work injuries and occupational diseases should be reported in writing whenever possible. The worker may lose the right to receive compensation if an accident is not reported within 30 days.

The employer will supply free of charge, upon request, a form for reporting accidents and will also furnish, free of charge, information about workers' compensation. The employer will also furnish to the employee, upon request, copies of Board forms on file with the employer pertaining to an employee's claim.

The Board may excuse lack of notice of injury if the employer does not follow the foregoing requirements for posting notice. [O.C.G.A. § 34-9-80]

(b) The Board furnishes, upon request, copies of forms required by law. Use originals of the forms or approved copies of the original forms. The text and format of a Board form may not be altered, except with the specific written permission of the Executive Director. Generally, when filing any Board form or document with the Board, file only the original and no copies. Do not use tabs to separate documents. **ANYONE USING A BOARD FORM MUST USE THE MOST CURRENTLY REVISED VERSION OF THE FORM. INSTRUCTIONS ON THE BACK OF ANY BOARD FORM SHALL BE SENT TO THE EMPLOYEE AND SHALL NOT BE FILED WITH THE BOARD.**

(1) **Form WC-1. Employer's First Report of Injury.** Employers shall complete Section A immediately upon knowledge of an injury and submit the form to their insurer. The insurer, self-insurer, or group self-insurer shall place their SBWC ID Number in the appropriate box on this form. Insurers who receive a Form WC-1 from an employer shall clearly stamp the date of receipt on the form. Insurers and self-insurers shall complete Section B or C and mail the original to the Board and a copy to the employee within 21 days of the employer's knowledge of disability. Use this form to report accidents and injuries for cases involving more than seven days of lost time. Cases with seven or less days of lost time should be reported on Form WC-26. For previously designated "medical only" claims, you must check the appropriate box in Section B or C. In death cases with accident dates before July 1, 1995, a copy of Form WC-1 shall also be filed with the Administrator of the Subsequent Injury Trust Fund

at the same time it is mailed to the Board. In accepted catastrophic claims, Form WC-1 shall be filed within 48 hours of the employer's acceptance of a catastrophic injury as compensable.

Complete Section B when the insurer/self-insurer commence payment of weekly benefits or when the employer continues to pay salary during compensable disability and when employer/insurer suspend for an actual return to work prior to the filing of Form WC-1. Furnish copy to employee.

The employer, insurer, self-insurer, or group self-insurer shall completely fill out the Form WC-1 and failure to provide the name and address of the employee, employer, insurer, self-insurer, or group self-insurer, date of injury, the employee's social security number, the insurer's, self-insurer's, or group/self-insurer's SBWC ID number, or the completion of sections B, C, or D may result in the rejection of the filing with the Board.

Complete Section C within 21 days in accordance with subsection (d) of O.C.G.A. § 34-9-221 when employer/insurer controverts payment of compensation. Furnish copies to employee and, upon request, to any other person with a financial interest in the claim. In addition, complete and file a Case Progress Report, Form WC-4, within 180 days of the date of claimed disability.

(2) Form WC-2. Notice of Payment or Suspension of Benefits. File Form WC-2 to commence, suspend, or amend the weekly benefit payment under O.C.G.A. § 34-9-261, O.C.G.A. § 34-9-262, or O.C.G.A. § 34-9-263, including payment of salary for compensability, or when a change in disability status occurs after Form WC-1 has been properly filed with the Board. File when suspending O.C.G.A. § 34-9-261 benefits and commencing O.C.G.A. § 34-9-262 benefits pursuant to § 34-9-104(a)(2). Mail a copy of the Form WC-2 and attachments, if any, to the employee and their attorney, if one has been retained. *See*, Rule 221. If the last payment is intended to close the case, file final Form WC-4 with the Board.

(3) Form WC-2A. Notice of Payment or Suspension of Death Benefits. Use in death case in lieu of Form WC-2. Use when change in dependency occurs. Use this form when making a payment to the State of Georgia for no dependents.

(4) Form WC-3. Notice to Controvert. Complete Form WC-3 to controvert when a Form WC-1 has previously been filed. Furnish copies to employee and any other person with a financial interest in the claim including, but not limited to, the treating physician(s) and attorney(s) in the claim. *See* subsections (d), (h), and (i) of O.C.G.A. § 34-9-221 and Rule 221. In addition, complete and file a Form WC-4 within 180 days of the date of the controvert.

(5) **Form WC-4. Case Progress Report.** File as follows:

(A) In both controverted and accepted claims, within 180 days of the first date of disability;

(B) Within 30 days from last payment for closure;

(C) Upon request of the Board;

(D) Every 12 months from the date of the last filing of a Form WC-4 on all open cases;

(E) To reopen a case;

(F) Within 30 days of final payment made pursuant to an approved stipulated settlement;

(G) Within 90 days of receipt of an open case by the new third party administrator.

(6) **Form WC-6. Wage Statement.** File when the weekly benefit is less than the maximum under O.C.G.A. § 34-9-261 or § 34-9-262 and furnish a copy to the employee. If a party makes a written request of the employer/insurer, then the employer shall send the requesting party a copy of the Form WC-6 within 30 days.

(7) **Form WC-10. Notice to Elect or Reject Coverage.** A sole proprietor or partner must file this form to elect coverage under the provisions of O.C.G.A. § 34-9-2.2.

The employer must file this form in order that the corporate officer or limited liability company member be exempt from coverage, or to revoke their previously filed exemption. Rejection becomes effective the date of filing with the insurer. Where the employer has workers' compensation insurance coverage, the employer must send this form to their workers' compensation insurer. If no workers' compensation coverage is in place, file this form with the Board.

The farm labor employer must file this form in order to request coverage for farm laborers, or to revoke their previously filed request.

(8) **Form WC-11. Standard Coverage Form.**

(9) **Form WC-12. Request for Copy of Board Records.** Any party requesting a copy of Board records shall file their request on this form. Any party who receives a copy of a Board record pursuant to their request shall pay the charges due within 30 days of receipt of an invoice from the Board.

(10) **Form WC-14. Notice of Claim/Request for Hearing or Mediation.** File to open a claim, request a hearing, or request a mediation conference. Furnish a copy of Form WC-14 to all other parties. (A request for hearing by an employee will be considered only after the time

required of the employer/insurer to make the first payment of income benefits has expired as provided in O.C.G.A. § 34-9-221.)

(11) **Form WC-14A. Request to Change Information on a Previously Filed Form WC-14.** A party or attorney shall file this form with the Board when requesting correction of a mistake concerning the employee's name, social security number, date of injury, or county of injury on a previously filed Form WC-14. **A Form WC-14A shall not be used to change an address of record, add additional parties, or additional dates of injury.** A new Form WC-14 shall be filed with the Board to add or amend any information pertaining to the employer, the insurer, the servicing agent or part of body injured, and to add an additional date of injury, hearing issue, or mediation issue.

(12) **Form WC-15. Attorney Certification for No-Liability Stipulated Settlements.** Must be attached to all no-liability stipulated settlements.

(13) **Form WC-20(a). Medical Report.** This report and/or the HCFA 1500, HCFA 1450, and/or UB92 shall be completed and filed as follows:

(A) The attending physician or other practitioner makes the report and forwards it along with office notes and other narratives to the employer/insurer as follows:

- (i) Within seven days of initial treatment;
- (ii) Upon the employee's discharge by the attending physician;
- (iii) At least every three months until the employee is discharged;
- (iv) Upon the employee's release to return to work;
- (v) When a permanent partial disability rating is determined.
- (vi) Pursuant to Rule 203(b).

(B) The employer/insurer shall file the report including office notes and narratives with the Board within 10 days after receipt as follows:

- (i) When the report contains a permanent partial disability rating;
- (ii) Upon request of the Board; and,
- (iii) To comply with other rules and regulations of the Board.

(C) The employer/insurer shall maintain copies of all medical reports and attachments in their files and shall not file medical reports except in compliance with this rule and Rule 200(c).

(14) **Form WC-24. Enforcement Division Request for Board Intervention.** For use by Enforcement Division only.

(15) **Form WC-25. Application for Lump Sum/Advance Payment.** See Board Rule 222.

(16) **Form WC-26. Consolidated Yearly Report of Medical Only Claims and Annual Payments on Indemnity Claims.** File on or before January 31 following each calendar year in respect to all medical and indemnity payments for the previous year for work-related injuries. File annually even if no reportable payment occurred during the reporting year.

(17) **Form WC-100. Request for Settlement Mediation.** To be used when a party is requesting a settlement mediation.

(18) **Form WC-102. Request for Documents from Parties.** Prior or subsequent to a hearing being requested in a claim, the parties shall be entitled to request copies of documents listed in this form from the opposing parties, and the named documents shall be provided to the requesting party within 30 days of the date of certificate of service, subject to penalties for failure to comply.

(19) **Form WC-102B. Notice of Representation by an attorney for an employer, insurer, or party-at-interest.** A claimant's attorney shall file a notice of representation by filing their attorney fee contract in compliance with Board Rule 108.

(20) **Form WC-102C. Attorney Leave of Absence.** An attorney who is counsel of record, and wishes to obtain a Leave of Absence, must file this form with the Atlanta office of the Board. If granted, the leave will cover all cases for which the attorney is counsel of record which are not calendared on the date of approval.

(21) **Form WC-102D. Motion/Objection to Motion.** A party who makes or objects to a motion shall use this form, if no other specific Board form exists for the motion or request, and shall serve a copy on all counsel and unrepresented parties.

(22) **Form WC-104. Notice to Employee of Medical Release to Return to Work with Restrictions or Limitations.** For non-catastrophic accidents occurring on or after July 1, 1992, the employer/insurer shall send this form to the employee no later than 60 days after the medical release of the employee to return to work with restrictions or limitations.

(23) **Form WC-108a. Attorney Fee Approval.** An attorney shall file this form in order to request approval of a fee contract, an assessed fee by consent, and for resolution of a fee lien dispute by consent, when there is no pending litigation, and shall serve a copy on all counsel and unrepresented parties.

(24) **Form WC-108b. Attorney Withdrawal/Attorney Fee Lien.** An attorney who wishes to withdraw must file this form and follow the

procedure set out in Rule 108(b). An attorney of record who chooses to file a lien for services and/or request for reimbursement of expenses after withdrawal from representation or after services are terminated, in writing, by a client, shall file this form with supporting documentation, and serve a copy on all counsel and unrepresented parties.

(25) **Form WC-121. Change of TPA Claims Office/Servicing Agent.** An insurer, self-insurer, or self-insurance fund shall file this form to give: (1) notice of the employment of a claims office; (2) change an address of a claims office; (3) add additional claims offices; and (4) notice of the termination of services of a claims office.

(26) **Form WC-131. Permit to Write Insurance.** Insurers shall complete this form and file it with the Board to receive a permit to write workers' compensation insurance in the state of Georgia.

(27) **Form WC-131(a). Permit to Write Insurance Update.** Insurers shall complete this form annually and file it with the Board when updating a permit to write workers' compensation insurance in the state of Georgia.

(28) **Form WC-200a. Change of Physician/Additional Treatment by Consent.** Parties who agree on a change of physician/additional treatment shall file a properly executed Form WC-200a with the Board, with copies provided to the named medical provider(s) and parties to the claim, which form shall be deemed to be approved and made the order of the Board pursuant to O.C.G.A. § 34-9-200(b) unless otherwise ordered by the Board. A Form WC-200a shall be rejected by the Board if a Form WC-1 or WC-14 has not been previously filed by any party or attorney creating a Board claim.

(29) **Form WC-200b. Request/Objection for Change of Physician/Additional Treatment.** A party who requests a change of physician or additional treatment without consent, or who objects to a request which has been made, shall file this form with the Board, and serve a copy on all counsel and unrepresented parties. Objections must be filed within 15 days of the date on the certificate of service on the request.

(30) **Form WC-205. Request for Authorization of Treatment or Testing by Authorized Medical Provider.** Authorized medical providers seeking approval for treatment or testing shall send this form by facsimile or e-mail directly to the insurer/self-insurer who must fax or e-mail a response within five business days. Neither the request nor response shall be filed with the Board, unless otherwise requested.

(31) **Form WC-206. Reimbursement Request of Group Health Insurance Carrier/Healthcare Provider.** A group health insurance carrier or health care provider which requests reimbursement of medical expenses shall file this form during the pendency of a claim, and serve a copy on all counsel and unrepresented parties.

(32) **Form WC-207. Authorization and Consent to Release Information.** Employer/insurers seeking the release of medical information pursuant to O.C.G.A. § 34-9-207 may utilize this form to receive consent from the employee.

(33) **Form WC-208a. Application for certification of WC/MCO.**

(34) **Form WC-226(a). Petition for Appointment of Temporary Guardianship of Minor.** A party petitioning for the Board to appoint a temporary guardian to receive and administer workers' compensation benefits for a minor may file this form with the WC-14 or when submitting a settlement agreement and shall serve a copy on all counsel and unrepresented parties.

(35) **Form WC-226(b). Petition for Appointment of Temporary Guardianship of Legally Incapacitated Adult.** A party petitioning for the Board to appoint a temporary guardian to receive and administer workers' compensation benefits for a legally incapacitated adult may file this form with the WC-14 or when submitting a settlement agreement and shall serve a copy on all counsel and unrepresented parties.

(36) **Form WC-240. Notice to Employee of Offer of Suitable Employment.** The employer/insurer shall use this form to notify an employee of an offer of employment which is suitable to his/her impaired condition as required by O.C.G.A. § 34-9-240, and shall provide it to the employee and his/her attorney at least 10 days prior to the date the employee is scheduled to return to work. File this form as an attachment to a Form WC-2 when unilaterally suspending income benefits under Board Rule 240(b)(1)-(2).

(37) **Form WC-240A. Job Analysis.** An employer/insurer may use this form in conjunction with a Form WC-240 to provide a detailed job description when notifying an employee of an offer of employment which is suitable to his/her impaired condition as required by O.C.G.A. § 34-9-240, and shall provide it to the employee and his/her attorney at least 10 days prior to the date the employee is scheduled to return to work. Attach this form with a Form WC-240, and file it with the Form WC-240 as an attachment to a Form WC-2 when unilaterally suspending income benefits under Board Rule 240(b)(1)-(2).

(38) **Form WC-243. Credit.** An employer/insurer seeking a credit pursuant to O.C.G.A. § 34-9-243 shall file this with the Board and send a copy to all counsel and unrepresented parties. The employer/insurer must specify the amount of unemployment compensation and/or income payments made to the employee pursuant to a disability plan, a wage continuation plan, or a disability insurance policy, and shall specify the ratio of the employer's contributions to the total contributions of such plan or policy.

(39) **Form WC-244. Reimbursement Request of Group Insurance Carrier/Disability Benefits Provider.** A group insurance carrier or dis-

ability benefits provider which requests reimbursement of disability benefits shall file this form during the pendency of a claim, and serve a copy on all counsel and unrepresented parties.

(40) **Form WC-262. Payment of Temporary Partial Disability Income Benefits.** Upon payment of any temporary partial disability income benefits under O.C.G.A. § 34-9-262 to an employee, an employer shall file this form with the Board and send a copy to the employee and counsel, if represented.

(41) **Form WC-Change of Address. Change of Address.** This form is to be used only to change certain addresses of record. For employees, this form only changes the employee's address in a specifically identified claim. For employers and attorneys, this form only needs to be filed once as this form will change information permanently in every claim. Do not file this form if a party's address is correct, but improperly listed in a claim.

(42) **Form WC-R1. Request for Rehabilitation.** The employer/insurer shall file:

(A) Within 48 hours of the employer's acceptance of a catastrophic injury as compensable, simultaneously with the Form WC-1, naming a catastrophic supplier;

(B) Within 15 days of notification that rehabilitation is required to request a rehabilitation supplier;

(C) When the employer/insurer requests a supplier for cases with dates of injury prior to July 1, 1992;

(D) When the employer/insurer requests a change of supplier;

(E) To request reopening of rehabilitation; or

(F) Upon request of the Board.

The employee or employee's attorney shall file a Form WC-R1 to request appointment of a supplier for cases with dates of injury prior to July 1, 1992, for change of supplier or reopening of rehabilitation.

A case party shall file a Form WC-R1 when a stipulated settlement provides for rehabilitation and rehabilitation is not already on the case. A case party may file a Form WC-R1 to request an extension of vocational rehabilitation services for cases with dates of injury prior to July 1, 1992.

All required information shall be supplied and shall be legible. The certificate of service must be completed and the date mailed must be indicated.

(43) **Form WC-R1CATEE. Employee Request for Catastrophic Designation.** The employee or employee's attorney shall file:

(A) If the employer/insurer fail to timely designate the claim catastrophic and the employee believes the case to qualify for catastrophic designation;

(B) With supporting documentation;

(C) Presenting a choice for a Board Certified catastrophic rehabilitation supplier.

(44) Form WC-R2. Rehabilitation Transmittal Report.

The principal rehabilitation supplier shall file:

(A) To accompany updated narrative progress reports on catastrophic cases every 90 days;

(B) To request a rehabilitation conference or prepare for a rehabilitation conference;

(C) With all progress reports as required by the Board not submitted with a Form WC-R2A and when a stipulation request has been submitted;

(D) Upon request of the Board;

(E) To report medical care coordination services for non-catastrophic cases with dates of injury prior to July 1, 1992.

(45) Form WC-R2A. Individualized Rehabilitation Plan. The principal rehabilitation supplier shall file within 60 calendar days from the date of appointment; not later than 30 calendar days prior to the end of the current rehabilitation period to request extension of services, or to amend an approved plan 30 calendar days prior to the date of plan expiration.

(46) Form WC-R3. Request for Rehabilitation Closure. The principal rehabilitation supplier shall file this form, accompanied by a closure report and any necessary documentation:

(A) Following 60 days of return to work status;

(B) When further services are not needed or feasible;

(C) When a stipulated settlement has been approved by the Board that does not include further rehabilitation services; or

(D) When the Board has closed the case.

Any party may file to request closure of rehabilitation accompanied by documentation supporting the request.

(47) Form WC-R5. Request for Rehabilitation Conference. Any party or principal rehabilitation supplier may file to request a rehabilitation conference.

(48) **Form WC-Rehabilitation Registration Application. Application to be a licensed rehabilitation supplier.** File this form with the Board to be a certified rehabilitation supplier in the state of Georgia.

(49) **Form WC-Rehabilitation Registration Application Renewal. Application to renew certification for a licensed rehabilitation supplier.** File this form annually with the Board to renew certified rehabilitation supplier status in the state of Georgia.

(50) **Form WC-Catastrophic Rehab Release.**

(51) **Form WC-P1. Panel of Physicians.** *See Board Rule 201.*

(52) **Form WC-P2. Conformed Panel of Physicians.** *See Board Rule 201.*

(53) **Form WC-P3. WC/MCO Panel.** To be utilized only by employers/insurers contracted with a Board Certified Managed Care Organization. *See Board Rule 201*

(54) **Form WC-Bill of Rights. Bill of Rights.** Use and post with the panel of physicians (Form WC-P1, Form WC-P2, or WC-Form P3). *See O.C.G.A. § 34-9-81.1 & Board Rule 81.1.*

(55) Any party or attorney filing a form with the Board shall use the most current version of the form. In addition, no party or attorney shall submit any form that has been discontinued or altered. A violation of this rule may result in the rejection of the filing with the Board, and/or the imposition of a civil penalty under O.C.G.A. § 34-9-18.

(56) When electronically filing any form with the Board, and when required by Statute, Rule, or form to serve a copy on an opposing attorney or party, a copy of the form or the ICMS equivalent of the form filed may be used for service.

(57) Service upon a party or attorney of any form, document, or other correspondence shall be by electronic mail. Whenever electronic mail is not available, service shall be by U.S. mail.

(58) No party or attorney shall use the ICMS doc-type "Misc" when requesting any action by the Board. This doc-type shall only be used when no action is being requested.

(59) All forms, documents, or other correspondence should be filed electronically through ICMS web submission or EDI, if available.

Note as to revisions. — The revision effective July 1, 2006, in paragraph (b)(1), added the second sentence in paragraph (b)(1), and added the next-to-last undesignated paragraph; inserted "under O.C.G.A. § 34-9-261, O.C.G.A. § 34-9-262, or O.C.G.A. § 34-9-263" in the middle of the

first sentence of paragraph (b)(2); deleted "This form shall not be used to change an address of record." from the end of paragraph (b)(10); rewrote paragraphs (b)(11) and (b)(25); added paragraphs (b)(26) and (b)(27); redesignated paragraphs (b)(28) through (b)(45) as paragraphs (b)(30)

through (b)(47), respectively; in paragraph (b)(28), added the last sentence; in paragraphs (b)(36) and (b)(37), deleted “, filing a copy with the Board” from the end of first sentence, and added the second sentence; rewrote present paragraph (b)(41); added paragraphs (b)(48) and (b)(49); redesignated paragraphs (b)(46) through (b)(49) as paragraphs (b)(50) through (b)(53), respectively; and added paragraphs (b)(54) and (b)(55).

The revision effective July 1, 2007, rewrote subparagraph (b)(5)(F); added present paragraph (b)(50), and redesignated former paragraphs (b)(50) through (b)(55) as paragraphs (b)(51) through (b)(56), respectively.

The revision effective July 1, 2008, deleted “(Color of paper: Pink)” from paragraphs (b)(51) through (b)(54), and added paragraphs (b)(57) through (b)(59).

Rule 63. Proration of Board’s Expenses.

The premium to be reported to the Board for the purpose of assessment shall be the “direct net earned premium”. The minimum assessment based upon the administrative cost necessary to provide licensure support and basic computer management reports shall be \$100 annually for each insurer and self-insurer.

Rule 81.1. Bill of Rights.

The employer shall post the summary of rights, benefits, and obligations which is required by O.C.G.A. § 34-9-81.1 and is provided by the Board in the same location as the panel of physicians which is required by O.C.G.A. § 34-9-201.

Rule 82. Statute of Limitation and Procedure for Filing Claims.

(a) Any defense as to the time of filing a claim is waived unless it is made no later than the first hearing.

(b) A party filing a claim should file Form WC-14 with the Board and serve a copy on all other parties.

Note as to revisions. — The revision effective July 1, 2007, deleted “, along with five copies when also requesting a hearing,” preceding “and serve a copy” in subsection (b).

Rule 100. Alternative Dispute Resolution (ADR) Division.

(a) An Alternative Dispute Resolution Division is established to resolve disputes without the necessity of a hearing.

(b) Hearing requests or motions will be screened in order to identify cases likely to be resolved by Board order or the mediation process without a hearing.

(c) In addition, the ADR Division and each Administrative Law Judge shall have the authority to direct the parties to attend a mediation

conference when deemed appropriate by the Board. The Board's authority to direct the parties to attend a mediation conference shall extend to include mediation of disputes which arise in cases designated as "Medical Only." Participation in a mediation conference shall not abridge the rights of the parties to a subsequent evidentiary hearing or ruling on the contested issues should the issues not be successfully resolved through mediation. An expedited hearing may be scheduled by agreement of the parties subsequent to the conference being held. An agreement reached at mediation will be reduced to writing and shall have the full effect of an award or order issued by the Board. A settlement agreement reached through the mediation process must be submitted and reviewed pursuant to O.C.G.A. § 34-9-15 and Board Rule 15.

(d) Parties requesting a Board mediation for the purpose of an all issues settlement must file a Form WC-100 certifying that all parties are in agreement with the request for a settlement mediation and that the employer/insurer has, or will have by the date of the first scheduled mediation conference, authority to resolve the claim based upon a good faith evaluation. The Form WC-100 must be served on all parties and parties at interest simultaneous with the board filing.

(e) Notices of Mediation will be sent by electronic mail and shall only be sent to attorneys of record. Whenever electronic transmission is not available, a Notice of Mediation will be sent by mail.

(f) Communications.

(1) All communications or statements, oral or written, that take place within the context of a mediation conference are confidential and not subject to disclosure. Such communications or statements shall not be disclosed by any mediator, party, attorney, attendee or Board employee, and may not be used as evidence in any proceeding. An executed Board mediation sheet or written executed agreement resulting from a mediation is not subject to the confidentiality described above.

(2) Neither the mediator nor any 3rd party observer present with the permission of the parties may be subpoenaed or otherwise required to testify concerning a mediation or settlement negotiations in any proceeding. The mediator's notes shall not be placed in the Board's file, are not subject to discovery, and shall not be used as evidence in any proceeding.

(3) Confidentiality does not extend to:

- (A) threats of violence to the mediator or others;
- (B) security personnel or law enforcement officials;
- (C) party or attorney misconduct;
- (D) legal or disciplinary complaints brought against a mediator or attorney arising out of and in the course of a mediation;

(E) appearance;

(F) the list of physicians submitted to an Administrative Law Judge by the parties or attorneys when the parties have been ordered to submit the names of physicians in a change of physician dispute and the dispute is not resolved through mediation.

(g) Attendance.

(1) Each party to the dispute is required to have in attendance at the mediation conference a person or persons who have adequate authority to resolve all pending issues. The employee shall be in attendance at the mediation conference. The employer shall have in attendance at the mediation conference a representative of the employer/insurer who has authority to resolve all pending issues. The requirement of the presence of the employer/insurer's representative shall not be satisfied by the presence of legal counsel of the employer. In claims where the Subsequent Injury Trust Fund (SITF) is a party-at-interest to the claim, a representative of the SITF must either be in attendance at the mediation conference or have extended settlement authority to the representative of the employer/insurer no later than two business days prior to the date of the conference. Exceptions to the attendance requirement may be granted upon permission of an Administrative Law Judge from the ADR Division or his/her designee, obtained prior to the conference date.

(2) Only the parties and attorneys of record may attend a scheduled mediation. Exceptions to attendance may be granted if agreed or consented to by the parties and attorneys of record and approved by a mediator or an Administrative Law Judge.

(h)(1) Any party or attorney directed or ordered by the Board to participate in or attend a mediation conference and who fails to attend the scheduled conference without reasonable grounds may be subject to civil penalties, attorney's fees, and/or costs. If the parties or attorneys agree to the postponement and/or rescheduling of a mediation conference, such request may be granted at the discretion of an Administrative Law Judge from the ADR Division or his/her designee upon good cause shown. Any party or attorney requesting cancellation, postponement or rescheduling of a mediation conference shall provide notice to all parties or their attorneys and shall promptly, but in no event later than 4:30 p.m. on the business day immediately before the scheduled mediation conference, notify the ADR Division of the request: (1) first, by telephone call; and (2) if so instructed by the ADR Division, by subsequent written or electronic confirmation.

(2) Whenever the pending mediation issues resolve or a case settles prior to a scheduled mediation date, the parties or attorneys shall immediately notify the ADR Division: (1) first, by telephone call; and (2) if so instructed by the ADR Division, by subsequent written or electronic confirmation.

(3) Any party or attorney who fails to follow the cancellation, postponement, or rescheduling procedures as outlined above in sections (h)(1) & (2), and who is unable to show good cause for such failure, may be subject to civil penalties, assessed attorney's fees, and/or costs.

(4) The ADR Division may postpone, reset, cancel or take off the calendar any mediation request, scheduled mediation, or Board ordered mediation.

(i) No person, party, or attorney shall, during the course of any mediation, engage in any discourteous, unprofessional, or disruptive conduct.

Note as to revisions. — The revision effective July 1, 2006, in the Rule heading, substituted "Alternative Dispute Resolution (ADR) Division" for "Alternative Dispute Resolution (ADR) Unit"; substituted "ADR Division" for "ADR Unit" throughout this Rule; rewrote subsection (f); in subsection (g), designated the previously existing provisions as paragraph (1), and added paragraph (2); rewrote subsection (h); and added subsection (i).

The revision effective July 1, 2007, design-

nated the existing provisions of subsection (h) as paragraph (h)(1); in paragraph (h)(1), made a punctuation change near the end, and substituted "if so instructed by the ADR Division, by subsequent written" for "then, when instructed by the ADR Division or when otherwise appropriate or necessary, by a subsequent written"; and added paragraphs (h)(2) and (h)(3).

The revision effective July 1, 2008, added paragraph (h)(4).

JUDICIAL DECISIONS

Cited in *Grier v. Proctor*, 195 Ga. App. 116, 393 S.E.2d 18 (1990).

Rule 102. Attorneys Entitled to Practice Before the Board; Reporting Requirements; Postponements, Leave of Absence, and Legal Conflicts; Conduct of Hearings; Motions and Interlocutory Orders; Discovery and Submission of Evidence; Written Responses.

(A) Practice of Law.

(1) Attorneys Entitled to Practice before the Board: Rule 1-203 of the Rules and Regulations for the Organization and Government of the State Bar of Georgia, as now in effect or as hereinafter amended, is controlling as to the practice of law before the Board and its Administrative Law Judges.

(2) Any ex parte communication, including electronic mail, with an administrative law judge in a pending claim is prohibited.

(3) Attorneys, not licensed in the State of Georgia, shall comply with Uniform Rule of Superior Court 4.4 addressing Admission Pro Hac Vice.

(4) On all filings with the Board, attorneys shall place their Georgia bar number. In addition, no attorney shall submit any form that has been

discontinued or altered. A violation of this rule may result in the rejection of the filing with the Board, and/or the imposition of a civil penalty under O.C.G.A. § 34-9-18.

(5) Service upon a party or attorney of any form, document, or other correspondence shall be by electronic mail. Whenever electronic mail is not available, service shall be by U.S. mail.

(B) Reporting Requirements:

(1) The address of record of an employee shall be that address shown on the most recent document filed with the Board.

(2) A party shall provide notice to the Board of the intent to obtain legal representation and the name of its legal representative, if any, within 21 days from the date of the hearing notice, subject to an assessment of penalties for failure to comply.

(3) The address of record of an employer shall be the address shown on the Form WC-1, the address on file with a Licensed Rating Organization filed by the insurer on behalf of the employer, or the principal office of the employer within the State of Georgia.

(4) Any party requesting a hearing shall furnish the correct name and current address of the employee, the employer, and the insurer/self insurer and third party administrator at the time the hearing is requested.

(5) An attorney who represents a party other than an employee or a claimant in a contested matter must file a notice of representation on a Form WC-102B with the Board, and must serve a copy on all counsel and unrepresented parties.

(6) An attorney who represents an employee or claimant in a contested matter shall file a fee contract as notice of representation and must serve a copy on all counsel and unrepresented parties. The contract must be dated, conform to Rule 108, and both the attorney and the client must sign the contract.

(C) Postponements, Leaves of Absence, and Legal Conflicts:

(1)(a) Postponement: If a hearing is on a calendar for the first time, and if all parties agree to postpone it to be rescheduled, they may obtain the postponement without consulting the Administrative Law Judge before whom it is scheduled, absent prior specific instructions from the judge to the contrary. This agreement must be communicated to the judge no later than 4:30 p.m. of the business day immediately preceding the hearing by the party who requested the hearing, or by any other party by agreement. Otherwise and generally, a hearing shall be postponed only upon strict legal grounds, or at the discretion of the Board or an Administrative Law Judge. For a case that has already been postponed, a second or subsequent request by counsel to postpone the

case from a calendar must be made no later than 4:30 p.m. on the business day immediately before the scheduled hearing, and the request must be approved by the Administrative Law Judge. For a case to be removed from the calendar with no reset, this notification, as with a postponement request, must be made no later than 4:30 p.m. on the business day immediately before the scheduled hearing. If the judge determines that the case is not ready for trial at this time, the claim may be removed from the calendar, not to be reset until the parties certify that discovery is complete and the case is ready to be tried.

(b) Whenever the pending hearing issues resolve or a case settles prior to a scheduled hearing date, the parties or attorneys shall immediately notify the Board or assigned Administrative Law Judge: (1) first, by telephone call; and (2) if so instructed by the Trial Division, by subsequent written or electronic confirmation.

(c) Any party or attorney who fails to follow the cancellation, postponement, or rescheduling procedures as outlined above in sections (C)(1)(a) & (b), and who is unable to show good cause for such failure, may be subject to civil penalties, assessed attorney's fees, and/or costs, including but not limited to the cost of the court reporter.

(2) In the event that an attorney wishes to obtain a leave of absence from the Board, the request should be submitted on a Form WC-102C and mailed to the Atlanta office of the State Board of Workers' Compensation or filed on-line via ICMS. The granting of a leave of absence will not apply to cases already calendared on the date the leave is signed, and will apply only to court appearances and mediations. In the event that leave is requested for a date already calendared, the attorney must request a postponement from the Administrative Law Judge, with permission of opposing counsel or by conference call, prior to the hearing or mediation.

(3) For the purpose of resolving requests for continuance based upon legal conflict, Rule 17.1(B)(4) of the Uniform Rules of the Superior Courts shall apply. A conflict letter shall be served upon opposing counsel and unrepresented parties no later than seven days prior to the date of conflict but shall not be filed with the Board unless or until such conflict letter is requested by an Administrative Law Judge or the Board. The action which was first filed shall take precedence, subject to judicial discretion.

(D) Motions and Interlocutory Orders Pending a Hearing:

(1)(a) All motions and objections shall be made on Form WC-102D, with the exceptions of motion for reconsideration and request for a change of physician/additional medical treatment under Board Rule 200(b)(1). Motions and objections, including briefs and exhibits, shall

be limited to 50 pages, unless otherwise approved by an Administrative Law Judge or the Board. When attaching documents as evidence to motions and objections, do not use tabs to separate documents. Any party or attorney filing a motion or objection shall also serve a copy on all counsel and unrepresented parties, along with supporting documents, including a separate certificate of service identifying the names and addresses served.

(b) When filing a motion for reconsideration, the parties or attorneys shall: (1) immediately notify the Board or assigned Administrative Law Judge by telephone call; (2) use the ICMS doc-type labeled motion for reconsideration; (3) limit their motion to 20 pages, including briefs and exhibits, unless otherwise permitted by the Board or an Administrative Law Judge; and (4) serve a copy on all counsel and unrepresented parties, along with supporting documents, including a separate certificate of service identifying the names and addresses served.

(2) Prior to filing a motion, including requests for documents made pursuant to Rule 102(F)(1), the moving party shall confer with the opposing party, or counsel if the party is represented, in a good-faith effort to resolve the matters involved.

(3) A party objecting to a motion shall respond on a Form WC-102D, which must be filed with the Board within 15 days of the date of the certificate of service on the request, and shall serve a copy on all counsel and unrepresented parties.

(4) Whenever the pending issues resolve, in whole or in part, in a motion, the parties or attorneys shall immediately notify the Board or assigned Administrative Law Judge: (1) first, by telephone call; and (2) if so instructed, by subsequent written or electronic confirmation. Any party or attorney who fails to follow this procedure, and who is unable to show good cause for such failure, may be subject to civil penalties and/or assessed attorney's fees.

(5) An Administrative Law Judge may issue an interlocutory order suspending or reinstating payment of weekly benefits to an employee pending an evidentiary hearing.

(6) Where the issue is which of two or more employer/insurers is liable, the Administrative Law Judge or the Board may issue an interlocutory order directing the employer or one of the insurers to pay weekly benefits and medical expenses until the determination of liability of an insurer has been made. Reimbursement may thereafter be ordered where appropriate.

(E) Conduct of Hearings:

(1) No person shall, during the course of a proceeding before an Administrative Law Judge or Director, engage in any discourteous or disruptive conduct.

(2) Any violation of the Georgia Rules of Professional Conduct of the State Bar of Georgia may subject an attorney to the assessment of a civil penalty pursuant to OCGA §34-9-18 and referral to the State Bar of Georgia for disciplinary action.

(3)(a) Prior to the commencement of a hearing, the parties shall consolidate any and all records, including but not limited to medical records, and any other documentary evidence to be admitted at a hearing in order to avoid any repetition and duplication.

(b) All medical evidence regarding the treatment, testing or evaluation of the claimant for the accident which is the subject of the hearing should be exchanged between the parties as soon as practicable, but no later than ten days prior to the hearing, and all depositions should be completed prior to the hearing. Failure to exchange such evidence within ten days of a hearing may, in the discretion of the Administrative Law Judge or the Board, result in: (1) the imposition of civil penalties, (2) award of assessed attorney fees, (3) a continuance, (4) award of costs, (5) award of witnesses fees and expenses, and/or (6) in limited circumstances, the exclusion of evidence at the hearing.

(c) If the amount of the average weekly wage is in dispute, counsel shall exchange written contentions with respect to their methods of calculation at least ten days prior to the hearing, and shall present the written contentions to the Administrative Law Judge at the commencement of the hearing.

(d) If accompanied by an affidavit, a written laboratory test result report is admissible into evidence for purposes of authenticity only. Any other evidentiary objections can be raised by the parties in motions or at evidentiary hearings.

(e) Any challenge to the testimony of an expert under O.C.G.A. § 24-9-67.1 shall be made not later than 15 days prior to the hearing. Failure to raise a timely challenge shall result in waiver of the challenge unless otherwise agreed to by the attorneys and the Administrative Law Judge.

(4) Parties may be allowed to make arguments either by the filing of briefs within the time set by the Administrative Law Judge at the hearing, by oral argument at the conclusion of the presentation of evidence at the hearing, or both. Oral argument shall be limited to five minutes for each party. Briefs shall be limited to 30 pages, unless otherwise approved by an administrative law judge or the Board.

(5) It is the policy of the Board to encourage the parties to close the record at the conclusion of the hearing. The parties are expected to make diligent efforts to present all the evidence at the hearing, without the need for the record to remain open.

(6) Hearing Transcript: Any Administrative Law Judge is authorized to relieve the court reporter of the duty of transcribing the record of proceedings. The record shall be transcribed and submitted to the Board or the superior court if there is an application for review of an appeal. The appellant shall serve a copy of the application for review or appeal on the court reporter at the same time it is served on all other persons.

(7) Notices of hearing may be sent by electronic mail to the parties and attorneys of record. Whenever electronic transmission is not available, a notice of hearing will be sent by U.S. Mail.

(F) Discovery and Submission of Evidence:

(1) Prior or subsequent to a request for hearing being filed in a claim, the parties shall be entitled to receive from each other without cost the documents specified in Form WC-102. These documents shall be provided within 30 days of the date of the certificate of service, subject to an assessment of penalties for failure to comply. Neither the request nor response shall be filed with the Board.

(2) Discovery filed pursuant to the Civil Practice Act shall only be permitted after a hearing has been requested in the claim, or as otherwise specified in these rules.

(3) Discovery documents, including but not limited to depositions, interrogatories, and notices to produce, shall not be filed with the Board until such time as they are tendered in evidence in a proceeding before the Board. Correspondence between the parties shall not be filed with the Board.

(4) All documents, transcripts, exhibits, and other papers filed with the State Board of Workers' Compensation shall be submitted on 8-½ by 11 inch paper only. Sufficient space shall be left at the top of all documents (at least one and one-half inches) so that all information will remain readable after the documents have been filed. Copies of items offered in evidence at a hearing must be properly identified and tendered to opposing parties at the hearing. When submitting any documents as evidence, do not use tabs to separate documents.

(G) Written Responses: The filing of all written responses will be governed in accordance with O.C.G.A. § 9-11-6(e).

Note as to revisions. — The revision effective July 1, 2006, rewrote paragraph (A); rewrote paragraph (C)(1); in paragraph

(D)(1), inserted “and objections” in the first and third sentences, added the second sentence, and inserted “or attorney” and “or

objection” in the fourth sentence; added the last sentence in paragraph (E)(3)(b); and added paragraph (E)(7).

The revision effective July 1, 2007, designated the existing provisions of paragraph (C)(1) as subparagraph (C)(1)(a), and added subparagraphs (C)(1)(b) and (C)(1)(c); in paragraph (C)(3), added the second sentence; added present paragraph (D)(4), and renumbered former paragraphs (D)(4) and (D)(5) as paragraphs (D)(5) and (D)(6), respectively; and added subparagraph (E)(3)(e).

The revision effective July 1, 2008, added paragraph (A)(2), and renumbered former paragraphs (A)(2) and (A)(3) as present paragraphs (A)(3) and (A)(4), respectively; added paragraph (A)(5); in paragraph (C)(2), added “or filed on-line via ICMS” at the end of the first sentence; redesignated paragraph (D)(1) as subparagraph (D)(1)(a) and rewrote the first sentence; and added subparagraph (D)(1)(b).

Rule 103. Appeals to the Appellate Division.

(a) The time for application for review commences on the date shown on the notice of award and is computed as in paragraph (3) of subsection (d) of O.C.G.A. § 1-3-1.

(b) Appearance before the Appellate Division shall be by brief only unless a request for oral argument is made at the time the application for review is filed by appeal or cross appeal. Within 10 days from the date of the certificate of service on the application for review, the appellee or cross appellee may request oral argument. Oral argument shall be limited to five minutes for each party.

(1) Any party applying for review shall serve a copy of the application for review and enumerations of errors allegedly made by the Administrative Law Judge upon all opposing parties. Failure to file enumerations of error with the Board may result in the dismissal of the appeal or cross appeal.

(2) The party requesting review shall have 20 days from the date shown on the certificate of service of the application for review in which to file a brief. The party requesting the review shall certify that a copy of the brief was served in person or by mail to all opposing parties on the date the brief is submitted to the Board. Opposing parties shall then have 20 days from the date of appellant’s or cross appellant’s certificate of service to file reply briefs with the Board. Briefs not filed in conformity with this rule will not be accepted except by permission of the Board.

(3) Notices of Oral Argument, and other correspondence, will be sent by electronic mail and only to attorneys of record. Whenever electronic transmission is not available, a Notice of Oral Argument, or other correspondence, shall be sent by mail.

(4) Briefs shall generally follow the format required by the appellate courts. Only the original of the brief is required to be filed with the Board. Briefs shall be limited to 20 pages, unless otherwise approved by the Board.

(5) Where a case has been scheduled on a calendar for oral argument, no more than one postponement will be granted to reschedule the argument. If the argument cannot be made within that time, the claim may be reviewed on briefs only.

(6) Any party scheduled for oral argument shall notify the Appellate Division no later than 4:30 the day before the scheduled appearance if they do not intend to appear.

(7) Amicus curiae briefs may be filed without permission any time before a decision is issued. The amicus brief shall disclose the identity and interest of the person or group on whose behalf the brief is filed.

(8) In a pending appeal before the Appellate Division, whenever the issues resolve, in whole or in part, or a case settles, the parties or attorneys shall immediately notify the Court Clerk of the Appellate Division: (1) first, by telephone call; and (2) if so instructed by the Appellate Division, by subsequent written or electronic confirmation. Any party or attorney who fails to follow this procedure, and who is unable to show good cause for such failure, may be subject to civil penalties, assessed attorney's fees, and/or costs.

(9) When filing a motion for reconsideration, the parties or attorneys shall: (1) immediately notify the Court Clerk of the Appellate Division or the Board by telephone call; (2) use the ICMS doc-type labeled motion for reconsideration; (3) limit their motion to 20 pages, including briefs and exhibits, unless otherwise permitted by the Court Clerk or the Board; and (4) serve a copy on all counsel and unrepresented parties, along with supporting documents, including a separate certificate of service identifying the names and addresses served.

(c) The Board will apply the law of Georgia regarding the tenure and character of newly discovered evidence required for the granting of a new trial.

(d) The Board will not accept an application for review of an interlocutory order unless the Administrative Law Judge, in the exercise of his or her discretion, certifies that the order or decision is of such importance to the case that immediate review should be had. In the event the Administrative Law Judge certifies his or her interlocutory order for immediate review, in order for the Appellate Division to have jurisdiction under O.C.G.A. 34-9-103(a), a party must file an application for review with the Appellate Division within twenty days of the date of the original interlocutory order.

(e) No person appearing before the Appellate Division shall engage in any undignified or discourteous conduct.

(f) Upon determining that an appeal has been prosecuted without reasonable grounds, the Appellate Division shall have the authority to assess penalties and attorneys' fees against the offending party.

Note as to revisions. — The revision effective July 1, 2007, added paragraph (b)(8).

The revision effective July 1, 2008, added paragraph (b)(9).

JUDICIAL DECISIONS

Newly discovered evidence. — There is no statutory authority for a claimant to seek, or the Board to conduct, a post-award hearing on the ground of newly discovered evidence; thus, the superior court correctly affirmed the Board's ruling that it had no jurisdiction

to hear the claimant's request for a hearing to open the record for the introduction of newly discovered evidence. *Cook v. Jordan Bradley Supply Co.*, 195 Ga. App. 604, 394 S.E.2d 400 (1990).

Rule 104. Suspension/Reinstatement of Benefits.

(a) To unilaterally convert the employee's income benefits from temporary total disability income benefits to temporary partial disability income benefits under O.C.G.A. §34-9-104(a)(2), the employer/insurer shall serve the employee and the employee's attorney a Form WC-104 no later than 60 days from the date the employee was released to work with restrictions by the employee's authorized treating physician. In addition, the employer/insurer shall attach to the Form WC-104 the medical report demonstrating the employee is capable of performing work with restrictions.

(b) After serving the employee and the employee's attorney sufficient and timely notice under section (a), if the employee has been released to work with restrictions for 52 consecutive weeks or 78 aggregate weeks, the employer/insurer may unilaterally convert the employee's income benefits from temporary total disability income benefits to temporary partial disability income benefits by filing a Form WC-2 with the Board. When filing the Form WC-2, the employer/insurer shall attach the Form WC-104 and attached medical report. Copies of all filings shall be served on the employee and the employee's attorney, if represented.

Rule 105. Appeals to the Courts.

(a) The prevailing party shall supply the Board with copies of the following documents:

- (1) Order of Superior Court disposing of an appeal;
- (2) Denial by the Court of Appeals or Supreme Court of an application for discretionary review;
- (3) Notice of appeal from Superior Court to Court of Appeals or Supreme Court where discretionary appeal is granted;
- (4) Denial of certiorari by the Supreme Court from a decision of the Court of Appeals;
- (5) Court of Appeals remittitur to Superior Court;

(6) Judgment on remittitur from Superior Court when the Court of Appeals does anything other than affirm the judgment of the Superior Court.

(b) The non-prevailing party shall supply the Board with the following documents:

(1) Application to the Court of Appeals or Supreme Court for discretionary review of a judgment of the Superior Court;

(2) Application to the Supreme Court for certiorari to review a decision of the Court of Appeals;

(3) Notice from the Supreme Court of granting of certiorari from a decision of the Court of Appeals.

(c) The party dismissing an appeal shall file a copy of the dismissal with the Board.

(d) In the event of a settlement during the pendency of an appeal, it shall be the joint obligation of the parties to supply the Board with copies of all documents necessary to restore jurisdiction to the Board to consider the settlement.

(e) Copies of the documents listed above shall be submitted to the Board by regular mail within five days of filing in the appropriate court.

(f) Any party filing with the Board an appeal to Superior Court shall pay the reasonable copying and transmittal costs of the Board. Upon good cause shown, the Board may waive the copying and transmittal costs.

Note as to revisions. — The revision effective July 1, 2007, added subsection (f).

Rule 108. Attorney's Fees.

The attorney's fee shall not exceed 400 weeks of income benefits and may be terminated or suspended sooner as provided by law or at the Board's discretion. The Board may, in its discretion, approve an attorney's fee for a period greater than 400 weeks so long as the attorney fee is not in excess of 25% of the claimant's weekly benefits.

(a) Attorney fee contracts. Immediately upon being employed by an employee or claimant in a matter which is before the Board, the attorney shall file a contract of employment and fees with the Board. This contract shall include the following attorney typed information: (1) name, (2) bar number, (3) firm name, (4) address, (5) phone number, (6) fax number, (7) email address, and (8) Board claim number. If the Board claim number is not known, this contract shall include the employee's first name, last name, social security number, and date of injury. Finally, all contracts shall include the employee's name and

address. This contract shall be dated, and shall be signed by both the attorney and the client, and shall include the following statement with respect to an accident occurring on or after July 1, 1992:

This contract is subject to the approval of the State Board of Workers' Compensation, and no fee of more than \$100.00 shall be paid under the contract unless approved by the Board.

No contract shall be filed with the Board which provides for a fee greater than 25 percent of the recovery of weekly benefits. Any contract with these terms, absent compelling evidence to the contrary, shall be deemed to represent the reasonable fee of the attorney.

With respect to an accident occurring before July 1, 1992, the contract shall include the following statement:

This contract is subject to the approval of the State Board of Workers' Compensation, and no fee of more than \$100.00 shall be paid under the contract unless approved by the Board.

No contract concerning an accident occurring before July 1, 1992, shall be filed with the Board which provides for a fee greater than 25 percent of the recovery of weekly benefits without a hearing, 30 percent of the recovery of weekly benefits with extensive discovery preparatory for a hearing, and 33-1/3 percent of the recovery of weekly benefits after a hearing. Any contract with these terms, absent compelling evidence to the contrary, shall be deemed to represent the reasonable fee of the attorney.

An attorney who requests approval of his or her fee contract when there is no pending litigation shall file with the Board Form WC-108a. When an attorney requests approval of his or her fee contract after a hearing notice has been issued and after the dispute has been resolved, that attorney shall file Form WC-108a with the Administrative Law Judge who issued the hearing notice.

(b)(1) The value of the services of the attorney may be agreed upon by the parties subject to approval of the Board.

(2) Any offer to make payment if the party waives a claim for attorney's fees under paragraph (2) or (3) of subsection (b) of O.C.G.A. § 34-9-108, or any agreement to waive a claim for attorney's fees as a condition to payment of income or medical benefits, where the only consideration for such waiver is the commencement of income or medical benefits, shall be void *ab initio*.

(3) No party shall be required to pay an attorney for services for which the fee was assessed against the opposing party. The Board, if deemed appropriate, may approve an attorney's fee which combines fees assessed against an opposing party and fees paid pursuant to approval of an

attorney fee contract, provided that the claimant receives a credit for the assessed fee.

(4) An attorney advertising to render services to a potential workers' compensation claimant must intend to render said services and shall not divide a fee with another attorney who is not a partner in or associate of his or her law firm unless:

1. The client consents to associating the other attorney after full disclosure that the fee will be divided; and,

2. The fee division is made in direct proportion to the services and responsibility performed and assumed by each attorney; and,

3. The total fee of the attorneys shall not exceed a reasonable fee for the claim.

No party shall be required to pay for the services of an attorney who violates the provisions of O.C.G.A. § 34-9-108(c).

(5) Upon assessing attorney's fees, costs may be assessed against the offending party which are payable to the Board in an amount not less than \$250.00. The Administrative Law Judge may assess higher costs based on the length of the hearing, time traveled, and time lost from other duties. In any case where a determination is made that proceedings have been brought, prosecuted, or defended in whole or in part without reasonable grounds, the Administrative Law Judge or the Board may, in addition to assessed attorney's fees, award to the adverse party reasonable litigation expenses, in whole or in part, against the offending party. Reasonable litigation expenses under this subsection are limited to witness fees and mileage pursuant to O.C.G.A. § 24-10-24; reasonable expert witness fees (subject to the Fee Schedule, where applicable); reasonable deposition costs; and the cost of the hearing transcript.

(6) When requesting payment of attorney's fees at a hearing pursuant to O.C.G.A. § 34-9-108, the party making the request shall be required to demonstrate the reasonableness of the attorney's fees requested by placing into the record expert testimony as to the value of services rendered. Counsel may testify personally or in affidavit form at the hearing, subject to cross-examination, as to expert status and the reasonable value of the services rendered in order to meet this requirement. No attorney's fees will be awarded pursuant to O.C.G.A. § 34-9-108 absent this evidence being placed in the record.

(7) When the parties agree to an assessment of attorney's fees the attorney who is to receive the assessed fee shall file with the Board Form WC-108a, serve a copy on all parties or their counsel, and sign the certificate of service on the form.

(8) An attorney shall not receive an attorney's fee on any medical treatment or expenses obtained for an employee, unless such fee is assessed under O.C.G.A. § 34-9-108(b)(1).

(9) The Board shall not approve a percentage of the claimant's income benefits as an attorney fee unless the attorney sufficiently shows that the payment of weekly benefits is the result of the attorney's efforts.

(10) If an attorney obtains the "catastrophic" designation for a claim under O.C.G.A. § 34-9-200.1(g), reinstates income benefits after a unilateral reduction under O.C.G.A. § 34-9-104(a)(2), and/or prevents a change in condition, then, upon request, the Board may approve the attorney's fee contract to commence at such time as the benefit accrues to the claimant and if deemed appropriate by the Board.

(c) Solicitation of Services. See O.C.G.A. §§ 34-9-22, 34-9-30, 34-9-31 and 34-9-32.

(d) An attorney who has made an appearance by filing Form WC-14 or by filing a fee contract and who wishes to withdraw as counsel for any party therein, shall file a Form WC-108b with the Board.

(e) An attorney of record who chooses to file a lien for services must do so by filing written notice of the contended value of such services with the Board on Form WC-108b within 20 days after (i) withdrawal from the case, or (ii) notice of termination of the contract in writing by the client. The attorney of record filing a lien shall serve a copy of Form WC-108b on all unrepresented parties and counsel. Failure to attach supporting documentation will result in the lien being denied. If the Board includes the issue of approval of the fee lien for determination at a hearing or mediation, and the attorney who filed the lien fails to appear and present evidence in support of the lien, then it shall be void. If all parties agree to resolution of a fee lien request prior to the initiation of litigation, then one of them must file with the Board Form WC-108b. Failure to perfect a lien in this manner will be considered a waiver of further attorneys' fees.

(f) No attorney shall charge to any client as an expense of litigation any portion of any referral fee or membership charged by any lawyer referral service, or nonspecific office costs.

Note as to revisions. — The revision effective July 1, 2006, added the second and third sentences in the introductory language of subsection (a); and added paragraph (b)(8).

The revision effective July 1, 2008, in the first paragraph, deleted "unless" preceding "and may be", and deleted "sooner" following "and may be" in the first sentence, and

deleted the former second sentence, which read: "An extension may be granted by order of the Board based upon an application filed prior to the expiration of 400 weeks of income benefits and demonstrating good cause for the granting of an extension."; and added paragraphs (b)(9) and (b)(10).

JUDICIAL DECISIONS

Contract for compensation entered into and performed in another state. — Although the Georgia Board of Workers' Compensation has complete authority over what

shall be approved legal fees in workers' compensation proceedings in Georgia, it could not, according to its own definition of what is right and proper, presume to contra-

vene a valid contract for compensation entered into and to be performed in another state. *Norris v. Kunes*, 166 Ga. App. 686, 305 S.E.2d 426 (1983).

Rule 121. Insurance in More Than One Company; Self-Insurance; Insurance by Counties and Municipalities.

(a) A compensation policy must cover all of the operations of an employer, except as hereinafter provided. An employer has the right to place insurance with more than one insurer; but if this is done with respect to distinct operations, the policies must be concurrent and the written portions must read alike. If there is any difference in coverage, it can be expressed as applying to a fractional part thereof. If an employer has more than one place of business, each operation can be covered separately unless the business is interchangeable. Each insurer on the risk must cover alike all the employees coming under the law.

(b) Any employer desiring to become a self-insurer shall apply on the form prescribed by the Self-Insurers Guaranty Trust Fund Board of Trustees and approved by the Board. All inquiries must be answered fully and will be treated as strictly confidential. The Self-Insurers Board of Trustees, with the approval of the Board, shall set the amount of security in the form of a surety bond or letter of credit to be required, but in no event shall the amount be less than \$100,000.00. It shall be at the discretion of the Self-Insurers Guaranty Trust Fund Board of Trustees if other forms of security are acceptable. Each case will be considered on its own merits with strict regard to the hazards of the business involved. So long as an employer shall continue solvent and promptly pay any and all compensation legally due in accordance with the provision of the law there shall be no effort to collect under the securities.

(c) Counties, municipalities, and other political subdivisions must qualify as self-insurers or obtain insurance coverage. Permission for self-insurance by municipalities and political subdivisions may be granted by application therefor and without deposit of surety bonds security. Assurance must be given the Board, however, that provision will be made for the payment of all awards.

(d) When an insurer, self-insurer, or group self-insurance fund obtains the services of a servicing agent or third party administrator for the purpose of administering workers' compensation matters, the insurer, self-insurer, or group self-insurance fund shall give notice to the Board on a Form WC-121 (or annual update) of the name and address of each servicing agent or third party administrator handling Georgia claims, the name, address and telephone number of a contact person with that third party administrator or servicing agent, the effective date of the servicing agent's or third party administrator's commencement of services, and if applicable, the ending date of those services, and shall file Form WC-121 with the Board no later than the agreed commencement date of those services. The insurer,

self-insurer, or group self-insurance fund shall also give notice by regular mail or electronic mail of the servicing agent's or third party administrator's name, address and telephone number to the claimants in all existing claims for which it is commencing administration within 14 days of commencing services. When the relationship between the insurer, self-insurer or group self-insurance fund and the servicing agent or third party administrator is terminated, the insurer, self-insurer, or group self-insurance fund shall file Form WC-121 with the State Board of Workers' Compensation no later than 30 days prior to the date of cessation of services, and shall give notice, by regular mail or electronic mail to all claimants in existing claims which it has been administering.

(e) Within 10 days from the date an employer determines its inability to make payment for workers' compensation benefits, the employer shall notify its surety and the Board in writing of its inability to fulfill its obligations under the Act.

Upon receipt of information establishing an employer's inability to meet its obligations under the Act, or upon notice from an employer that it is unable to meet its obligations under the Act, the Board shall make demand of the surety for payment of the bond or other security held. The Board shall give written notice of the demand for payment to the employer, and all claimants affected by this proceeding.

After the Board receives the proceeds of the bond or other security, then the Board shall determine whether the amount of the security is sufficient to pay all of the employer's obligations arising under this Chapter. If it is not sufficient, the Board shall apportion the proceeds of the bond, or other security held for distribution.

The Board may enter into an agreement with a servicing agent or the Georgia Self-Insurers Guaranty Trust Fund to administer the settlement of claims pursuant to this section.

(f) Rules for third party administrators/servicing agents.

(1) A third party administrator/servicing agent must be licensed by the Office of Commissioner of Insurance pursuant to O.C.G.A. § 33-23-100 and follow the Rules and Regulations of the Insurance Commissioner's Office Chapter 120-2-49 entitled Administrator Regulations.

(2) The third party administrator/servicing agent must comply with all sections of O.C.G.A. § 34-9 and all rules and regulations of the Board.

(3) Workers' Compensation claim files of third party administrators/servicing agents are subject to audit by the Board at any time.

(4) The transfer of files from one third party administrator/servicing agent to another must be handled in a professional and timely manner.

(i) Open indemnity files must be current as of the date of transfer and the transferring (former) third party administrator/servicing agent must include in the file a complete current Form WC-4 (completed within the last 30 days) reflecting all payments made as of the date of transfer. The transferring third party administrator/servicing agent must at the date of transfer provide the receiving third party administrator with a payment history on all Medical Only claims with an occurrence date of 90 days or less as of the date of transfer. Penalties for noncompliance by the transferring third party administrator/servicing agent would be in accordance with O.C.G.A. § 34-9-18(a).

(ii) The receiving (new) third party administrator/servicing agent must notify all active (open) claimants of the change in administration within 14 days of receiving the files. Vendors must be notified within 60 days of receipt of medical bills or service invoices.

Note as to revisions. — The revision effective July 1, 2007, in subsection (d), substituted “a Form WC-121 (or annual update)” for “Form WC-121”, and “each servicing agent or third party administrator handling

Georgia claims” for “the servicing agent or third party administrator” in the first sentence; and inserted “or electronic mail” in the second and third sentences.

JUDICIAL DECISIONS

Policies without co-extensive coverage not simultaneously effective. — Where two policies did not provide concurrent and co-extensive coverage with respect to distinct operations of the employer, it cannot be said that the policies were simultaneously effective

under the provisions of this rule. *American Centennial Ins. Co. v. Flowery Branch Nursing Center*, 258 Ga. 222, 367 S.E.2d 788, aff'd, 188 Ga. App. 172, 373 S.E.2d 399 (1988).

OPINIONS OF THE ATTORNEY GENERAL

Corporation operating facilities for hospital authority may not self-insure. — A private, nonprofit corporation that is leasing and operating health care facilities on behalf

of a hospital authority may not self-insure its workers' compensation liability as an “entity” of the authority. 1993 Op. Att’y Gen. No. 93-10.

Rule 126. Proof of Compliance with Insurance Provisions.

(a) Every employer insured by a licensed insurer shall have proof of coverage documented by its insurer directly with a Licensed Rating Organization through their policy information system. Every employee leasing company shall have proof of coverage documented with a Licensed Rating Organization of the initiation or termination of any contractual relationship with a client company; for the purposes of this Rule, the term employee leasing company shall refer to both; (1) any employee leasing company defined in O.C.G.A. § 34-8-32, and (2) any professional employer organization as defined in O.C.G.A. § 34-7-6. Reports will be made to the Licensed Rating Organization pursuant to procedures outlined by the

Licensed Rating Organization and approved by the Georgia State Board of Workers' Compensation.

(1) The proof of coverage documented with a Licensed Rating Organization is evidence that coverage is in effect until superseded or terminated.

(2) Termination

(i) Non-renewals

The expiration date documented by a Licensed Rating Organization shall be considered the date of termination on all non-renewals.

(ii) Mid-term cancellation by a licensed insurer

A mid-term cancellation by a licensed insurer documented with a Licensed Rating Organization is evidence that coverage is terminated, effective not less than 15 days after filing except where the provisions of Title 33 provide for an earlier effective date.

(b) Group self-insurance funds operating pursuant to the Georgia Workers' Compensation Act shall file with the Board a separate report for each insured member employer on Standard Coverage Form WC-11 on or before the effective date of coverage.

(1) The filing of Form WC-11 is evidence that coverage is in effect until superseded or terminated.

(2) The filing of a cancellation by a group self-insurer fund on Form WC-11 is evidence that coverage is terminated, effective not less than 15 days after filing.

(3) If the insured member employer operates under different trade names, a separate Form WC-11 must be filed for each trade name, properly cross-referenced.

(4) Group self-insurance funds shall file a separate Form WC-11 for each insured member of the fund by July 1, 1987.

(c) Self-insurers must give written notice to the Board addressed to the Director of Licensure and Quality Assurance when they add or delete subsidiaries, affiliates, divisions or locations to their self-insurance certificate, or make any changes in their excess insurance policies. (See Rule 382(d).)

JUDICIAL DECISIONS

If previous coverage superseded, cancellation report not necessary. — The filing of new insurance coverage by another insurer was evidence that the coverage shown thereon superseded the coverage previously

in effect, and since the previous coverage was thus superseded, there was no necessity for the previous insurer to file a report of cancellation, which is merely evidence that coverage is terminated. American Centen-

nial Ins. Co. v. Flowery Branch Nursing Center, 258 Ga. 222, 367 S.E.2d 788, aff'd, 188 Ga. App. 172, 373 S.E.2d 399 (1988) (decided under facts existing prior to 1987 revision).

Rule 127. Permits for Self-Insurance; Establishment of Offices.

In order for a certificate to be granted by the Board under O.C.G.A. § 34-9-127, the employer desiring to become a self-insurer must designate an office in the State of Georgia for the handling of claims or, if claims are handled out of state, shall designate an agent located in the State of Georgia who shall be authorized to execute instruments for the payment of compensation in an emergency (or, if necessary). Every service organization or office handling claims for self-insurance under the law shall be staffed during normal working hours and be available for immediate telephone contact with the Board and the public through a toll free telephone number. During normal working hours at this office, at least one staff member shall be authorized to execute (negotiable instruments) checks for the payment of compensation. Certificates to self-insure shall be continuous unless the self-insurer fails to meet the requirements of the Board.

Rule 131. Designation by Insurer of Office for Service of Notices.

The most recent address for servicing agents/claims offices submitted by an insurer, self-insured employer, or group self-insurer, on a Form WC-121, Form WC-131, Form WC-131a, or annual update shall be used as the address of record for service of forms, notices, orders, and awards.

Note as to revisions. — The revision effective July 1, 2007, rewrote this rule.

Rule 200. Compensation for Medical Care; Changes in Treatment; Filing of Medical Reports; Requests for Medical Information.

(a)(1) The employer/insurer have a duty to provide all reasonable and necessary medical treatment in a timely manner and to give appropriate assistance in contacting medical providers when necessary. The employee has a continuing obligation to cooperate with medical providers in the course of their treatment for work related injuries.

(2) Payment of compensation for costs by the employer or its insurer directly to the providers of medical, surgical and hospital care and other treatment, items, or services on behalf of the employee or directly to the employee shall satisfy employer's obligation to furnish the employee compensation for costs of such medical, surgical, hospital care and other treatment, items and services provided for by O.C.G.A. § 34-9-200(a).

(b)(1) Changes in treatment. Except as provided in subsection (b) of O.C.G.A. § 34-9-201, changes of physician or treatment are made only by

agreement of the parties or by order of the Board. If there has been no hearing requested, a party requesting a change shall make a good faith effort to reach agreement on the change before requesting an order from the Board.

If an agreement cannot be reached, the party requesting the change shall make the request on a Form WC-200b. When filing the WC-200b, the moving party shall sign the Form WC-200b, attach supporting documentation including a separate certificate of service identifying the names and addresses served attached to the end of the request, and serve a copy on all counsel and unrepresented parties. In cases that have been designated as "Medical Only", the requesting party shall file a Form WC-14 Notice of Claim or a Form WC-1 along with the Form WC-200b in order for the Board to process the request. The party making the request must specify the reason for the requested change, as well as the date that the change shall be effective. If the argument in support of the request is based on testimony, then an affidavit must be attached to the form, and if the argument refers to documents, then a copy of the documents must be attached. Do not use tabs to separate documents used as evidence. If the Board grants a change, the effective date will be the date that the Form WC-200b was filed, unless otherwise specified.

Any party who objects to the request for a change of physician or treatment shall also file their objection on a Form WC-200b with the Board within 15 days of the date of the certificate of service on the request, including a separate certificate of service identifying the names and addresses served attached to the end of the objection, and serving a copy on all unrepresented parties and counsel. Affidavits and documents must be attached as specified above.

All requests and objections to change of physicians shall be filed on a Form WC-200b and shall be limited to 50 pages, including briefs and exhibits, unless otherwise permitted by an Administrative Law Judge or the Board.

Whenever the pending issues in a request resolve, in part or in whole, the parties or attorneys shall immediately notify the assigned Administrative Law Judge: (1) first, by telephone call; and (2) if so instructed, by subsequent written or electronic confirmation. Any party or attorney who fails to follow this procedure, and who is unable to show good cause for such failure, may be subject to civil penalties and/or assessed attorney's fees.

If a hearing has been requested, the party requesting a change of physician or treatment may include the request in the original request for hearing, or amend the hearing request within 15 days prior to the date of the hearing to include the issue of change of physician or treatment. Upon consideration of the evidence, the Administrative Law Judge will render a decision on all the issues presented.

If the parties agree on a change of physician or treatment, a properly executed Form WC-200a may be filed with the Board, with copies provided to the named medical provider(s) and parties to the claim, which form shall be deemed approved and made the order of the Board pursuant to O.C.G.A. § 34-9-200(b), unless otherwise ordered by the Board.

(2) The party requesting/objecting to a change in physician shall set forth reasons why the change will/will not benefit the employee, or provide the employee with medical care reasonably required to effect a cure, give relief, or restore the employee to suitable employment. Factors which may be considered in support of the request/objection may include, but are not limited to, the following:

- (i) Proximity of physician's office to employee's residence;
- (ii) Accessibility of physician to employee;
- (iii) Excessive/redundant performance of medical procedures;
- (iv) Necessity for specialized medical care;
- (v) Language barrier;
- (vi) Referral by authorized physician;
- (vii) Noncompliance of physician with Board Rules and procedures;
- (viii) Panel of physicians;
- (ix) Duration of treatment without appreciable improvement;
- (x) Number of prior treating physicians;
- (xi) Prior requests for change of physician/treatment;
- (xii) Employee released to normal duty work by current authorized treating physician;
- (xiii) Current physician indicates nothing more to offer.

(3) When filing a motion for reconsideration, the parties or attorneys shall: (1) immediately notify the Board or assigned Administrative Law Judge by telephone call; (2) use the ICMS doc-type labeled motion for reconsideration; (3) limit their motion to 20 pages, including briefs and exhibits, unless otherwise permitted by the Board or an Administrative Law Judge; and (4) serve a copy on all counsel and unrepresented parties, along with supporting documents, including a separate certificate of service identifying the names and addresses served.

(c)(1) As long as an employee is receiving compensation, he or she shall submit himself or herself to examination by the authorized treating physician scheduled by the employer/insurer at reasonable times and with reasonable notice. If the employee refuses to submit himself or

herself to or in any way obstructs such an examination requested by and provided for by the employer, upon order of the board his or her right to compensation shall be suspended until such refusal or objection ceases and no compensation shall at any time be payable for the period of suspension unless in the opinion of the board the circumstances justify the refusal or obstruction.

(2) Nothing contained herein shall be construed to abridge the employee's continued right to schedule his/her appointments for authorized medical treatment.

(d) The employer/insurer may suspend weekly benefits for refusal of the employee to submit to treatment only by order of the Board.

(e) Medical Reports

The employer/insurer shall not file with the Board a medical report for any injury which occurred after January 1, 1989, except as follows:

(1) The report or its attachments contains a permanent partial disability rating (file within 10 days of employer/insurer's receipt);

(2) A rehabilitation plan is filed with the Board. In such instance the medical reports shall be filed with the rehabilitation plan;

(3) Medical reports are requested by the Board (file within 10 days of request.) Any additional medical reports required shall be filed within 10 days of the employer/insurer's receipt of same. The employer/insurer shall maintain copies of all medical reports in their files and shall not file medical reports except in compliance with this Rule.

(f)(1) Requests for Medical Information. The employee shall, upon the request of the employer/insurer, furnish copies of all medical records and reports which are in his/her possession concerning the treatment for the accident which is the subject of the claim. The employee shall furnish the copies within 30 days of the date of the request. The employer/insurer shall pay the reasonable cost of the copies as provided by the Board-approved fee schedule.

(2) The employer/insurer shall, upon the request of the employee, furnish a copy of the posted panel of physicians, and copies of all medical records and reports in their possession concerning the treatment for the accident which is the subject of the claim, and shall, upon request of the employee, furnish copies of all medical records and reports which were obtained with a release of the employee provided pursuant to O.C.G.A. § 34-9-207(b), within 30 days of the date of the request at no expense to the employee.

(3) Upon failure of either party to furnish information as provided above, the physician or other medical providers shall, upon request, furnish copies of all medical reports and bills in their possession

concerning the treatment for the accident which is the subject of the claim, at no expense to the employee or his/her attorney. A reasonable cost for copies pursuant to the fee schedule may be charged against the party determined to be responsible for payment of medical expenses. Nothing in this Rule shall limit an employee's right to obtain a complete copy of his/her medical records from any health care provider.

(g) Physicians as defined in O.C.G.A. § 34-9-201(a) may be called upon and may be issued a subpoena requiring their testimony as expert witnesses based upon their examinations and treatment of employees alleging work-related injuries. In lieu of live testimony at hearings in cases pending before the State Board of Workers' Compensation regarding matters subject to the Act, as permitted under O.C.G.A. § 24-10-24, depositions may be taken pursuant to O.C.G.A. § 34-9-26 et seq and O.C.G.A. § 34-9-102(d)(3), and said physicians shall be compensated for their preparation time and actual time pursuant to the provisions of the Board approved Fee Schedule or by a fee agreement agreed to by the parties and the physician.

Note as to revisions. — The revision effective July 1, 2006, added the third undesignated paragraph of paragraph (b)(1).

The revision effective July 1, 2007, added

the fifth undesignated paragraph of paragraph (b)(1).

The revision effective July 1, 2008, added the undesignated paragraph at the end of paragraph (b)(2).

Rule 200.1. Provision of Rehabilitation Services.

(a) REHABILITATION SERVICES

(1) Definitions:

(i) Rehabilitation services by a Board registered rehabilitation supplier are required in claims where the injury is catastrophic and for non-catastrophic claims with dates of injury prior to July 1, 1992. Services of a Board registered rehabilitation supplier may be utilized in all other non-catastrophic claims only upon written agreement of all parties. Consistent with O.C.G.A. § 34-9 and Board Rules, a rehabilitation supplier delivers and coordinates services under an individualized Rehabilitation Plan; facilitates coordination of medical care; provides vocational counseling, exploration, and assessment; performs job analysis, job development, modification, and placement, evaluates social, medical, vocational, psychological, and psychiatric information; and may provide additional services upon agreement of the parties or Board order. The rehabilitation supplier shall comply with the professional standards and code of ethics as set forth by his or her certification or licensure board. Neither rehabilitation suppliers nor case managers operating under O.C.G.A. § 34-9-208 shall provide services in a workers' compensation claim until and unless registered with, or certified by, the Board.

(ii) Case managers may be involved in cases where the employer/insurer has contracted with a certified workers' compensation managed care organization (WC-MCO). These case managers shall operate pursuant to the provisions of O.C.G.A. § 34-9-208 and Board Rule 208.

(iii) Other than the appointed rehabilitation supplier as defined by O.C.G.A. § 34-9-200.1 and Board Rule 200.1, or a case manager as defined by O.C.G.A. § 34-9-208 and Board Rule 208, only a direct employee of the insurer, third party administrator, or employer may communicate with an injured employee and/or the authorized treating physicians to assess, plan, implement, coordinate, monitor, and evaluate options and services relative to an injured employee's condition and/or vocational needs. The individual shall identify himself to others as an employee of the insurer, third party administrator, or employer and shall not identify himself as a case manager, rehabilitation supplier, or with any other term suggesting a fiduciary relationship with the injured employee. Nothing contained in this portion of the Board Rule shall apply to an attorney representing a party.

(2) Unauthorized Activities:

Rehabilitation suppliers and case managers not registered with the Board or any person performing any of the activities described in subsections (a)(1) of this Board Rule who is not a direct employee of the insurer, third party administrator or employer, shall be subject to civil penalties in accordance with O.C.G.A. § 34-9-18. Complaints pertaining to unregistered or unauthorized rehabilitation suppliers and case managers should be directed in writing to the Director of the Managed Care & Rehabilitation Division of the Board, with copies to all case parties and the rehabilitation supplier. Upon receipt of a complaint, the Director shall investigate the alleged violation and may refer the issue to the Enforcement Division and/or the Legal Division of the Board for further investigation or for the scheduling of an evidentiary hearing for a determination of whether or not penalties are warranted.

(3) Appointment of Board Registered Rehabilitation Supplier:

(i) In all catastrophic injury claims, within forty-eight hours of accepting the injury as compensable, or notification of a final determination of compensability, the employer/insurer shall appoint a Board registered catastrophic rehabilitation supplier. The employer/insurer shall file a Form WC-R1 with the Board simultaneously with the Employer's First Report of Injury (WC-1), or by filing a WC-R1 within twenty days of notification of an administrative decision that rehabilitation services are required.

(ii) If the employer/insurer does not timely appoint a registered catastrophic rehabilitation supplier as required pursuant to subsection (a)(3)(i), the employee shall file a WC-R1CATEE to request appoint-

ment of a registered catastrophic supplier with service to all parties and the requested supplier.

(iii) For non-catastrophic claims with date of injury prior to July 1, 1992, unless excused by the Board, any party may file a WC-R1 at any time requesting the appointment of a registered rehabilitation supplier subject to the opposing party's right to file an objection within twenty days. If the Board deems rehabilitation is appropriate, the Board may appoint a rehabilitation supplier.

(iv) Absent written objections filed with the Board within fifteen days of the date of the certificate of service on the WC-R1 or WC-R1CATEE, the request for rehabilitation services will be approved if, in the judgment of the Board, the appointment is appropriate. In the event written objection has been timely filed, the Board shall make a determination regarding appointment of a supplier and notify all parties.

(4) Rehabilitation Supplier Duties:

(i) A rehabilitation supplier is not a party to the case. The registered rehabilitation supplier shall have sole responsibility for the rehabilitation aspects of each individual case. The registered rehabilitation supplier shall communicate with the injured employee and others to assess, plan, implement and coordinate, monitor and evaluate options and services to meet an injured employee's health care needs through communication and available resources to promote cost effective outcomes with a goal of return to work.

(ii) The registered rehabilitation supplier shall meet with the injured employee within thirty (30) days of appointment and complete an initial rehabilitation evaluation and an appropriate plan for medical and vocational services. The initial rehabilitation plan must be filed with the Board on Form WC-R2A within ninety (90) days of the supplier's appointment to the claim, unless excused by the Board. A current Rehabilitation Plan must be filed with the Board during all phases of service delivery.

(iii) In the event that a Board approved Rehabilitation Plan proposes that services be provided to the employee that are outside the scope of the qualifications or expertise of the appointed registered supplier, the registered rehabilitation supplier may obtain those specific services from another qualified individual, facility, or agency.

(iv) For catastrophic claims, the registered catastrophic rehabilitation supplier shall file a WC-R2 and all accompanying rehabilitation reports every ninety days.

(v) For non-catastrophic claims with dates of injury prior to July 1, 1992, the registered rehabilitation supplier shall file a WC-R2 with all

rehabilitation reports and available medical information not previously submitted, every twenty-six weeks.

(vi) All rehabilitation plans shall be submitted with a current narrative report justifying the proposed action, which may include all pertinent medical documentation, evaluation reports, progress reports made since the last rehabilitation plan, labor market surveys, and other documentation. If the Board rejects the proposed rehabilitation plan, the registered rehabilitation supplier shall have 30 days to submit a revised plan. The registered rehabilitation supplier shall develop and submit an amended rehabilitation plan on a WC-R2A at any time that the circumstances change significantly such that the goals, activities, and timeliness of the current approved rehabilitation plan are no longer applicable or realistic. Amended or extended rehabilitation plans shall be submitted thirty days prior to the expiration of the current approved plan.

(5) Rehabilitation Plans:

(i) A Medical Care Coordination Plan assists catastrophically injured employees in attaining maximum medical improvement and independence in activities of daily living. Each individual medical care coordination plan shall be in place for no longer than one year.

(ii) An Independent Living Plan encompasses those items and services, including housing and transportation, which are reasonable and necessary for a catastrophically injured employee to return to the least restrictive lifestyle possible. Each individual independent living plan shall be in place no longer than one year.

(iii) An Extended Evaluation Plan provides evaluation to establish vocational feasibility and appropriate vocational goals. The extended evaluation plan may include medical care coordination services to meet medical care goals. The extended evaluation plan shall be in place for no longer than one year.

(iv) A Return-to-Work Plan assists with job placement in order to return an employee to suitable employment. Return-to-work plans, in order of preference, are: 1) return to same job with the same employer; 2) return to different job with same employer; 3) return to work with new employer; 4) short-term training; 5) long-term training; or 6) self-employment. The return-to-work plan shall be in place for no longer than a one-year period. Following an actual return to work, the plan may be extended for no longer than sixty days for the purpose of monitoring the return to work.

(v) A Training Plan documents the feasibility and necessity of vocational training. Each individual training plan shall be in place for no longer than one year.

(vi) A Self-Employment Plan is considered only when return-to-work plans or training plans are not feasible and when a reasonable probability of success in self-employment can be documented.

(vii) Any party objecting to a proposed rehabilitation plan shall file a written objection with the Board within fifteen days of the date of the certificate of service. The Rehabilitation Division may hold a rehabilitation conference and/or issue an administrative decision.

(6) Communication in Rehabilitation Services:

(i) A rehabilitation supplier shall recognize the employee's attorney as the employee's representative and shall encourage communication among all parties and their attorneys.

(ii) A rehabilitation supplier shall simultaneously provide copies of all correspondence to all parties and their attorneys.

(iii) The rehabilitation supplier shall provide professional identification and shall explain his or her role to any physician at the initial contact with the physician.

(iv) The employee has the right to a private physical examination and/or consultations with the medical provider. The rehabilitation supplier shall not attend such examination, except by the revocable written consent of the employee, or his or her attorney, if represented by counsel, after the employee has been advised of the right to a private examination and/or consultation.

(v) The rehabilitation supplier shall not obtain medical information regarding an injured employee in a private meeting with any treating physician unless the rehabilitation supplier has reserved with the physician sufficient appointment time for the conference and the injured employee and his or her attorney were given ten days advance notice of their option to attend the conference. If the employee is represented by counsel, all efforts shall be made to coordinate the meeting with the employee's attorney. All legal excuses for the injured employee's attorney's inability to attend the conference will be recognized. If the injured employee or the physician does not consent to a joint conference, or if, in the physician's opinion, it is medically contraindicated for the injured employee to participate in the conference, the rehabilitation supplier shall note this in his or her report and may in those specific instances communicate directly with the physician. The rehabilitation supplier shall report to all parties and the employee's attorney the substance of the communication between him or her and the physician. Exceptions to the above notice requirements may be made in cases of medical necessity or with the consent of the injured employee or his or her attorney.

(vi) The rehabilitation supplier shall simultaneously provide copies of all written communications and shall report the substance of all oral

communications between him or her and the treating physicians to all parties and their attorneys.

(vii) The rehabilitation supplier may assist the physician in scheduling second opinions and specialized treatment and shall give the injured employee and his or her attorney at least ten days notice of the time and place of any requested examination, unless waived by the Board or by agreement of the parties.

(viii) The rehabilitation supplier may assist in obtaining a permanent partial disability rating from the authorized treating physician.

(7) Rehabilitation Closure:

(i) The registered rehabilitation supplier shall submit a WC-R3, Request for Closure, for all catastrophic and pre-July 1, 1992 claims as follows:

- (1) sixty days after the employee's return to work;
- (2) at any time it is determined that further services are not needed or feasible;
- (3) when a stipulated settlement that does not include rehabilitation services has been approved by the Board; or
- (4) when the Board directs rehabilitation closure.

(ii) At any time, upon review of the file, the Board may determine that rehabilitation closure is appropriate and may issue an order or an administrative decision to close rehabilitation.

(iii) A party may request that the Board close rehabilitation services by filing a written request setting forth the specific reasons in support of their request for closure with copies to all parties and the supplier.

(b) CHANGE IN REGISTERED REHABILITATION SUPPLIER

(1) A change in registered rehabilitation supplier shall be requested only by parties to the claim and must be approved by the Board. The WC-R1 requesting a change in supplier shall include the names and addresses of the involved suppliers and the specific reasons the change is requested. The requesting party shall send copies of the WC-R1 to all parties and their attorneys and to involved rehabilitation suppliers and complete the certificate of service on the WC-R1.

(2) When a WC-R1 is filed to request a change of registered rehabilitation supplier, the current Board appointed rehabilitation supplier shall maintain responsibility for providing necessary rehabilitation services until all appeals have been exhausted, unless excused by the Board.

(3) Any party objecting to a change of rehabilitation supplier shall file a written objection with the Board within fifteen days of the date of the

certificate of service. The Rehabilitation Division may hold a rehabilitation conference and/or issue an administrative decision.

(c) CHALLENGES TO ADMINISTRATIVE DECISIONS

Any party to the claim dissatisfied with an administrative decision must file a WC-14, Request for Hearing, served on all parties and their attorneys and involved rehabilitation supplier within twenty days of the date of the administrative decision. The Board, in its discretion, may order the parties to participate in a mediation conference before the scheduling of the de novo hearing. The administrative decision shall be admissible in evidence.

(d) PEER REVIEW

Peer review shall be the procedure by which disputes concerning the necessity of services and the reasonableness of fees are resolved.

(e) FAILURE OF A PARTY OR COUNSEL TO COOPERATE

(1) Benefits may be suspended for failure or refusal to accept or cooperate with authorized rehabilitation services only by order of the Board.

(2) A party or attorney may be subject to civil penalty or to fee suspension or reduction for failure to cooperate with rehabilitation services. Failure to cooperate may include, but is not limited to, the following:

(i) Interference with the services outlined in a Board approved rehabilitation plan;

(ii) Failure to permit an interview between the employee and supplier within ten days of a request by the supplier or other obstruction of the interview process without reasonable grounds;

(iii) Interference with any party's or designated rehabilitation supplier's attempts to obtain updated medical information for purposes of rehabilitation planning;

(iv) Failure to sign and return or object to the proposed rehabilitation plan within twenty days of receipt; or

(v) Failure to attend a rehabilitation conference without good cause.

(3) At the request of a party, a rehabilitation supplier, an Administrative Law Judge, or the Board's rehabilitation coordinator, the Board may schedule a mediation or an administrative rehabilitation conference to resolve problems relating to the rehabilitation process. The parties should make all efforts to resolve the problems before requesting a mediation or conference. At Board scheduled rehabilitation conferences or mediations, all parties, attorneys of record, and the rehabilitation

supplier may be required to attend or to be represented by a person with full authority to resolve the pending disputes. Only the parties, attorneys of record, and rehabilitation supplier may attend a scheduled mediation or rehabilitation conference. Exceptions to attendance may be granted if agreed or consented to by the parties and attorneys of record and approved by a mediator, rehabilitation coordinator, or administrative law judge. Agreements reached at mediations or rehabilitation conferences will be reduced to writing. Agreements reached at mediation shall be governed by Rule 100.

(i) Any person notified by the Board who fails to attend a Board scheduled mediation or rehabilitation conference without reasonable grounds may be subject to sanction pursuant to O.C.G.A. § 34-9-18. Any party requesting cancellation or rescheduling of a rehabilitation conference or mediation shall notify the Board and other parties with adequate notice to all parties.

(ii) Following the rehabilitation conference, the Board may issue an administrative decision.

(f) REHABILITATION SUPPLIERS SHALL BE CERTIFIED OR LICENSED AND REGISTERED WITH THE BOARD

(1) Qualified Certifications or Licenses

Any rehabilitation supplier who wishes to supply services in a Workers' Compensation claim shall hold one of the following certifications or licenses:

- (i) Certified Rehabilitation Counselor (CRC);
- (ii) Certified Disability Management Specialist (CDMS);
- (iii) Certified Rehabilitation Registered Nurse (CRRN);
- (iv) Work Adjustment and Vocational Evaluation Specialist (WAVES);
- (v) Licensed Professional Counselor (LPC);
- (vi) Certified Case Manager (CCM);
- (vii) Certified Occupational Health Nurse (COHN); or
- (viii) Certified Occupational Health Nurse Specialist (COHN-S).

(2) Registration with the Board

(i) To register as a rehabilitation supplier or rehabilitation resident, an applicant shall submit a completed, notarized application and a registration fee of one hundred dollars (\$100.00). The registration shall be renewed annually. Not later than November 30th each year, an applicant shall submit a completed, notarized renewal application, a

renewal fee of fifty dollars (\$50.00), and documentation of current certification. Rehabilitation suppliers registered prior to July 1, 1985, who are not certified by CRC, CDMS, WAVES, LPC, CCM, CRRN, COHN, or COHN-S shall continue to renew registration annually. The renewal application for uncertified rehabilitation suppliers shall be accompanied by proof of completion of at least thirty contact hours of approved continuing education units. Any person who fails to renew on or before November 30th, shall be penalized an additional twenty-five dollars (\$25.00). Any person who is delinquent on or after January 1st of each year shall be penalized an additional amount up to one hundred dollars (\$100.00). A rehabilitation supplier who has not renewed his or her rehabilitation supplier registration by November 30th of the year following his or her supplier registration expiration date, shall not be eligible for renewal. If that individual wishes to provide rehabilitation services to injured employees, he or she will be required to submit a new application to become a rehabilitation supplier in accordance with the first paragraph of this section. In addition, if that supplier was registered as a catastrophic rehabilitation supplier, and wishes to provide catastrophic rehabilitation services, he or she will also be required to re-apply for catastrophic registration pursuant to (4) of this section.

(ii) Notice of a rehabilitation supplier's registration approval will contain a supplier registration number with the November 30th expiration date, which shall be included on all reports submitted to the Board by the rehabilitation supplier.

(iii) An appeal of a denial of an application for registration, renewal, or reinstatement may be made within twenty days of notification of the denial by letter to the Board requesting a hearing. The applicant will be advised by the Board of the date, time, and place of the appeal hearing.

(iv) The Director of Managed Care and Rehabilitation may require a rehabilitation supplier to submit corrective action plans and/or may recommend the assessment of penalties for the violation of Board Rules, consistent submission of inappropriate rehabilitation or medical care plans, consistent failure to timely revise denied rehabilitation plans, and/or unethical behavior during rehabilitation services.

(v) Rehabilitation supplier registration may be revoked or suspended for violation of Board Rules. A complaint against a registered rehabilitation supplier shall be filed in writing, with copies to all case parties and the supplier, with the Director of the Managed Care and Rehabilitation Division of the Board. Upon receipt of a complaint, or upon the Board's knowledge of a violation, the Director of Managed Care and Rehabilitation shall notify the rehabilitation supplier in writing of the nature of the complaint. Within fifteen days of the date of the notice, the rehabilitation supplier shall file with the Director of

Managed Care and Rehabilitation a written response to the complaint. If the Director of Managed Care and Rehabilitation determines that justification exists for penalties and/or revocation or suspension of the rehabilitation supplier's registration, the issue will be referred to the Enforcement Division and the Legal Division for a hearing to be held before an Administrative Law Judge. The Administrative Law Judge shall issue an order either dismissing the complaint, assessing penalties and/or revoking or suspending the rehabilitation supplier's registration, or placing the rehabilitation supplier on probation. The rehabilitation supplier may appeal the order of the Administrative Law Judge in accordance with O.C.G.A. § 34-9-103 and § 34-9-105.

(3) Rehabilitation Resident

(i) An individual who meets the academic and experience criteria and who has applied for and been registered to sit for the examination to be certified or licensed as CRC, CDMS, WAVES, CRRN, LPC, CCM, COHN, or COHN-S may register to be a rehabilitation resident. A resident may provide rehabilitation services under the direct supervision of a registered rehabilitation supplier. However it is the registered rehabilitation supplier who shall perform the initial evaluation and prepare any rehabilitation plans, job analyses, progress reports, or closure report and who has any personal contact with the injured employee.

(ii) In the event a rehabilitation resident does not become certified or licensed by the appropriate licensing board within a two-year period from the date of initial application, the rehabilitation resident shall be disqualified from providing services to injured employees. A rehabilitation resident shall register with the Board on forms supplied by the Board.

(iii) Nothing contained in this subsection shall be construed to permit a rehabilitation resident to act independently as a registered rehabilitation supplier or to relieve the registered rehabilitation supplier from his or her responsibilities in any claim where a rehabilitation resident is utilized.

(iv) Any individual participating in a Council on Rehabilitation Education (CORE) approved master's level program of study practicum/internship shall not be required to register with the Board while completing that short term internship. The registered rehabilitation supplier supervising an educational intern shall be responsible for all activities on the claims.

(4) Registered Catastrophic Rehabilitation Supplier

In order to provide services to catastrophically injured employees, the rehabilitation supplier must be registered with the Board as a catastrophic supplier.

(i) A catastrophic applicant shall have been registered as a rehabilitation supplier for a minimum of two years immediately prior to beginning the catastrophic application process. The applicant for catastrophic supplier registration shall document experience and/or training in at least three of the types of catastrophic injury listed in O.C.G.A. § 34-9-200.1(g) 1 through 5. Other detailed requirements for becoming a catastrophic supplier, including education, experience and renewal are set forth in the current edition of the Board's Procedure Manual.

(ii) Within thirty days of the date of a denial of an application for registration as a catastrophic supplier, an appeal may be initiated by filing a written request with the Board for a conference with the Catastrophic Certification Committee. The applicant will be notified in writing of the date, time, and place of the conference within thirty days of the appeal.

(g) CATASTROPHIC DESIGNATION

(1) When there is no dispute, the employer/insurer shall file a Form WC-R1 requesting a catastrophic designation and an appointment of a registered catastrophic rehabilitation supplier. The claim is automatically accepted as a catastrophic claim.

(2) When a catastrophic designation is disputed, an employee or employee's attorney shall file a WC-R1CATEE, with certificate of service with the Managed Care and Rehabilitation Division to request a catastrophic designation and an appointment of a registered catastrophic rehabilitation supplier. The WC-R1CATEE must be accompanied by documentation as specified in the current edition of the Board's Procedure Manual, or as requested by the Board.

(3) Any objections must be filed with the Board in writing within twenty days of the certificate of service on the WC-R1CATEE. In the alternative, either party may file a Form WC-14 requesting an evidentiary hearing within 20 days of the certificate of service on the WC-R1CATEE. In the event a Form WC-14 is filed, the file shall be transferred to an administrative law judge for an evidentiary hearing without an administrative decision being rendered by the Rehabilitation Coordinator. The timeliness of the objection or hearing request will be processed in accordance with provisions of O.C.G.A. § 9-11-6(e).

(4) The Board's Rehabilitation Coordinator will review the file and render an administrative decision, in writing as soon as possible. Prior to issuing a decision, the Rehabilitation Coordinator may schedule a rehabilitation conference. The administrative decision will be issued, in writing promptly following the conference.

(5) Any party to the claim dissatisfied with the administrative decision must, within twenty days of the date of the administrative decision, file a

WC-14, Request for Hearing. The WC-14 must be served on all parties, their attorneys and involved rehabilitation suppliers. The Board, in its discretion, may order the parties to participate in a mediation conference before the scheduling of the de novo hearing.

(6) When no hearing is requested following an administrative decision by a Board Rehabilitation Coordinator or when an administrative law judge determines that an injury is catastrophic, the employer/insurer have 20 days from the date of such administrative decision or administrative law judge's award to select a Board-registered rehabilitation supplier. If the employer/insurer fails to select a supplier, or requests a hearing without reasonable grounds following an administrative decision, or files an appeal of the administrative law judge's decision granting catastrophic designation and the catastrophic designation is upheld on appeal, the Board will select the supplier, and may, in the exercise of its discretion, appoint the supplier requested by the employee.

(h) VOLUNTARY REHABILITATION

Any party may request the appointment of a registered rehabilitation supplier on a voluntary basis upon agreement of the parties. The registered rehabilitation supplier shall be responsible for obtaining the written agreement from the employee.

If one party does not consent to voluntary rehabilitation services or subsequently withdraws consent for rehabilitation services, the rehabilitation supplier shall have no further contact, written, oral or otherwise, with the employee, the employee's attorney, or the employee's authorized treating physicians.

(i) PROFESSIONAL RESPONSIBILITIES OF A REHABILITATION SUPPLIER

(1) A rehabilitation supplier may contract as a consultant with an employer/insurer or attorney, to review files, give recommendations regarding case management, safety and rehabilitation issues, and to perform job analyses of employment positions. All recommendations and reviews must be submitted directly to the employer/insurer or its agent requesting rehabilitation services.

(2) The rehabilitation supplier utilized by the parties must hold one of the certifications, or licenses specified in subsection (f) of this Rule and the supplier must be registered with the Board.

(3) A rehabilitation supplier will inform all parties of the legal limitations of their services or the benefits offered to the injured employee. The rehabilitation supplier shall function within the limitations of his or her role, training, and technical competency and will accept only those positions for which he or she is professionally qualified. A rehabilitation supplier will not misrepresent his or her role or

competence to an injured employee and will refer the injured employee to a specialist as the needs of the injured employee dictate.

(4) The rehabilitation supplier shall disclose at the outset of a case to health care providers, the parties, and their attorneys any possible conflicts of interest. The rehabilitation supplier shall inform any health care providers, the parties, and their attorneys of his or her assignment and proposed role in the case.

(5) The rehabilitation supplier shall exercise independent professional judgment in making and documenting recommendations for medical and vocational services, including any alternatives for medical treatment and cost-effective return-to-work options including retraining or retirement. The rehabilitation supplier shall acknowledge that the authorized treating physician directs the medical care of an injured employee.

(6) Subject to the qualifications of the rehabilitation supplier, he or she may explain medical information to the injured employee, and shall discuss with the injured employee all treatment options appropriate to the injured employee's conditions.

(7) The rehabilitation supplier shall insure the confidentiality of the injured employee's medical records and shall not disclose the medical records to non-parties without the written consent of the injured employee or unless otherwise legally required to do so.

(8) As an expert witness or consultant, the rehabilitation supplier shall provide unbiased, objective opinions. The limits of his or her relationship shall be clearly defined in writing to all parties.

(9) A rehabilitation supplier shall not conduct or assist any party in claims negotiation, investigative activities, or perform any other non-rehabilitation.

(10) A rehabilitation supplier shall not advise the injured employee as to any legal matter, including but not limited to claims settlement options or procedures, monetary evaluation of claims, or the applicability of benefits of any kind under the Workers' Compensation Act. Rehabilitation suppliers shall advise a non-represented injured employee to direct such questions to the State Board of Workers' Compensation and a represented injured employee to direct such questions to his or her counsel.

(11) A rehabilitation supplier shall not accept any additional compensation or reward from any source as a result of settlement of a case.

(12) The assigned rehabilitation supplier shall not perform any additional services for either party for compensation not contemplated by the approved plan, unless all parties agree.

(13) A rehabilitation supplier who possesses information concerning an alleged violation of this rule shall reveal such information to the Managed Care & Rehabilitation Division of the State Board of Workers' Compensation, unless the information is protected by law.

Note as to revisions. — The revision effective July 1, 2006, in subsection (e), in subdivision (2)(iv), substituted "twenty days" for "fifteen days", in paragraph (3), inserted "attorneys of record," in the third sentence, and added the fourth and fifth sentences; in subsection (f), in subdivision (2)(i), deleted "and shall have official certified post secondary academic transcripts or evidence of professional licensure by the State of Georgia

sent directly to the Board" from the end of the first sentence, and substituted "the Board" for "the Director of the Board's Licensure and Quality Assurance Division" in subdivisions (f)(2)(iii) and (f)(4)(ii).

The revision effective July 1, 2008, in paragraph (b)(3), substituted "fifteen days" for "twenty days" in the first sentence; and, in division (f)(2)(iii), substituted "twenty days" for "fifteen days" in the first sentence.

Rule 201. Panel of Physicians.

(a) The employer may satisfy the requirements for furnishing medical care under O.C.G.A. § 34-9-200 in one of the following manners:

(1)(i) The employer may maintain a traditional posted panel of physicians that shall consist of at least six non-associated physicians, but is not limited to a minimum of six. However, the Board may grant exceptions to the required size of the panel where it is demonstrated that more than four physicians or groups of physicians are not reasonably accessible. The physicians selected under this subsection from the panel may arrange for any consultation, referral, and extraordinary or other specialized medical services as the nature of the injury shall require without prior authorization from the Board; provided, however, that any medical practitioner providing services as arranged by a primary authorized treating physician under O.C.G.A. § 34-9-201(b)(1) shall not be permitted to arrange for any additional referrals. The physicians and groups listed on the panel shall be counted as a separate choice from the others listed only if they are not associated with the other physicians and groups listed on the panel. The minimum panel shall include an orthopedic physician, and no more than two physicians shall be from industrial clinics. Further, this panel shall include one minority physician. The minority physician so selected must practice within the State of Georgia or be reasonably accessible to the employee's residence. "Minority" shall be defined as a group which has been subjected to prejudice based on race, color, sex, handicap or national origin, including, but not limited to Black Americans, Hispanic Americans, Native Americans or Asian Americans. Failure to include one minority physician on the panel does not necessarily render the panel invalid. The Board reserves the right to allow exceptions when warranted. The employee may make one change from one physician to another on the same panel without prior

authorization of the Board. The party which challenges the validity of a panel shall have the burden of proving that the panel violates the provisions of O.C.G.A. § 34-9-201 and Board Rule 201.

(ii) In the event that the Board has granted any exceptions to the panel requirements, all exceptions must be posted at the same location as the panel.

(2) **Conformed Panel of Physicians.** The employer may maintain a list of physicians that shall be known as the “conformed panel of physicians,” which shall include a minimum of ten physicians, or professional associations, reasonably accessible to employees and providing the same types of healthcare services specified in Board Rule 201(a)(1) and the following additional healthcare services: general surgeons and chiropractors. The physicians and groups listed on the panel shall be counted as a separate choice from the others listed only if they are not associated with other physicians and groups listed on the panel. Further, this panel shall include one minority physician as specified in Board Rule 201(a)(1). An employee may obtain the services of any physician from the conformed panel and may thereafter also elect to change to another physician on the panel without prior authorization of the Board. The physician so selected will then become the authorized treating physician in control of the employee’s medical care and may arrange for any consultation, referral, and extraordinary or other specialized medical services as the nature of the injury shall require without prior authorization of the Board; provided, however, that any of the physicians to whom the employee is referred by the primary authorized treating physician shall not be permitted to arrange for any additional referrals. The party which challenges the validity of the conformed panel shall have the burden of proving that the panel violates the provisions herein.

(3) An employer or the workers’ compensation insurer of an employer may contract with a workers’ compensation managed care organization certified pursuant to O.C.G.A. § 34-9-208 and Board Rule 208. A “workers’ compensation managed care organization” (hereinafter “WC/MCO”) means a plan certified by the Board that provides for the delivery and management of treatment to injured employees under the Georgia Workers’ Compensation Act. The party which challenges the validity of the WC/MCO panel shall have the burden of proving that the panel violates the provisions herein. An employer utilizing a WC/MCO may satisfy the notice requirements of O.C.G.A. § 34-9-201(c) by posting a notice in prominent places upon the business premises which includes the following information:

(A) The employer has enrolled with the specified WC/MCO to provide all necessary medical treatment for workers’ compensation injuries. An employee with an injury prior to enrollment may continue to receive treatment from the non-participating authorized treating physician until the employee elects to utilize the WC/MCO;

(B) The effective date of the WC/MCO;

(C) The geographical service area (by counties);

(D) The telephone number and address of the administrator for the employer and/or WC/MCO who can answer questions about the managed care plan;

(E) How the employee can access care with the WC/MCO and the toll-free 24-hour telephone number of the managed care plan that informs employees of available services.

(b) The employer/insurer cannot restrict treatment of the employee to the panel of physicians, conformed panel of physicians, or WC/MCO when the claim has been controverted. However, if the controverted claim is subsequently found to be or is accepted as compensable, the employee is authorized to select one of the physicians who has provided treatment for the work-related injury prior to the finding or acceptance of compensability, and after notice has been given to the employer, that physician so selected becomes the authorized treating physician. The employee may thereafter make one change from that physician to another physician without approval of the employer and without an order of the Board. However, any further change of physician or treatment must be in accordance with O.C.G.A. § 34-9-200 and Board Rule 200.

(c) When a case has not been controverted but the employer fails to provide any of the procedures for selection of physicians as set forth in O.C.G.A. § 34-9-201(c), the employee is authorized to select a physician who is not listed on the employer's posted panel of physicians, conformed panel of physicians or WC/MCO. After notice has been given to the employer, that physician so selected becomes the authorized treating physician, and the employee may make one change from that physician to another physician without approval of the employer and without an order of the Board. However, any further change of physician or treatment must be in accordance with O.C.G.A. § 34-9-200 and Board Rule 200.

(d) A party requesting a change of physician must do so in the manner prescribed by Board Rule 200.

JUDICIAL DECISIONS

Charges for treatment. — Where employee sought and received treatment before filing a claim for benefits and thus before employer and its insurer had an opportunity to controvert the claim, subdivision (b) of this Rule will not be construed to prevent

them from denying responsibility for charges for the treatments thereby subverting the intent and meaning of O.C.G.A. § 34-9-201. *Ledbetter v. Pine Knoll Nursing Home*, 180 Ga. App. 654, 350 S.E.2d 299 (1986).

Rule 202. Examinations.

(a) Examinations contemplated by O.C.G.A. § 34-9-202 shall include physical, psychiatric and psychological examinations. An examination shall also include reasonable and necessary testing as ordered by the examining physician.

(b) The examining physician may require prepayment pursuant to the Fee Schedule base amount for the first hour (\$500.00). Payment for any additional charges pursuant to the Fee Schedule shall be due within 30 days of receipt of the report and charges by the employer/insurer.

(c) The employer shall give ten days written notice of the time and place of any requested examination. Advance payment of travel expenses required by Rule 203(e) shall accompany such notice.

(d) The employer/insurer shall not suspend weekly benefits for refusal of the employee to submit to examination except by order of the Board.

Rule 203. Payment of Medical Expenses; Procedure When Amount of Expenses are Disputed.

(a) Medical expenses shall be limited to the usual, customary and reasonable charges as found by the Board pursuant to O.C.G.A. § 34-9-205. Employer/insurers may automatically conform charges according to the fee schedule adopted by the Board and the charges listed in the fee schedule shall be presumed usual, customary, and reasonable and shall be paid within 30 days from the date of receipt of charges. Employer/insurers shall not unilaterally change any CPT-4 code of the provider. All automatically conformed charges according to the fee schedule adopted by the Board shall be for the CPT-4 code listed by the provider. In situations where charges have been reduced or payment of a bill denied, the carrier, self-insured employer, or third party administrator shall provide an Explanation of Benefits with payment information explaining why the charge has been reduced or disallowed, along with a narrative explanation of each Explanation of Benefits code used. In all claims, any health service provider whose fee is reduced to conform to the fee schedule and who disputes that fee, or employer/insurers who dispute the CPT-4 code used by the provider for services rendered shall, in the first instance, request peer review of the charges, and may thereafter request a mediation conference or an evidentiary hearing by filing Form WC-14 with the Board. For charges not contained in the fee schedule and which are disputed within 30 days as not being reasonable, usual and customary, the aggrieved party shall follow the procedures provided in subsection (b).

(b)(1) A medical provider or an employee who has incurred expenses for healthcare goods and services or other medical expenses shall submit the charges to the employer or its workers' compensation carrier for payment

within one year of the date of service. In the event that the claim or the expense is controverted, the medical expenses or request for reimbursement must be submitted for payment within one year of the date of service or within one year of the date that the claim is accepted or established as compensable, whichever is later. Failure by the medical provider to submit expenses within the time prescribed shall result in waiver of such expenses.

(2) Any challenge by a medical provider to the amount of payment for goods, services, or expenses shall be submitted to the payor within 120 days of payment. Failure by a medical provider to challenge the amount of payment of such goods, services, or expenses within 120 days shall result in the waiver of additional payment.

(c) Disputes

(1) An employer or insurer shall pay when due all charges deemed reasonable, and follow the procedures set forth in subsection (2) for review of only those specified charges which are disputed.

(2) For charges not contained in the fee schedule and which are disputed as not being the usual, customary and reasonable charges prevailing in the State of Georgia, the employer, insurer, or physician shall file a request for peer review with a peer review organization authorized by the Board within 30 days of the receipt of charges by the employer/insurer, and shall serve a copy of the request and supporting documentation upon all parties and counsel. A request for peer review of chiropractic charges or treatment shall attach to the application 10 copies of the charges and all of the reports dealing with the treatment of the injured employee. A request for peer review of any other treatment or charges shall attach to the application two copies of the charges and all of the reports dealing with the treatment of the injured employee.

The peer review committees approved by the Board are as follows: Medical Directors Solutions, LLC; Georgia Psychological Association; Georgia Chiropractic Association, Inc.; Appropriate Utilization Group, LLC; and such other committees as the Board has posted as so designated at its Atlanta office.

(3) Unless peer review is requested as set forth in Rule 203 (c)(2), all reasonable charges for medical, surgical, hospital and pharmacy goods and services shall be payable by the employer or its worker's compensation insurer within 30 days from the date that the employer or the insurer receives the charges and the medical reports required by the Board. Failure of the health care provider to include with its submission of charges the reports or other documents required by the Board, constitutes a defense for the employer or insurer's failure to pay the submitted charges within 30 days of receipt; however, the employer or insurer must submit to the health care provider written notice indicating the need for

further documentation within 30 days of receipt of the charges and failure to do so will be deemed a waiver of the right to defend a claim for failure to pay such charges in a timely fashion on the ground that the charges were not properly accompanied by required documentation. Such waiver shall not extend to any other defense the employer and insurer may have with respect to a claim of untimely payment.

If any charges for health care goods or services are not paid when due, penalties shall be added to such charges and paid at the same time as, and in addition to, the charges claimed for the health care goods and services. For any payment of charges made more than 30 days after their due date, but paid within 60 days of such date, there shall be added to such charges an amount equal to 10% of the amount due. For any payment of charges made more than 60 days after the due date, but paid within 90 days of such date, there shall be added to such charges an amount equal to 20% of the amount due. For any charges not paid within 90 days of the due date, in addition to the 20% add-on penalty, the employer or insurer shall pay interest on the combined total in an amount equal to 12% per annum from the 91st day after the date the charges were due until full payment is made. All such penalties and interest shall be paid to the provider of the health care goods or services.

(4) The employer, insurer, or physician requesting review must comply with the requirements of the statute, Board Rules, and rules of the appropriate peer review committee before the Board will rule on any disputed charges.

(5) If there is no appropriate peer review committee, the party requesting review may request a mediation conference by filing Form WC-14 with the Board. The charges submitted which conform to the list as published by the Board shall be prima facie proof of the usual, customary, and reasonable charges for the medical services provided.

(6) The employer/insurer shall, within 30 days from the date that a decision regarding the peer review of charges or treatment is issued by a peer review organization, make payment of disputed charges based upon the recommendations, or request a mediation conference or an evidentiary hearing. The peer review committee shall serve a copy of its decision upon the employee if unrepresented, or the employee's attorney. A physician whose fee has been reduced by the peer review committee shall have 30 days from the date that the recommendation is mailed to request a mediation or hearing. In the event of a hearing or mediation conference, the recommendations of the peer review committee shall be evidence of the usual, customary, and reasonable charges.

(7) In cases where the peer review committee recommends that the fee be reduced, the employer/insurer shall pay the physician the fee amount recommended by the peer review committee less the filing costs

initially paid by the employer/insurer. In the event the peer review committee recommends the entire fee be disallowed, the employer/insurer may automatically deduct the filing costs for the peer review from future allowable expenses submitted by the physician for treatment or services rendered to the employee arising out of the same injury.

(d) Medical expenses shall include the reasonable cost of attendant care that is directed by the treating physician, during travel or convalescence.

(e) Medical expenses shall include but are not limited to the reasonable cost of travel between the employee's home and the place of examination or treatment or physical therapy, or the pharmacy. When travel is by private vehicle the rate of mileage shall be 40 cents per mile. This rate is subject to change based upon changes in fuel costs. Travel expenses beyond the employee's home city shall include the actual cost of meals and lodging. Travel expenses shall further include the actual cost of meals when total elapsed time of the trip to obtain outpatient treatment exceeds four hours. Cost of meals shall not exceed \$30 per day.

Note as to revisions. — The revision effective July 1, 2006, in subsection (e), substituted "40 cents" for "28 cents" in the second sentence, and added the third sentence.

The revision effective July 1, 2007, designated the existing provisions of subsection (b) as paragraph (b)(1), and added the last sentence, and added paragraph (b)(2).

Rule 204. Subsequent Non-Work Related Injury; Chain of Causation; Burden of Proof.

The employer/insurer shall not suspend weekly benefits on the ground that a subsequent nonwork related injury has broken the chain of causation between the compensable injury and the employee's disability except by the order of the Board.

The burden of proving that the chain of causation has been broken shall be upon the employer/insurer.

Rule 205. Necessity of Treatment; Disputes Regarding Authorized Treatment.

(a) Reports required by the Board include State Board of Workers' Compensation Form WC-20(a), or HCFA 1500, HCFC 1450, UB-04 or UB92 and supporting narrative, if any, properly filled out and with supporting itemized hospital charges, discharge summary, and billings from other authorized providers of service and shall be furnished at no charge to the party responsible for payment. Medical services provided pursuant to the Workers' Compensation Act are not confidential to the employer/insurer who by law are responsible for the payment of services. Hospitals and other medical providers who by their own rules require medical releases shall be responsible for obtaining same at the time of treatment.

(b)(1) Medical treatment/tests prescribed by an authorized treating physician shall be paid, in accordance with the Act, where the treatment/tests are:

(a) Related to the on the job injury;

(b) Reasonably required and appear likely to accomplish any of the following:

(1) Effect a cure;

(2) Give relief;

(3) Restore the employee to suitable employment;

(4) Establish whether or not the medical condition of the employee is causally related to the compensable accident.

(2) Advance authorization for the medical treatment or testing of an injured employee is not required by this Chapter as a condition for payment of services rendered. A Board certified WC/MCO may provide for pre-certification by contract with network providers pursuant to O.C.G.A. § 34-9-201(b)(3).

(3)(a) An authorized medical provider may request advance authorization for treatment or testing by completing Sections 1 and 2 of Board Form WC-205 and faxing or emailing same to the insurer/self-insurer. The insurer/self-insurer shall respond by completing Section 3 of the WC-205 within five (5) business days of receipt of this form. The insurer/self-insurer's response shall be by facsimile transmission or email to the requesting authorized medical provider. If the insurer/self-insurer fail to respond to the WC-205 request within the five business day period, the treatment or testing stands pre-approved.

(b) In the event the insurer/self-insurer furnish an initial written refusal to authorize the requested treatment or testing within the five business day period, then within 21 days of the initial receipt of the WC-205, the insurer/self-insurer shall either: (a) authorize the requested treatment or testing in writing; or (b) file with the Board a Form WC-3 controverting the treatment or testing indicating the specific grounds for the controversion.

(c)(1) If medical treatment is controverted on the ground that the treatment is not reasonably necessary, the burden of proof shall be on the employer. If the treatment is controverted on the grounds that the treatment is either not authorized or is unrelated to the compensable injury, the burden of proof shall be upon the employee.

(2) In the event of a dispute as to the necessity and/or reasonableness of services already rendered, the procedure listed in Board Rule 203(c) shall be followed.

(d) If an employer or insurer utilizes a Board certified WC/MCO pursuant to O.C.G.A. § 34-9-201(b)(3), and a dispute arises regarding the treatment/test prescribed by the authorized treating physician and the dispute is not resolved within 30 days as outlined in Rule 208(f), then the employer or insurer has 15 days from notification by the WC/MCO to authorize the treatment/test or controvert the treatment/test. In no event will the employer or insurer utilizing a WC/MCO have more than 45 days from the receipt of the notice of a dispute as set forth in Rule 208(f) to comply with this provision.

(4) Where the employer fails to comply with Rule 205(b)(3), the employer shall pay, in accordance with the Chapter, for the treatment/test requested.

Note as to revisions. — The revision effective July 1, 2007, inserted “UB-04” in the first sentence of subsection (a).

JUDICIAL DECISIONS

Burden of proof. — The superior court did not err in affirming the Workers’ Compensation Board’s allocation of the burden of proof to the employee where the employee sought to establish that the employee’s claim for continued medical treatment (after years of the employer paying for medical treatment for a work-related aggravation of a preexisting injury) was directly related to the employee’s work-related injury. *Smith v. Mr. Sweeper Stores, Inc.*, 247 Ga. App. 726, 544 S.E.2d 758 (2001).

Rule 206. Reimbursement of Group Carrier or Other Healthcare Provider.

(a) Form WC-206, including supporting documentation, shall be submitted to the Board by the party seeking reimbursement during the pendency of the claim. Copies shall also be sent by the party requesting reimbursement to all counsel and unrepresented parties at interest.

(b) If a hearing request is pending when the Board receives a request for reimbursement and designation as a party at interest, the Board will provide the requesting party with notice of the hearing.

Rule 208. Managed Care Organization Rules.

(a) Application and certification.

(1) All provisions of this Rule constitute the minimum requirements necessary to obtain and maintain certification as a WC/MCO under the Georgia Workers’ Compensation Act. To obtain certification of a plan, application shall be submitted on a Form WC-208a accompanied by a non-refundable fee of \$1,000.00 and shall include the following information:

(A) An audited financial statement evidencing the ability of the Managed Care Organization to comply with any and all financial

requirements to insure the delivery of services the Board may prescribe.

(B) Complete disclosure should be made of the following individuals (an individual may act in more than one capacity):

(1) The names, addresses and resume of all directors and officers of the WC/MCO;

(2) The title, name, address, telephone number and resume of the person to be the day-to-day administrator of the WC/MCO;

(3) The title, name, address, telephone number and resume of the person to be the administrator of the financial affairs of the WC/MCO;

(4) The name, address, medical specialty and resume of the medical director;

(5) The name, address and telephone number of the WC/MCO's communication liaison for the Board, the insurer, the employer, and the employee; and

(6) The name and address or any other information requested by the Board regarding any entity, other than individual health care providers, with whom the WC/MCO has a joint venture or other agreement to perform any of the functions of the managed care plan, and a description of the specific function to be performed by each entity.

(C) The WC/MCO must insure provisions of quality services that meet all uniform treatment standards required by Georgia law and provide appropriate financial incentives to reduce service costs and utilization without sacrificing the quality of service.

(D) The WC/MCO must provide a description of its proposed geographic service area by county and specify the times, places and manner of providing services, including a statement describing how the WC/MCO will insure that an adequate number of each category of health care provider is available to give employees convenient geographic accessibility to all categories of providers and adequate flexibility to choose health care providers from among those who provide services under the plan.

(E) The WC/MCO must include minority providers, and at a minimum, the following types of health care services and providers, unless the WC/MCO provides evidence that a particular service or type of provider is not available in the geographical service area:

(1) Medical doctors, including specialists in at least one of the following fields: family practice, internal medicine, occupational medicine, or emergency medicine;

- (2) Orthopedic surgeons, including specialists in hand and upper extremity surgery;
- (3) Neurologists and neurosurgeons;
- (4) General surgeons;
- (5) Chiropractors;
- (6) Physical and occupational therapists;
- (7) Psychologists or psychiatrists;
- (8) Diagnostic pathology and laboratory services;
- (9) Radiology services; and
- (10) Hospital, outpatient surgery, and emergency care services.

(F) The WC/MCO must submit sample copies of all types of agreements with providers who will deliver services under the WC/MCO and a description of any other relationships with providers who may deliver services to a covered employee.

(G) The WC/MCO must attach to each type of sample agreement a corresponding list of names, clinics, addresses and types of license and specialties for the health care providers with whom they have utilized the agreement.

(H) In all agreements with the WC/MCO and any other provider of services, the agreement shall contain the following provision: "It is the intent of the parties to this agreement to insure quality services that meet all uniform treatment standards required by Georgia law, and any provision herein which may be inconsistent with that intent shall be void."

(I) The WC/MCO must submit a statement certifying that all licensing requirements for the providers and medical case managers are current and in good standing in Georgia or the state in which the provider is practicing.

(J) The WC/MCO must provide a referral for specialty services that are not specified in subparagraph (E) and that may be reasonable and necessary to effect a cure or give relief as required under O.C.G.A. § 34-9-200. The employer or the workers' compensation insurance carrier remains liable for any health service required under the Workers' Compensation Act, provided that the services meet all other requirements of the Workers' Compensation Act.

(K) The WC/MCO must include procedures to insure that employees will receive services in accordance with the following criteria:

- (i) The medical case manager shall inform the employee of his right to choose from the providers designated in Rule 208(a)(1)(E),

inform the employee that a list of medical providers is available and provide assistance in obtaining the list if necessary. The medical case manager shall assist the employee in choosing a provider appropriate to the injury. The physician so chosen shall be deemed the “authorized treating physician” for all purposes under the Workers’ Compensation Act. Employees must be allowed to change authorized treating physicians within the managed care plan at least once without proceeding through the managed care plan’s dispute resolution process. In such cases, employees shall give notice to the managed care plan for a change in their authorized treating physician;

(ii) Employees must be able to receive information on a 24-hour basis regarding the availability of necessary medical services available within the managed care plan. The information may be provided through recorded toll-free telephone messages after normal working hours. The message must include information on how the employee can obtain emergency services or other urgently needed care and how the employee can access an evaluation within a reasonable time after request;

(iii) Employees must receive initial evaluation by a participating licensed health care provider within twenty-four hours after the employee’s request for treatment, following a work-related injury;

(iv) In cases where the employee has received treatment for the work injury by a health care provider outside the managed care plan, the employee must receive initial evaluation or treatment by a participating health care provider within five (5) working days of the employee’s request for a change of doctor or referral to the managed care plan;

(v) Employees must receive any necessary treatment, diagnostic tests or specialty services in a manner that is timely, effective and convenient for the employee, and reasonable under the circumstances;

(vi) Employees must have reasonable access to health care providers. If the employee is medically unable to travel to a participating provider, the managed care plan shall refer the employee to an available or non-participating provider to receive necessary treatment for the injury.

(L) The WC/MCO must designate the procedures for approval of services from a health care provider outside the managed care plan.

(M) The WC/MCO must include a procedure for peer review and utilization, consistent with Rule 208(g).

(N) The WC/MCO must include a procedure for internal dispute resolution, including a method to resolve complaints by injured employees, medical providers, employers and insurers.

(O) The WC/MCO must inform employees of all choices of medical services provided within the plan and how employees can gain access to those providers including but not limited to a wallet-sized card containing this information in a format suitable for carrying on the employee's person. The plan must submit a proposed publication which may be customized according to the needs of the employer, but must include the information required in Rule 201(a)(3) and must also include a complete list of all WC/MCO medical providers in the applicable geographical service area. All employees of covered employers shall be provided with the publication.

(P) The WC/MCO must provide the information required by Rule 208(h) and describe how medical case management will be provided for injured employees, and an effective program for return-to-work and cooperative efforts by the employees, the employer and the managed care plan to promote workplace health and safety and other services.

(Q) The WC/MCO must provide such other information as the Board considers necessary to determine compliance with the Workers' Compensation Act.

(2) Within 60 days of receipt of an application, the Board must notify an applicant for certification of any additional information required or modification that must be made. The Board must notify the applicant in writing of the approval or denial of certification within 60 days of receipt of the additional information or modification. If certification is denied, the applicant must be provided, in writing, with the reason or reasons for the denial.

(3) Any person aggrieved by a denial of certification by the Board may make written request for a hearing within 30 days of the date the denial is served and filed. The Appellate Division shall hold all hearings and issue a final decision.

(b) Coverage responsibility of WC/MCO.

(1) A WC/MCO must contract with the employer or the workers' compensation insurer of an employer. In the event multiple WC/MCO's are contracted to cover the same employer, each employee shall have the initial election of the WC/MCO that will manage the employee's care, and utilization of a WC/MCO will be deemed an election.

(2) An employee who gives notice to an employer of a compensable injury shall receive medical services in the manner prescribed by the terms and conditions of the WC/MCO contract in effect at the time medical services are rendered.

(3) To insure continuity of care, the WC/MCO contract shall specify the manner in which an injured employee will receive medical services when a WC/MCO contract or contract with the health care provider terminates. The employee may continue to treat with the health care provider or the WC/MCO under the terminating contract until such time as the employee elects to utilize the employer's current posted panel of physicians, conformed panel of physicians or WC/MCO, or a change of physician is granted.

(c) Reporting requirements for Board certified WC/MCO's.

(1) A WC/MCO shall provide the Board with a copy of the following contracts:

(A) Contracts between the WC/MCO and any employer or workers' compensation insurer, prior to utilization of the contract. If the Board does not issue a written approval or denial within 90 days, then the contract shall be approved. Any contract rejected by the Board shall be deemed void for purposes of this Rule. Standard contracts may be submitted instead of individual contracts if no modifications are made. Standard contracts must include a list of signatories and a listing of all employers covered by each contract, including the employers' name, business address and estimated number of employees governed by the WC/MCO. Amendments and addendums to the contracts must be submitted to the Board within 30 days of execution. Contract provisions must be consistent with O.C.G.A. § 34-9-208 and this Rule. The contract must specify the billing and payment procedures and how the medical case management and return-to-work functions will be coordinated.

(B) New types of agreements between participating health care providers and the WC/MCO that are not identical to the agreements previously submitted to the Board shall not be effective until approved by the Board. Any contract which is neither approved nor rejected by the Board within 90 days from submission shall be deemed approved.

(C) Contracts between the WC/MCO and any entity, other than individual participating providers that performs some of the functions of the WC/MCO.

(D) Any changes in the individuals or information required by Board Rule 208(a)(1)(B)(1)-(5).

(2) In order to maintain certification, each WC/MCO shall provide on the first working day following each anniversary of certification the following information in the form of a certified annual report:

(A) A current listing of all individuals identified in Board Rule 208(a)(1)(B)(1)-(5) and all participating health care providers, including provider names, types of license, specialty, business address,

telephone number and a statement that all licenses are current and in good standing;

(B) A summary of any sanctions or punitive actions taken by the WC/MCO against any participating providers;

(C) A report that summarizes peer review, utilization review, supplier profiles, reported complaints and dispute resolution proceedings showing cases reviewed, issues involved, and any action taken; and

(D) An audited financial statement for the most recent fiscal year, upon request of the Board.

(E) The annual report must be accompanied by a non-refundable fee of \$500.00.

(3) Any proposed changes to the Board certified WC/MCO falling within the categories enumerated below, other than changes to the health care provider list, may not be implemented under the plan until approved by the Board:

(A) Amendments to any contract with participating health care providers;

(B) Amendments to contracts between the WC/MCO and another entity performing functions of the managed care plan; and

(C) Any other amendments to the WC/MCO as certified.

(4) The WC/MCO must report to the employer or insurer any data regarding medical services and suppliers related to the workers' compensation claim required by the self-insured employer or insurer to determine compensability under the Workers' Compensation Act, and any other data required by the Board. The Board may require additional information from the managed care organization if the information is relevant to the Workers' Compensation Act.

(d) Commencement and termination of contract between the WC/MCO and participating providers.

(1) Prospective new participating health care providers under a WC/MCO shall submit an application to the WC/MCO. A director, executive director or administrator may approve the application under the requirements of the WC/MCO. The managed care plan shall verify that each new participating health care provider meets all licensing, registration and certification requirements necessary to practice in Georgia or other applicable state of practice.

(2) A participating provider may elect to terminate participation in the WC/MCO or to be subject to cancellation by the managed care plan under the requirements of the managed care plan. Upon termination of a provider contract, the managed care plan shall make alternate arrange-

ments to provide continuing medical services for an affected injured employee under the plan in compliance with Board Rule 208(b)(3).

(e) A health care provider who is not a participating health care provider may provide medical services to an employee covered by a WC/MCO in any other circumstances provided below:

(1) Emergency treatment;

(2) When the employee is referred to the provider by the managed care organization;

(3) By order of the Board, or by consent of the parties.

(f) Disputes which arise on an issue related to managed care shall first be processed without charge through the dispute resolution process of the WC/MCO. The WC/MCO dispute resolution process must be completed within 30 days of a written notice. If the dispute cannot be resolved, the WC/MCO must immediately notify the employer or insurer. If the dispute involves treatment/test prescribed by the authorized treating physician, the employer or insurer must follow the procedure outlined in Rule 205.

(g) Utilization review and peer review.

(1) The WC/MCO must implement a system for peer review to improve patient care and cost effectiveness of treatment. Peer review must include a majority of health care providers of the same discipline being reviewed. The peer review must be designed to evaluate the quality of care given by a health care provider to a patient or patients. The plan must describe in its application for certification how the providers will be selected for review, the nature of the review and how the results will be used.

(2) The WC/MCO must implement a plan for utilization review. The program must profile each medical supplier and include the collection, review, analysis of group data (utilizing CPT-4 codes) to improve overall quality of care, efficient use of resources and duration of disability. In its application for certification, the WC/MCO must specify the data that will be collected, how the data will be analyzed and how the results will be applied to improve patient care and increase cost effectiveness of treatment.

(h) Medical case management.

(1) The medical case manager must monitor, evaluate and coordinate the delivery of quality, cost effective medical treatment and other health services needed by an injured employee, and must promote an appropriate, prompt return to work. Medical case managers must facilitate communication between the employee, employee's representative, employer, employer's representative, insurer, health care provider, WC/MCO and, when authorized, any qualified rehabilitation consultant to

achieve these goals. The WC/MCO must describe in its application for certification how injured employees will be subject to case management, the services to be provided, and who will provide services.

(2) Case management for an employee covered by a WC/MCO must be provided by a licensed registered health care professional holding one of the following certifications: Certified Rehabilitation Registered Nurse (CRRN), Certified Case Manager (CCM), Certified Occupational Health Nurse (COHN), Certified Occupation Health Nurse Specialist (COHN-S), Certified Disability Management Specialist (CDMS), Certified Rehabilitation Counselor (CRC), Work Adjustment/Vocational Evaluation Specialist (WAVES), or Licensed Professional Counselor (LPC). Case managers must have at least one year experience in workers' compensation. In catastrophic cases, case management must include assignment to a Board-registered rehabilitation supplier, who has been designated by the board as qualified to manage catastrophic cases (Rule 200.1 (f)(4)). If qualified, the case manager may register with the Board to serve as the catastrophic rehabilitation supplier.

(3) The parties to the claim and their representatives shall cooperate with medical case management services when such services are being provided by a WC/MCO which has been certified pursuant to O.C.G.A. § 34-9-208 and Board Rule 208 and which has posted a WC-P3 panel. The unreasonable refusal to cooperate with or the unreasonable interference with medical case management services by any party or its representative may subject that party or its representative to civil penalties pursuant to O.C.G.A. § 34-9-18. The employer/insurer may suspend weekly benefits for the failure of the employee to cooperate with medical case management only by order of the Board.

(i) Monitoring records.

(1) The Board shall monitor and may conduct audits and special examinations of the WC/MCO as necessary to insure compliance with the WC/MCO certification and performance requirements.

(2) All records of the WC/MCO and its participating health care providers relevant to determining compliance with the Workers' Compensation Act shall be disclosed in a reasonable time after request by the Board. Records must be legible and cannot be kept in a coded or semi-coded manner unless a ledger is provided for codes.

(3) The release of records filed with the Board must clearly identify the portions of the application or records which are believed to be non-public trade secret data or otherwise confidential.

(j) Suspension; revocation.

(1) The WC/MCO shall work with all parties and their representatives in a reasonable manner consistent with the purposes of this Act.

Complaints pertaining to violations by the WC/MCO shall be directed in writing to the Board. Upon receipt of a written complaint or after monitoring the managed care plan operation, the Board shall investigate the alleged violation. The investigation may include, but shall not be limited to, requests for and review of pertinent managed care records. If the investigation reveals reasonable cause to believe that there has been a violation warranting suspension or revocation of certification, the Board shall schedule a hearing.

(2) The certification of any WC/MCO issued by the Board may be suspended or revoked, in the discretion of the Board, if the WC/MCO fails to meet any of the requirements of O.C.G.A. § 34-9-208 or Board Rule 208.

(3) For purposes of this Rule, “suspension” and its variations means the cessation of the WC/MCO’s authority to enter into new contracts with employers or insurers for a specified period of time up to a maximum of one (1) year. Upon suspension, the WC/MCO may continue to provide services in accordance with the contracts in effect at the time of the suspension. A suspension may be set aside prior to the end of the designated suspension period if it is shown to the satisfaction of the Board that the WC/MCO is in compliance. Furthermore, if it is shown that the WC/MCO is not in compliance immediately prior to the end of the designated suspension period, the suspension may be extended without further hearing, or revocation proceedings may be initiated.

(4) For purposes of this Rule, “revocation” and its variations means a revocation of a WC/MCO’s certification to provide services under these Rules. If the WC/MCO certification is revoked, no employee is covered by the contract between the WC/MCO and the employer or workers’ compensation carrier. However, upon revocation of certification, the WC/MCO may continue to provide services under contracts in effect to the extent the Board determines that it is necessary for injured employees to continue to receive medical services in that manner.

(5) Suspension or revocation under this Rule will not be made until the WC/MCO has been given notice and the opportunity to be heard through a show-cause hearing before the Board. The Board shall provide the WC/MCO written notice of an intent to suspend or revoke the WC/MCO’s certification and the grounds for such action. The notice shall also advise the WC/MCO of the right to participate in the show-cause hearing and specify the date, time and place of the hearing. The notice shall be issued from the Board at least twenty-one (21) days prior to the scheduled date of the hearing. After the show-cause hearing, the Board may issue a final order suspending or revoking the WC/MCO’s certification.

(6) Upon revocation of a WC/MCO’s certification, the employer or the workers’ compensation insurer of an employer with whom the

revoked WC/MCO had been contracted to provide managed care shall make alternate arrangements to provide continuing medical services for injured employees who had been receiving medical care through the revoked WC/MCO. Any injured employee receiving medical services through a WC/MCO prior to revocation of the WC/MCO's certification may continue to treat with one of the individual health care providers with whom the employee had received medical services prior to revocation until such time as the employee elects to utilize the employer's replacement posted panel of physicians, conformed panel of physicians or WC/MCO, or a change of physician is ordered.

Rule 220. Computing Days of Disability Preceding Payment of Compensation.

(a) The date of disability is the first day the employee is unable to work a full day. If, however, the employee is paid in full for the date of injury, the date of disability shall begin the next day following the date of injury.

(1) The day or days considered lost because of disability to work shall be counted from the first seven calendar days of disability even though the days may not be consecutive.

(2) Intervening days, which are not scheduled workdays, during disability or preceding a return to work, are days of disability.

(3) Disability shall end on the day of the return to work.

(b) Entitlement to benefits for the first seven days of disability, or any part thereof, requires 21 consecutive days of disability. The employer/insurer shall pay compensation for the first seven days of disability on the 21st consecutive day.

(c) An injured employee who receives regular wages during disability shall not be entitled to weekly benefits for the same period.

Rule 221. Method of Payment.

(a) Payment shall be made to the address of record or account specified by the claimant, in cash, by negotiable instrument, or upon agreement of the parties by electronic transfer. Payment by negotiable instrument shall denote the pay period which the payment represents. Mailed payments shall be sent to the claimant in accordance with the procedure prescribed by O.C.G.A. § 34-9-221(b).

(b) For the purpose of calculating time periods, the date of injury shall be deemed to be the date of disability and a week shall be deemed to be seven calendar days. See Rule 220(a).

(c) In all cases, including payment of salary for compensable disability, upon making the first payment and upon suspension of payment, Forms

WC-1 or WC-2 or, in case of death, Form WC-2A shall be filed with the Board. If the Forms WC-1 or WC-2 show payment is less than the maximum weekly benefit under either O.C.G.A. § 34-9-261 or O.C.G.A. § 34-9-262, as applicable, a Form WC-6 or other sufficient explanation shall be filed with the Board with the accompanying Form WC-1 or WC-2. To report any change in weekly benefits, payment of salary during period of compensability, classification, or rating of disability, a Form WC-2 shall be filed with the Board. An injured employee who receives regular wages during disability shall not be entitled to weekly benefits for the same period.

(d) To controvert in whole or in part the right to income benefits or other compensation, use Forms WC-1 or WC-3. Failure to file the Forms WC-1 or WC-3 before the 21st day after knowledge of the injury or death may subject the employer/insurer to an assessment of penalties or attorney's fees. See paragraphs (2) and (3) of subsection (b) of O.C.G.A. § 34-9-108.

(e) Any penalty for late payment shall be stated as a separate item on Forms WC-1, WC-2 or WC-2A.

(f) Accrued benefits payable under the terms of an award are due on the date the award is issued.

(g) Within 30 days after final payment of compensation, a final Form WC-4 shall be filed with the Board.

(h) Subsection (h) of O.C.G.A. § 34-9-221 applies only when income benefits are being paid under Forms WC-2, WC-2A, or subsection B of Form WC-1. To suspend payment on the ground of a change in condition, file Forms WC-2 or WC-2A.

(1) A Form WC-3 shall not be used to suspend benefits where the only issue is length of disability. In these cases, suspend benefits by filing a Form WC-2 or follow procedure outlined in Rule 240. If liability is denied subsequent to commencement of payment, but within 60 days of due date of first payment of compensation, file Form WC-3 in addition to a Form WC-2.

(2) If income benefits have been continued for more than 60 days after the due date of first payment of compensation, benefits may be suspended only on the grounds of a change in condition or newly discovered evidence. File Forms WC-2 or WC-2A. When controverting a claim based on newly discovered evidence, file Form WC-3 also.

(i)(1) Suspension of benefits at any time on the ground of change in condition requires advance notice of 10 days unless the employee has actually returned to work.

(2) The date of filing with the Board, in the absence of compelling evidence to the contrary, shall be considered the date of notice.

(3) The date affixed by the Board to Forms WC-2 or WC-2A, in the absence of compelling evidence to the contrary, shall be considered the date of notice.

(4) When suspending benefits for release to return to work without restrictions, the employer/insurer shall attach to the Form WC-2 a copy of the supporting medical report from employee's authorized treating physician, who must have examined the employee within sixty days of the effective date of the release.

Note as to revisions. — The revision effective July 1, 2006, in subsection (c), in the first sentence, deleted "use" preceding "Forms WC-1 or WC-2" and added "shall be filed with the Board", rewrote the second sentence, and substituted "a Form WC-2 shall be filed with the Board" for "use Form WC-2" in the third sentence.

The revision effective July 1, 2007, substi-

tuted "date of notice" for "date of filing" at the end of paragraphs (i)(2) and (i)(3), and in paragraph (i)(4), substituted "without restrictions" for "without restriction" and "who must have" for "provided that the physician has".

Law reviews. — For annual survey of workers' compensation, see 38 Mercer L. Rev. 431 (1986).

JUDICIAL DECISIONS

Employer filing notice of appeal after twentieth day. — Where employee was awarded workers' compensation benefits, where employer filed its appeal to the full board within the 30-day period for bringing appeals which was then in effect but after 20 days from the date of the award, and where more than one year from the original award, the employee requested that the board assess a 20 percent penalty against the employer for failing to pay benefits within 20

days from the date of the original award, the penalty was properly assessed; an award becomes due on the date the award is issued and a penalty is assessable if benefits are not paid within 20 days from the date they become due. *Cox Enters., Inc. v. Marshall*, 190 Ga. App. 322, 378 S.E.2d 725 (1989).

Cited in *Cornell-Young v. Minter*, 168 Ga. App. 325, 309 S.E.2d 159 (1983); *Liberty Nat'l Life Ins. Co. v. Coley*, 201 Ga. App. 623, 411 S.E.2d 553 (1991).

Rule 222. Time Limit for Application for Lump Sum Payment.

(a) The Board will consider an application for a lump sum payment of all remaining income benefits or a lump sum advance of a portion of the remaining income benefits, but will not consider any application unless benefits have been continued for at least 26 weeks. The employer/insurer may make a lump sum payment or lump sum advance without commutation of interest and without an award from the Board.

(b) In lieu of a hearing, the Board will consider applications for lump sum advances and lump sum payments in accordance with the following procedure:

(1) A request for a lump sum advance or lump sum payment must be submitted on Form WC-25, and a copy must be sent to the employer/insurer and any other interested parties. The request will not be granted unless the current Form WC-25 is completely filled out with appropriate supporting documents as directed on the form.

(2) The parties have 15 days from the date of the certificate of service to file objections to the application. Objections to an application must be accompanied by documents in support of the objections, may be accompanied by counter-affidavits, and must be served upon the party or the attorney making the application. A certificate of service must accompany the objections attached.

(3) If any party elects to cross-examine an adverse party, it must notify the Board within 15 days of the date of the certificate of service of the Form WC-25 of its intention to submit a deposition. The deposition must be filed with the Board no later than 30 days from the certificate of service on the Form WC-25, unless an extension is granted by the Board upon a showing of just cause.

(4) If, in the judgment of the Board, there are material and bona fide disputes of fact, the Board may schedule a hearing or assign the case to an Administrative Law Judge for the purpose of receiving evidence, or schedule a mediation conference on the issues.

(5) The maximum amount of attorney fees which will be awarded in conjunction with an advance will be 25 percent of the amount of the advance or \$500.00, whichever is less, unless specifically authorized by the Board. In the event the attorney obtaining the advance has a fee contract that has been previously approved by order or award of the Board, attorney fees will be authorized in accordance with the terms of the order or award.

Rule 226. Procedures for Appointing Guardian for Minor or Incompetent Adult.

(a) A petition for the Board to appoint a temporary guardian to bring or defend an action under this chapter and/or receive and administer workers' compensation benefits for a minor or incompetent adult should be filed with the Board at the time the WC-14 is filed. In the case of a stipulated settlement, the guardianship petition should be filed prior to or at the time of the filing of the stipulated settlement agreement.

If payment to the minor or incompetent adult is pursuant to a WC-2, the guardianship petition should be filed with the Board and a guardian appointed prior to the payment of any monetary benefits to them.

(b) Any applicant for guardianship shall consent to a criminal history record check via a Form WC-226(a) or Form WC-226(b) at the time the petition for guardianship is submitted to the Board. In addition, the applicant shall attach supporting documentation necessary to process the request.

(c) If a petition is filed on behalf of a minor child or children, the petitioner shall inform, in writing, the Board whether the minor child or children reside with the petitioner.

(d) If a petition is filed with the Probate Court or any other court, the parties are directed to immediately notify, in writing, the Board. If the Probate Court or any other court appoints a guardian, the parties shall file a copy of the order with the Board.

(e)(1) All objections shall be made on Form WC-102D. When attaching documents as evidence to objections, do not use tabs to separate documents. Any party or attorney filing an objection shall also serve a copy on all counsel and unrepresented parties, along with supporting documents, including a separate certificate of service identifying the names and addresses served.

(2) When filing a motion for reconsideration, the parties or attorneys shall: (1) immediately notify the Board or assigned Administrative Law Judge by telephone call; (2) use the ICMS doc-type labeled motion for reconsideration; and (3) serve a copy on all counsel and unrepresented parties, along with supporting documents, including a separate certificate of service identifying the names and addresses served.

Note as to revisions. — The revision effective July 1, 2008, in paragraph (b), substituted “shall consent to a criminal history check via a Form WC-226(a) or Form WC-226(b)” for “must submit a consent for proof of a criminal history check” in the first sentence, and deleted the former second sentence, which read: “When the petitioner

resides, or has resided, in a jurisdiction other than Georgia within the five years prior to the date of the petition for guardianship, the petitioner must submit a certified copy or other proof of a criminal history record check from all jurisdictions of residence.”; and added paragraphs (e)(1) and (e)(2).

Rule 240. Offer of Suitable Employment.

(a) For suspension and reinstatement of income benefits by interlocutory order generally, see Board Rule 102D.

(b) When an employee unjustifiably refuses to accept employment which has been approved by the authorized treating physician(s) suitable to his/her impaired condition and offered to the employee in writing, the employer/insurer may suspend payment of income benefits to that employee without an order of the Board in the following manner:

(1) File with the Board a Form WC-2 and Form WC-240 certifying that at least ten days before the employee was required to report for work he/she was notified on the completed Form WC-240 mailed to the employee and his/her attorney that there was a suitable job available, that it was approved by his/her authorized treating physician(s) after an examination within the last 60 days, and refusal to attempt to perform the job would result in the suspension of payment of weekly income benefits to the employee. The employer/insurer shall provide to the employee and legal counsel a copy of any job description/analysis in reference to subparagraph (2)(i), (ii) and (iii) at the time of submission to the authorized treating physician(s).

(2) Attached to the Form WC-240 shall be:

(i) A description of the essential job duties to be performed, including the hours to be worked, the rate of payment, and a description of the essential tasks to be performed;

(ii) The written approval of the authorized treating physician(s) of the essential job duties to be performed;

(iii) The location of the job, with the date and time that the employee is to report to work.

Attaching a properly completed Form WC-240A will satisfy the requirements for making a proper offer of employment as set forth herein.

(3) If the employee refuses to attempt to perform the proffered job after receiving the above notification, the employer/insurer shall be authorized to suspend payment of income benefits to the employee effective the date that they unjustifiably refused to report to work.

(c) Should the employee accept the employment offered by the employer/insurer but fail to continue working for more than the prescribed fifteen (15) scheduled work days, the employer/insurer, whether or not they have sent a WC-240, shall immediately reinstate payment of income benefits and shall file with the Board and serve upon the employee the appropriate Form WC-2 reflecting the reinstatement of income benefits.

(i) Failure to immediately reinstate benefits pursuant to Board Rule 240 (c), shall result in the waiver of the employer/insurer's defense of the suitability of employment for the period of time the employer/insurer did not pay the employee's weekly income benefits when due.

(ii) When the employer/insurer immediately reinstates benefits pursuant to Board Rule 240 (c), the employer/insurer are entitled to seek reimbursement of such benefits at a hearing addressing the suitability of the proffered employment

(d) When calculating the fifteen (15) scheduled work days provided by statute, the employer/insurer shall include as a work day each day or part thereof during which the employee is scheduled to perform his/her job duties.

(e) The employer/insurer shall also be entitled to suspend payment of weekly benefits to the employee pending a hearing by an order of the Board finding an unjustifiable refusal of the employee to accept employment procured for him/her suitable to his/her capacity. A motion requesting this order may be made simultaneously with the filing of a request for hearing or at any time during the pendency of the hearing and award and shall be filed on Form WC-102D, and must be accompanied by an affidavit from the employer setting forth that suitable employment has been offered to the employee as set forth in (b) above, the offer is continuing, and analysis of

the job is attached. The employer/insurer shall have the employee examined by the authorized treating physician(s) within 60 days prior to this request for suspension of income benefits. No request for suspension of income benefits for failure to accept suitable employment shall be granted unless the authorized treating physician(s) approve(s) the job offered by the employer/insurer. A party who objects to this motion shall file their response on Form WC-102D with the Board within 15 days of the date of the certificate of service on the request, and shall serve a copy on all counsel and unrepresented parties.

(f) The Board may also issue an interlocutory order reinstating weekly income benefits pending a hearing. A party making this motion shall file Form WC-102D, and shall serve a copy, along with a copy of supporting documents, on all counsel and unrepresented parties. A motion requesting this order may be made simultaneously with the filing of a request for hearing based on a change in condition or at any time during the pendency of the hearing and award and must be accompanied by an affidavit of the employee setting forth his contentions, along with current medical records when applicable. A party who objects to this motion shall file Form WC-102D with the Board within 15 days of the date of the Certificate of Service on Form WC-102D and shall serve a copy on all counsel and unrepresented parties.

(g) In the event the employee's weekly benefits are suspended pursuant to O.C.G.A. 34-9-240(b)(2), the employer/insurer shall comply with O.C.G.A. 34-9-263 and Board Rule 263.

Note as to revisions. — The revision effective July 1, 2008, substituted “shall provide” for “should provide” in the second sentence of paragraph (b)(1).

Rule 243. Credit for Payment of Income Benefits.

An employer/insurer seeking a credit as provided by O.C.G.A. § 34-9-243 shall file with the Board Form WC-243, and shall report on Form WC-243 the amount of unemployment compensation and/or weekly income payments made on behalf of an employee pursuant to a disability plan, a wage continuation plan, or a disability insurance policy and shall set forth the ratio of the employer's contributions to the total contributions of such plan or policy no later than 10 days prior to a hearing. A copy of this form shall be sent to all counsel and unrepresented parties by the employer/insurer at the same time that it is filed with the Board.

Rule 244. Reimbursement for Payment of Disability Benefits.

A provider of disability benefits who requests reimbursement shall file Form WC-244 with the Board, and shall serve a copy on all counsel and unrepresented parties.

Rule 260. Basis for Computing Compensation.

- (a) Computation of wages shall include, in addition to salary, hourly pay, or tips, the reasonable value of food, housing, and other benefits furnished by the employer without charge to the employee which constitute a financial benefit to the employee and are capable of pecuniary calculation.
- (b) Unless the contrary appears, it is assumed that a normal workweek is five days, that the normal workday is eight hours, and that the employee's daily wage is one-fifth of the weekly pay. Fractional parts of a day shall be credited proportionately in computing the daily wage. For example, the daily wage of a five-and-one-half day worker is the weekly wage divided by 5.5.
- (c) If the employee has similar concurrent employment the wages paid by all similar concurrent employers shall be included in calculating the average weekly wage.

Law reviews. — For annual survey of workers' compensation, see 38 Mercer L. Rev. 431 (1986).

Rule 261. Reserved.

Note as to revisions. — The revision effective July 1, 1998, substituted "Reserved" for the former provisions of this rule, which were transferred and now appear as subsection (a) of Rule 262.

Rule 262. Computing Temporary Partial Disability.

- (a) The average weekly wage the employee is able to earn after the injury may be determined according to the method of computation in O.C.G.A. § 34-9-260(1).
 - (1) An employer/insurer using this method may recompute the average weekly wage after payment of benefits begin under O.C.G.A. § 34-9-262 and at 13-week intervals thereafter.
 - (2) In lieu of calculating an average weekly wage after injury based on 13-week intervals, the employer/insurer may elect to calculate benefits due each week by multiplying two-thirds times the difference between the average weekly wage on the date of injury and the actual weekly wage the employee earned each week thereafter.
- (b) For the purposes of calculating temporary partial benefits as contemplated by O.C.G.A. § 34-9-104(a)(2), see method of calculation set forth in O.C.G.A. § 34-9-104(a)(3).
- (c) When paying weekly temporary partial disability income benefits, file a Form WC-262 with the Board at 13 week intervals or when such benefits

are suspended, whichever comes first. When filing the Form WC-262 with the Board, send a copy to the employee and the employee's counsel, if represented.

Rule 263. Determination of Disability Rating.

When the employee is no longer receiving weekly benefits under O.C.G.A. 34-9-261 or 34-9-262, and a permanent partial disability (PPD) rating has not previously been requested or issued, the employer/insurer shall have thirty days to request, in writing, from an authorized physician, that the employee be rated in accordance with the "Guides to the Evaluation of Permanent Impairment, Fifth Edition," published by the American Medical Association. The employer/insurer shall furnish a copy of the medical report of rating to the employee, and commence payment not later than 21 days after knowledge of the rating. The employer/insurer are presumed to have knowledge of the rating not later than 10 days after the date of the report establishing the rating.

Rule 265. Payment of No-Dependency Benefits Into the General Fund of the State Treasury.

The insurer or self-insurer in no-dependency death cases, shall pay to the State Board of Workers' Compensation the amount set forth in Code Section 34-9-265(b).

Rule 380. Establishment of the Self-Insurers Guaranty Trust Fund.**Rule 381. Definitions as used in this Article.**

(a) "Applicant" means an employee entitled to workers' compensation benefits.

(b) "Board" means the State Board of Workers' Compensation.

(c) "Board of trustees" means the Board of trustees of the Fund.

(d) "Fund" means the Self-Insurers Guaranty Trust Fund.

(e) "Insolvent self-insurer" means a self-insurer who files for relief under the Federal Bankruptcy Act, a self-insurer against whom involuntary bankruptcy proceedings are filed, or a self-insurer for whom a receiver is appointed in a federal or state court of this or any other jurisdiction and who is determined to be insolvent by rules and regulations promulgated by the Board of trustees and approved by the Board.

(f) "Participant" means a self-insurer who is a member of the Fund.

(g) "Self-insurer" means a private employer, including any hospital authority created pursuant to the provisions of Article 4 of Chapter 7 of

Title 31, the “Hospital Authorities Law,” that has been authorized to self-insure its payment of workers’ compensation benefits pursuant to this Chapter, except any governmental self-insurer or other employer who elects to group self-insure pursuant to Code Section 34-9-152, or captive insurers as provided for in Chapter 41 of Title 33, or employers who, pursuant to any reciprocal agreements or contracts of indemnity executed prior to March 8, 1960, created funds for the purpose of satisfying the obligations of self-insured employers under this chapter.

(h) “Trustee” means a member of the Self-Insurers Guaranty Trust Fund Board of Trustees.

U.S. Code. — The federal Bankruptcy Act, referred to in subsection (e), appears as 11 U.S.C.

Rule 382. Purpose.

(a) The purpose of creating a Self-Insurers Guaranty Trust Fund is to make payments in accordance with this chapter for the benefit of workers injured on the job in the event a participant becomes insolvent. The Fund shall be administered by an administrator appointed by the Chairman of the Board of trustees with approval of the Board of trustees. Monies in the Fund will be invested by the Board of trustees in the same manner as provided by law for investments in government backed securities.

(b) All returns on investment shall be retained by the Fund. In addition to paying benefits, and administrative fees, operating costs of the Board of trustees, attorneys’ fees incurred by the Board of trustees and other costs reasonably incurred by the Board will be paid from this Fund.

(c) As a condition of self-insurance a private employer must make application and be accepted in the Self-Insurers Guaranty Trust Fund.

(d) Self-insurers must give written notice to the Board addressed to the Director of Licensure and Quality Assurance when they add or delete subsidiaries, affiliates, divisions or locations to their self-insurance certificate, or make any changes in their excess insurance policies. (See Rule 126(c).)

Rule 383. Board of Trustees; How Appointed.

(a) Each member of the Board of trustees shall be an employee of a participant. The Board of trustees shall consist of a chairperson and six trustees elected by the participants. The Board of trustees shall initially be appointed by the Governor not later than August 1, 1990. Three of the initial trustees shall be appointed for terms of office which shall end on January 1, 1993, and the chairperson and the three other initial trustees shall be appointed for terms of office which shall end on January 1, 1995.

Thereafter, each trustee shall be elected to a four-year term and shall continue to serve unless otherwise ineligible under subsection (b) of this Code section. No later than 90 days prior to the end of any member's term of office, the chairperson shall select a nominating committee from among the participants to select candidates for election by the participants for the following term. In the event the chairperson fails to complete his or her term of office, a successor will be elected by the Board of trustees to fill the unexpired term of office.

(b) A vacancy in the office of the Board of trustees shall occur for the following reasons:

- (1) Resignation;
- (2) Death;
- (3) Conviction of felony;
- (4) Employer no longer qualifies as a self-insured participant;
- (5) Trustee is no longer an employee of the participant.

(c) The Board of trustees may remove any member from office for:

- (1) Formal finding of incompetence;
- (2) Neglect of duty; or
- (3) Malfeasance in office.

(d) The Board of trustees, within 30 days after the office of any elected member becomes vacant, shall elect a successor for the unexpired term.

Rule 384. Powers of the Board of Trustees.

The Board of trustees shall possess all powers necessary to accomplish objectives prescribed in this article including the following:

(a) Submit to the Board, for approval within 90 days from appointment, bylaws, rules, regulations, resolutions and application fee of \$500.00. Board of trustees may carry out its responsibilities by contract or other instrument; may purchase services, borrow money, purchase excess insurance, levy penalties and fines, and collect funds necessary to effectuate its activities. The Board of trustees shall appoint, retain and employ staff necessary to achieve the purposes of the Board of trustees with expenses incurred paid from the Fund.

(b) The Board of trustees shall meet quarterly or upon the call of the chairman issued to the trustees in writing not less than 48 hours prior to the day and hour of the meeting; upon a request submitted to the chairman 72 hours prior to the proposed day and hour by a majority of

the trustees whereupon the chairman will provide notice as set forth above or by unanimous written agreement of the trustees.

(c) Four trustees constitute a quorum.

(d) The Board of trustees shall serve without compensation; each member will be entitled to reimbursement for actual expenses incurred in the discharge of his official duties.

(e) The Board of trustees shall have the right to bring and defend actions in the name of the Fund. Neither trustees nor their employers shall be liable for matters arising from or out of authorized conduct of the Fund in accordance with this article.

Rule 385. Participant Filing for Relief Under the Federal Bankruptcy Act.

(a) Within 30 days of the occurrence of filing for relief under the Federal Bankruptcy Act or against whom bankruptcy proceedings are filed or for whom a receiver is appointed, the participant shall file a written notice with the Board and the Board of trustees.

(b) Any person filing an application for adjustment of a claim against a participant who has filed for relief under the Federal Bankruptcy Act, or against whom bankruptcy proceedings have been filed or a receiver appointed must file a written notice with the Board and the Board of trustees within 30 days of such person's knowledge.

(c) Upon receipt of any notice as provided in subsections (a) and (b) of this Code Section, the Board of trustees shall refer for investigation all facts, circumstances, and information in its possession to a properly designated authorized certified public accountant for determination of the question of insolvency according to generally accepted accounting principles. Upon receipt of the notice referenced herein, a participant shall be required to execute a release of any and all financial information, banking records, books of account, tax returns or other records determined by the Board of trustees to be necessary in making a determination of insolvency and the participant shall assist in the production of said information when requested to do so by the Board of trustees.

(d) When a participant is determined to be an insolvent self-insurer, the Board of trustees is empowered and shall assume on behalf of the participant the following:

(1) Outstanding workers' compensation obligations excluding penalties, fines and claimant's attorney fees assessed pursuant to § 34-9-108(b).

(2) Responsibility for taking necessary steps to collect, recover, and enforce all outstanding securities, indemnity, insurance, or bonds for the purpose of paying outstanding obligations of participants.

(3) Refunding any funds remaining from such securities to the appropriate party one year from the date of final payment, provided no liabilities remain against the Fund.

(e) The Board of trustees shall be a party in interest in all proceedings in the payment of workers' compensation claims for a participant and shall be subrogated to the rights of the participant. The Board of trustees may exercise all rights and defenses of the participant including:

(1) Appear, defend and appeal claims.

(2) Receive notice of, investigate, adjust, compromise, settle and pay claims.

(3) Investigate, handle and controvert claims.

(f) Should payment of benefits be stayed in bankruptcy court, the Board of trustees or a designated representative shall appear in the bankruptcy court and move to lift the stay.

(g) The Board of trustees shall notify all employees with pending claims of the name, address and telephone number of the party administering and defending against their claim.

(h) The Board has the discretion to direct the Fund to pay, in whole or in part, the contractual fee arrangement between an attorney and a claimant pursuant to § 34-9-108(a). The attorney must apply to the Board and provide notice to the employee with a pending claim. Any party may make an objection to the application and all objections will be considered by the Board.

(i) This code section shall not impair any claims, to the extent those claims are unpaid, in the insolvent self-insurer's bankruptcy which have been filed by a provider of services. Provider of services includes, but is not limited to, medical providers or the attorneys representing the insolvent self-insurer or the claimant, if the services provided are related to the insolvent self-insurer's workers' compensation obligations.

U.S. Code. — The federal Bankruptcy subsection (b), appears as Title 11 of the Act, referred to in the catchline and in United States Code.

Rule 386. Method of Assessment.

(a)(1) The Board of trustees shall, commencing January 1, 1991, assess each participant in accordance with paragraph (2) of this subsection. Upon reaching a funded level of \$10 million, all annual assessments against participants who have paid at least three prior assessments shall cease except as specifically provided in paragraph (4) of this subsection.

(2) Assessment for each new participant in the first calendar year of participation shall be \$4,000.00. Thereafter, assessments shall be in accordance with paragraphs (3) and (4) of this subsection.

(3) After the first calendar year of participation, the assessment of each participant shall be made on the basis of a percentage of the total of indemnity benefits paid by, or on behalf of, each participant during the previous calendar year. Except as provided in paragraph (2) of this subsection for the first calendar year of participation and paragraph (4) of this subsection, a participant will not be assessed at any one time an amount in excess of 1.5 percent of the indemnity benefits paid by that participant during the previous calendar year or \$1,000.00, whichever is greater. The total amount of assessments, not including those set out in paragraph (4) of this subsection, in any calendar year against any one participant shall not exceed the amount of \$4,000.00.

(4) If after the full funded level of \$10 million has been attained, the fund is reduced to an amount below \$7 million as the result of the payment of claims, the administration of claims, or the costs of administration of the Fund, the Board of trustees shall levy a special assessment of the participants in an amount sufficient to increase the funded level of \$10 million.

(5) Funds obtained by such assessment shall be used only for the purposes set forth in this article and shall be deposited upon receipt by the Board of trustees into the fund. If payment of any assessment made under this article is not made within 30 days of the sending of the notice to the participant, the Board of trustees is authorized to proceed in court for judgment against the participant, including the amount of the assessment, the costs of suit, interest, and reasonable attorneys' fees or proceed directly against the security pledged by the participant.

(b)(1) The Fund shall be liable for claims arising out of injuries occurring after January 1, 1991; provided, however, no claim may be asserted against the Fund until the funding level has reached \$1.5 million.

(2) All participants shall be required to maintain surety bonds or the Board of trustees may, in its discretion, accept any irrevocable letter of credit or other acceptable forms of security in the amount of no less than \$100,000.00 until the Board, after consultation with the Board of trustees, has determined that the financial capability of the trust fund and the participant no longer warrants any form of security.

(c) A participant who ceases to be a self-insurer shall be liable for any and all assessments made pursuant to this code section as long as indemnity compensation is paid for claims which originated when the participant was a self-insurer. Assessments of such a participant shall be based on the indemnity benefits paid by the participant during the previous calendar year.

(d) Upon refusal to pay assessments, penalties, or fines to the Fund when due, the Fund may treat the self-insurer as being in noncompliance with this Chapter and the self-insurer shall be subject to revocation of its Board authorization to self-insure.

Rule 387. Rights and Obligations of Board of Trustees to Obtain Reimbursement from Participant.

(a) The Board of trustees shall have the right and obligation to obtain reimbursement from any participant for compensation obligations in the amount of the participant's compensation obligations assumed by the Board of trustees and paid for claims as well as reasonable administrative and legal costs. The amount of the claims for reimbursement of reasonable administrative and legal costs shall be approved by the Board of trustees.

(b) The Board of trustees shall have the right to use the security deposit of a participant, its excess insurance carrier, and from any other guarantor to pay the participant's workers' compensation obligations assumed by the Board of trustees including attorneys' fees and legal costs.

Rule 388. Duties of the Board to Board of trustees.

(a) Report to Board of trustees when the Board has cause to believe participant examined may be in danger of insolvency.

(b) The Board shall, at the inception of the participant's self-insured status and at least annually thereafter, so long as the participant remains self-insured, furnish the Board of trustees with a complete, original bound copy of each participant's audit performed in accordance with generally accepted auditing standards by an independent certified public accounting firm, three to five years of loss history, name of the person or company to administer claims, and any other pertinent information submitted to the Board to authenticate the participant's self-insured status. The Board of trustees may contract for the services of a qualified certified public accountant or firm to review, analyze, and make recommendations on these documents. All financial information submitted by a participant shall be considered confidential and not public information.

(c) The Board of trustees shall make reports and recommendation to the Board on any matter germane to solvency, liquidation or rehabilitation of any participant. Reports and documents shall not be considered public documents.

(d) The Board of trustees shall review all applications and shall make recommendations to the Board for acceptance of self-insurers. If the Board rejects the recommendations of the Board of trustees, the Board shall notify the Board of trustees in writing within ten days prior to accepting the application for self-insurance.

Rules reserved by the Board: —

Rule 48

Rule 261

RULES AND REGULATIONS OF THE SUBSEQUENT INJURY TRUST FUND

CHAPTER 622-1 ORGANIZATION AND ADMINISTRATION

| Rule | | Rule | |
|----------------|---|------------|---|
| 622-1-.01. | Board of Trustees. | 622-1-.04. | Filing claims against the Subsequent Injury Trust Fund. |
| 622-1-.02. | Cost of Administration: budget. | 622-1-.05. | Employer's knowledge statement. |
| 622-1-.03 (1). | Payment of non-dependency benefits into the Subsequent Injury Trust Fund. | 622-1-.06. | Procedures for payment of reimbursement benefits by the fund. |
| 622-1-.03 (2). | Payment of assessments to fund by insurers and self-insurers. | 622-1-.07. | Settlements subsequent to reimbursement agreements. |
| 622-1-.03 (3). | Reports by employers of compensation and benefits paid; failure to pay assessments. | 622-1-.08. | Fund not bound as to certain matters. |

Editor's notes. — The **Administrative History** following each Rule gives the date on which the Rule was originally filed and its effective date, as well as the date which any amendment or repeal was filed and its effective date. Principal abbreviations used in the Administrative History are as follows:

f. — filed

eff. — effective

R. — Rule (Abbreviated only at the beginning of the control number)

Ch. — Chapter (Abbreviated only at the beginning of the control number)

ER. — Emergency Rule

Rev. — Revised

Chapter 622-1, entitled "Organization and Administration", containing Rules 622-1-.01 through 622-1-.08, was filed on May 26, 1987; effective June 15, 1987.

Rules 622-1-.04(1) and 622-1-.06(1) have been amended. Filed December 20, 1990; effective January 9, 1991.

Rule 622-1-.05 has been repealed and a new Rule of same title adopted. Filed September 9, 1993; effective September 29, 1993.

Rules 622-1-.03 and 622-1-.06 through 622-1-.08 have been amended. Filed June 16, 1995; effective July 12, 1995.

Rule 622-1-.01. Board of Trustees.

The organization of the Board of Trustees of the Subsequent Injury Trust Fund shall be as follows:

(a) Meetings are to be held at least quarterly.

(b) Special meetings can be held upon reasonable notice in writing to Board Members by the Chairman or any two voting members.

(c) Three voting members must be present to constitute a quorum for conducting business.

(d) Time, place, names of those present, all official action of the Board, and when requested, a member's approval or dissent with reasons shall be recorded in the Minutes.

(e) The Administrator shall cause the Minutes to be transcribed and presented for approval or amendments at the next regular meeting.

(f) Minutes, or a true copy, shall be open for inspection during regular office hours.

Authority O.C.G.A. Sec. 34-9-354(d). **Administrative History.** Original Rule entitled "Board of Trustees" was filed on May 26, 1987; effective June 15, 1987.

Rule 622-1-.02. Cost of Administration: budget.

(1) The operating budget of the Subsequent Injury Trust Fund shall be computed on a fiscal year basis, and the Subsequent Injury Trust Fund's fiscal year shall be the same as the fiscal year for the State of Georgia.

(2) The Administrator shall submit to the Board of Trustees a proposed budget covering the cost of administration of the Fund for each fiscal year. This budget should be submitted no later than the third quarter of the fiscal year preceding the fiscal year in the proposed budget. The budget shall be reviewed by the Board of Trustees at the quarterly Board meeting corresponding with the third quarter and submitted to the Office of Planning & Budget for comment. This budget proposal should be returned to the Board of Trustees by the Office of Planning & Budget within a reasonable time to enable implementation of the budget by the Board of Trustees.

Authority O.C.G.A. Sec. 34-9-354(d). **Administrative History.** Original Rule entitled "Cost of Administration: Budget" was filed on May 26, 1987; effective June 15, 1987.

Rule 622-1-.03 (1). Payment of non-dependency benefits into the Subsequent Injury Trust Fund.

For accident dates prior to July 1, 1995, the employers' payments to the Subsequent Injury Trust Fund in no-dependency death cases will be initiated through the use of a Subsequent Injury Trust Fund Form "F", referred to as a "No Dependency Agreement." This agreement must be submitted to the State Board of Workers' Compensation for approval and, upon approval, the employer will process the payment in accordance with Code Section 34-9-358.

Authority O.C.G.A. Sec. 34-9-354(d). **Administrative History.** Original Rule entitled "Payment of Non-Dependency Benefits into the Subsequent Injury Trust Fund" was filed on May 26, 1987; effective June 15, 1987. **Amended:** F. June 16, 1995; eff. July 12, 1995.

Rule 622-1.03 (2). Payment of assessments to fund by insurers and self-insurers.

Each insurer and self-insurer shall make payments to the fund in an amount equal to that proportion of 175 percent of the total disbursement made from the fund during the preceding calendar year less the amount of the net assets in the fund as of December 31 of the preceding calendar year which the total workers' compensation claims paid by the insurer or self-insurer bears to the total workers' compensation claims paid by all insurers and self-insurers during the preceding calendar year. The administrator is authorized to reduce or suspend assessments for the fund when a completed actuarial survey shows further assessments are not needed. Adjustments relative to any prior years' assessment will be added to or credited against each insurer's or self-insurer's most recent calendar year's assessment when total claims losses reported to the fund necessitated revising the prior years' assessment rate. An employer who has ceased to be a self-insurer prior to the end of the calendar year shall be liable to the fund for the assessment of the calendar year and/or the adjusted assessment, if any, of the previous calendar years.

Authority O.C.G.A. Sec. 34-9-354(d). **Added:** effective Dec. 9, 1998.

Rule 622-1.03 (3). Reports by employers of compensation and benefits paid; failure to pay assessments.

(a) As soon as practicable after January 1 but not later than January 31 of each calendar year, the administrator shall forward to each insurer and self-insured employer a questionnaire asking for the total amount of compensation, medical benefits, and rehabilitation benefits paid by each insurer and self-insurer employer during the preceding calendar year. The total amount shall consist of all gross paid losses consisting of indemnity, medical, and rehabilitation benefits paid including those paid through deductibles and self-insured retentions. The insurer or self-insurer may deduct from the gross paid losses those amounts the Subsequent Injury Trust Fund paid during the preceding calendar year, third party (Workers' Compensation) recoveries, and losses under federal compensation laws. Insurers and self-insured employers cannot use paid Workers' Compensation Board and Subsequent Injury Trust Fund assessments to reduce gross claims payments reported. This report is to be completed and returned to the administrator no later than March 1 of the same calendar year in which the request for this information is submitted. Failure to submit the report to the administrator carrying a post mark date on or prior to March 1 shall result in an automatic penalty of \$50.00 per day for each day the report is delinquent or 10 percent of the assessment, whichever is greater. This penalty will be added to the assessment.

(b) Any assessment levied or established in a specified amount shall constitute a personal debt of every employer or insurer so assessed and shall

be due and payable to the Subsequent Injury Trust Fund when payment is called for by the administrator. In the event of failure to pay any assessment upon the date determined by the administrator, the administrator may file a complaint for collection against the employer or insurer in a court of competent jurisdiction.

Authority O.C.G.A. Sec. 34-9-354(d). **Added:** effective Dec. 9, 1998.

Rule 622-1-.04. Filing claims against the Subsequent Injury Trust Fund.

(1) An employer or insurer shall notify the administrator of the Subsequent Injury Trust Fund of any possible claim against the Fund as soon as practical, but in no event later than Seventy-Eight (78) calendar weeks following the injury or the payment of an amount equivalent to Seventy-Eight (78) weeks of income or death benefits, whichever occurs last. Notification shall be in writing, transmitted on facsimile machine, or transmitted electronically and shall be effective on the date of receipt of the notice by the Subsequent Injury Trust Fund. The employer or insurer must submit or electronically transmit Subsequent Injury Trust Fund Form "A", referred to as "Notice of Claim." In addition, the employer or insurer must provide the following:

(a) Employer's knowledge statement pursuant to Rule 622-1-.05 of the Rules and Regulations of the Subsequent Injury Trust Fund;

(b) Documentation supporting merger between the subsequent injury and prior impairment; and

(c) Proof of payment of weekly income benefits to the injured employee in excess of 104 weeks and/or payments for medical benefits in excess of \$5,000.00.

(d) The required format to complete the above will be available from the Subsequent Injury Trust Fund or its website.

(2) The Reimbursement Agreement will contain a section for the insurer to certify that reserves have been reduced to the appropriate threshold levels. In addition, the reimbursement request form will contain a section for continued certification that reserves have been lowered to the appropriate threshold levels.

(a) Failure to provide certification as required above, or if evidence indicates failure to reduce reserves, reimbursement from Subsequent Injury Trust Fund will be suspended.

(3) When the employer returns an individual to work, and that employer has had a reimbursement claim in reference to that employee previously accepted by the Fund, the employer need not comply with additional mandatory indemnity or medical deductibles in the event that the employee sustains a new accident that merges with the prior impairment that

originally resulted in fund acceptance. Examples of reimbursement are as follows:

(a) If the employee, in a case accepted by the Subsequent Injury Trust Fund for reimbursement, returns to work with the same employer, and the same employer has exhausted both indemnity and medical deductibles, the Subsequent Injury Trust Fund will resume reimbursements without further deductibles applicable to the employer.

(b) In the above example, if the employee returns to work and sustains a new injury, and the employer has exhausted the indemnity deductible but not the medical deductible, the Subsequent Injury Trust Fund will resume indemnity reimbursements without further indemnity deductibles applicable to the employer, and the employer will exhaust the remaining portion of the medical deductible on the previous accident that resulted in Subsequent Injury Trust Fund acceptance for reimbursement before the Fund will reimburse medical expenses.

(c) If the employee returns to work and sustains a new accident, and the employer has not exhausted the indemnity deductible but has exhausted the medical deductible, the Subsequent Injury Trust Fund will resume reimbursement of medical expenses with no further medical deductibles applicable to the employer. The employer will be required to exhaust the remaining indemnity deductible as a result of the previous claim that required Subsequent Injury Trust Fund reimbursement before the Fund will reimburse indemnity expenses.

(d) Paragraphs (a), (b) and (c) will apply in the event a new insurer has assumed coverage for the employer.

(e) This provision does not apply if the employee returns to work for a new employer or there has been a break in service by the employee and employer.

(4) The fund shall reimburse only those indemnity, medical, and rehabilitation expenses that the employer or insurer was legally obligated to pay, and has actually paid, to the employee or claimant, including, but not limited to discounts granted by the service provider. The fund shall reimburse such expenses at a rate not exceeding the usual and customary charges. The fee schedules adopted by the State Board of Workers' Compensation shall be presumed to indicate the usual charges to any given service; except, however, where the employer or insurer was eligible for further cost reductions, the fund will reimburse the lesser amount.

Authority O.C.G.A. Sec. 34-9-354(d). **Administrative History.** Original Rule entitled "Filing Claims Against the Subsequent Injury Trust Fund" was filed on May 26, 1987; effective June 15, 1987. **Amended:** F. Dec. 20, 1990; eff. Jan. 9, 1991. **Amended:** July 1, 1998. **Amended:** July 11, 2000.

employer is subject to the Americans With Disabilities Act, the designated custodian of (medical) records.

2. Attach any documentation or records that were in the employer's possession **prior to** the subsequent injury. If you attach documents, these must be accompanied by certification on **employer's letterhead** that said documents were contained in the employer's files.

Any reports specifically referred to in the affidavit must be attached and certified.

3. The employer should identify the actual date of knowledge of the prior impairment.
4. The employer, if possible, should list any individuals either currently or formerly working for the employer who may have firsthand knowledge of the employee's pre-existing disabilities.

- a.

| | | |
|------|---------|---------------|
| | | |
| Name | Address | Telephone No. |
- b.

| | | |
|------|---------|---------------|
| | | |
| Name | Address | Telephone No. |
- c.

| | | |
|------|---------|---------------|
| | | |
| Name | Address | Telephone No. |

.....
 Authority O.C.G.A. Sec. 34-9-354(d). **Administrative History.** Original Rule entitled "Employer's Knowledge Statement" was filed on May 26, 1987; effective June 15, 1987. Repealed: New Rule of same title adopted. F. Sept. 9, 1993; eff. Sept. 29, 1993; **Amended:** eff. Apr. 7, 2002.

Rule 622-1-.06. Procedures for payment of reimbursement benefits by the fund.

(1) In order to establish payment for reimbursement benefits from the Subsequent Injury Trust Fund,

(a) an agreement setting forth factual information establishing the employer's right to reimbursement must be accomplished by the use of Subsequent Injury Trust Fund Form "B", referred to as "Reimbursement Agreement." This Agreement will be initiated by the Subsequent Injury Trust Fund and forwarded to the employer or insurer for signature. The Agreement must be approved the State Board of Workers' Compensation.

(b) The employer will be required to submit an itemized statement of weekly income benefits paid to the injured employee. In addition, an itemized statement of medical benefits paid on behalf of the claimant

must be submitted to the Subsequent Injury Trust Fund, along with providers' charges or a fee schedule audit. An employer or insurer who can provide a certified counterpart of its electronically generated or computer-generated pay document which identifies payment date, provider service, treatment (CPT) codes, and the amount paid, may be relieved from the requirement of providing the Subsequent Injury Trust Fund with copies of providers' charges. The Subsequent Injury Trust Fund may require narrative reports when deemed reasonably necessary by the Subsequent Injury Trust Fund. However, where the reimbursement request is based on documented, future medical and rehabilitation expenses which have been paid by the self-insured employer or insurer in accordance with a settlement agreement which provides that said funds will be set aside in a trust or similar funding mechanism consistent with federal laws and/or regulations; and, that said funds will be used solely for medical and rehabilitation expenses, the Subsequent Injury Trust Fund is authorized to reimburse such funds set aside in accordance with the usual and customary charges of the anticipated medical and rehabilitation expenses.

(c) Weekly income benefits and medical benefits reimbursement requests will be outlined on Subsequent Injury Trust Fund Form "C", referred to as "Reimbursement Request Form." No reimbursement will be made unless a Reimbursement Request form is completed and signed by the claiming party. The employer or his insurer is required to attest to their efforts to assure that the injured employee is entitled to receive, or to continue to receive workers' compensation benefits. Failure to comply with this regulation may subject the claim to a denial of reimbursement benefits. After the initial fund payment, reimbursement requests may be made in 13-week intervals.

(2) In the event the employer and the Fund fail to reach an agreement, the claiming party may make application to the State Board of Workers' Compensation for a hearing in regard to the matters at issue through the use of Form WC-14 Notice of Claim/Request for hearing. The Form WC-14, shall be directed to the State Board of Workers' Compensation with a copy forwarded to the Subsequent Injury Trust Fund.

(3) When the Subsequent Injury Trust Fund denies a reimbursement claim submitted by an employer, the employer may move for reconsideration of the denial by submitting to the administrator of the Trust Fund such additional information which was impossible for the employer to obtain prior to the Trust Fund's denial no later than 15 calendar days before the initially-scheduled hearing date. The parties should make every attempt to resolve their differences prior to the hearing, but if neither the Trust Fund nor the aggrieved party can reach an agreement, the matter may, upon request of either party, be referred to the Mediation Unit of the State Board of Workers' Compensation. This provision shall in no way enlarge the time

period in which the employer/insurer must request a hearing to challenge the Trust Fund's denial before the State Board of Workers' Compensation.

Authority O.C.G.A. Sec. 34-9-354(d). **History.** Original Rule entitled "Procedures for Payment of Reimbursement Benefits by the Fund" was filed on May 26, 1987; effective June 15, 1987. **Amended:** F. Dec. 20, 1990; eff. Jan. 19, 1991; F. June 16, 1995; eff. July 12, 1995; eff. June 18, 1998; eff. July 1, 1998; eff. July 11, 2000; eff. Apr. 7, 2002; eff. Dec. 31, 2002.

Rule 622-1-.07. Settlements subsequent to reimbursement agreements.

After the employer/insurer and the administrator of the Subsequent Injury Trust Fund reach an agreement with respect to reimbursement and the reimbursement agreement is approved by the State Board of Workers' Compensation, the employer/insurer shall keep the administrator of the Subsequent Injury Trust Fund informed as to any settlement discussion with the employee. The employer/insurer shall obtain the approval of the Subsequent Injury Trust Fund administrator on all settlements entered into for the employer.

Authority O.C.G.A. Sec. 34-9-354(d). **Administrative History.** Original Rule entitled "Settlements Subsequent to Reimbursement Agreements" was filed on May 26, 1987; effective June 15, 1987; F. June 16, 1995; eff. July 12, 1995; eff. July 1, 1998.

Rule 622-1-.08. Fund not bound as to certain matters.

Where the Subsequent Injury Trust Fund has been placed on notice of a potential claim against the Fund, the employer/insurer shall keep the Fund advised and cooperate with the administrator or his designee while defending the claim. Where the administrator or his designee acknowledges in writing that the Fund does not raise an objection to the manner in which the claim is defended or resolved, the Fund will not raise Code § 34-9-366 as a defense to reimbursement liability by the Fund; provided, however, that the Fund reserves the right to intervene where the administrator or his designee deems it appropriate.

Authority O.C.G.A. Sec. 34-9-354(d). **Administrative History.** Original Rule entitled "Fund Not Bound as to Certain Matters" was filed on May 26, 1987; effective June 15, 1987; F. June 16, 1995; eff. July 12, 1995.

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